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City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety

Angela L. Clark

Note

City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety

I. INTRODUCTION

In 1992, the City of Chicago (the "City") passed the Gang Congregation Ordinance (the "Ordinance"), commonly referred to as the Anti-Gang Loitering Ordinance, in an effort to combat criminal gang activity on neighborhood streets.[1] As a result of the Ordinance, law enforcement officers forced approximately 46,000 persons to disperse from neighborhood street corners.[2] Law enforcement officers similarly asked approximately another 43,000 persons to move on and arrested them when they refused to do so.[3] The vast majority of those arrested were African American and Hispanic.[4]

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1. The Ordinance provides in part:

(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) 'Loiter' means to remain in one place with no apparent purpose.

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts . . . and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. . . .

(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

(d) Any person who violates this Section is subject to a fine of not less than $100.00 and not more than $500.00 for each offense, or imprisonment for not more than six months, or both.

CHICAGO, ILL., MUN. CODE § 8-4-015 (1995) (effective Aug. 1, 1992).

2. *See* City of Chicago v. Morales, 119 S. Ct. 1849, 1855 & n.7 (1999) [hereinafter *Morales III*] *aff'g* 687 N.E.2d 53 (Ill. 1997).

3. *See id.*

4. *See* Lynn Sweet, *Court to Sort Out Loitering Law: City, ACLU Quarrel Over Crackdown*, CHI. SUN TIMES, Dec. 6, 1998, at 14.

Most importantly, the Ordinance allowed police to arrest anyone who did not move on when asked whom police officers *suspected* of being a gang member and anyone standing next to someone *suspected* of being a gang member.[5] Thus, under the Ordinance, police officers had the discretion to determine whether an individual was or was not a gang member.[6] The broad scope of the Ordinance placed virtually everyone in significant apprehension with regard to their freedom to simply stand on a street corner without being ordered to leave under penalty of arrest, fine and potential imprisonment.[7] Moreover, the Ordinance penalized gang membership, which in and of itself, is not a criminal activity.[8]

Given the Ordinance's potential constitutional deficiencies, the United States Supreme Court considered the Ordinance's constitutionality in *City of Chicago v. Morales* ("*Morales III*").[9] The Court, in a six to three decision, generated six different opinions and failed to marshal a majority opinion on the critical issue of whether loitering is a constitutionally protected individual liberty interest.[10] Instead, striking the Ordinance on grounds of vagueness,[11] the United States Supreme Court left open the door for upholding as constitutional a more carefully worded anti-loitering ordinance.

This Note first briefly explores the background of vagrancy and loitering ordinances in the United States and the circumstances that gave

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5. *See Morales III*, 119 S. Ct. at 1854 n.2 (citing CHICAGO, ILL., MUN. CODE § 8-4-015(a) (1992)) (stating that whether someone is a criminal street gang member is based on the police officer's reasonable belief that any person standing in a public place may be a gang member).

6. *See id.* at 1861-62 (discussing police officer discretion in determining gang membership and purpose).

7. *See id.* at 1862 n.34 (citing applicability of the Ordinance to non-gang members and instances of arrests); *see also id.* at 1866 (Breyer, J., concurring in part and concurring in the judgment) ("[I]t leaves many individuals, gang members and non-gang members alike, subject to its strictures.").

8. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (declaring unconstitutional a California state law that provided for imprisonment of narcotics addicts, absent any further requirement of "irregular behavior"). The Illinois Appellate Court held that the Ordinance in effect criminalized status. *See* City of Chicago v. Youkhana, 660 N.E.2d 34, 41 (Ill. App. Ct. 1995), *aff'd sub nom. Morales III*, 119 S. Ct. 1849 (1999). Nonetheless, neither the Illinois Supreme Court nor the United States Supreme Court reached this issue. *See Morales III*, 119 S. Ct. at 1856. Accordingly, this Note will not cover this issue as raised by the Illinois Appellate Court.

9. *Morales III*, 119 S. Ct. 1849 (1999), *aff'g* 687 N.E.2d 53 (Ill. 1997).

10. *See id.* at 1857-58. One commentator characterized the decision "as a test of whether this is still an 'individual liberties' Court or whether . . . community interests have shifted the Court away from that historic emphasis." Tony Mauro, *It's Not Just About Loitering*, LEGAL TIMES, Nov. 30, 1998, at 2; *see also infra* notes 239-52 and accompanying text (discussing the conflict between individual liberty and community interest).

11. *See Morales III*, 119 S. Ct. at 1856.

rise to the City of Chicago's enactment of the Ordinance at issue.[12] This Note will then discuss the United States Supreme Court's modern treatment of anti-loitering ordinances and, particularly, the Court's application of the void-for-vagueness doctrine.[13] This Note will then explain the bases for the Illinois Supreme Court's opinion, the opinion of the United States Supreme Court majority, and the dissenting opinions in *Morales III*.[14] Next, this Note will address the weaknesses in the majority's opinion because it failed to hold that loitering should be a constitutionally protected liberty interest,[15] thereby refusing to expand the reach of the Court's earlier decision in *Papachristou v. City of Jacksonville*.[16] Finally, this Note will discuss the impact of the Court's decision on a citizen's right to loiter for innocent purposes.[17]

II. BACKGROUND

Antiquated Elizabethan poor laws,[18] which have served as the model for most American vagrancy laws,[19] have given way to modern day anti-loitering ordinances.[20] United States lawmakers have promulgated these anti-loitering statutes as a means to prevent crime.[21] Prior to this crime prevention purpose, however, lawmakers sometimes used vagrancy law in the United States for sinister goals. For example, in the

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12. *See infra* Part II.

13. *See infra* Parts II.A-B.

14. *See infra* Parts II.D, III.

15. *See infra* Part IV.

16. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding that a vagrancy ordinance was void-for-vagueness because it failed to give fair notice of prohibited conduct); *see also infra* Part II.B.1.

17. *See infra* Part V.

18. One commentator described fourteenth century England in the following manner:

> [T]he breakup of feudalism and the depopulation caused by the Black Death, created a severe labor shortage in England. As a result . . . laborers began to travel the country offering their services to the highest bidder. In response, Parliament passed the Statutes of Labourers . . . compelling workers to remain in certain areas and establishing a fixed wage. In 1530, able bodied vagrants who did not offer themselves to work were subjected to such penalties as whipping . . . and bodily mutilation.

Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 385-86 (1995). Other penalties included a two year enslavement period for those who "liveth idly and loiteringly, by the space of three days." Mark Malone, Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749, 754 n.17 (1982). Thus, "[i]nitially English vagrancy and loitering statutes had an economic rationale." *Id.* at 754.

19. *See Papachristou*, 405 U.S. at 161-62 (stating that the Jacksonville, Florida statutes "derived from early English law").

20. *See* Poulos, *supra* note 18, at 386.

21. *See id.*

late nineteenth century, following the end of the Civil War, southern states, such as Alabama, broadened their vagrancy statutes to limit the freedom of former slaves in an attempt to keep them in a "state of quasi slavery."[22]

Furthermore, by the middle of the twentieth century, the police could arrest individuals as they deemed appropriate under vagrancy laws to maintain order in public places, often with discriminatory results.[23] Indeed, many citizens were at the mercy of the police and arrested under catch-all vagrancy laws that criminalized their status of "rogue," "vagabond," or "habitual loafer."[24] Several of the laws sought to punish "idle or dissolute" itinerants,[25] or those who led "an idle, immoral or profligate . . . life."[26] Sometimes such laws even extended to "common pipers and fiddlers."[27] Such laws, Justice Felix Frankfurter avowed in 1948, constituted "a class by themselves" in which exact statutory language was "designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[28] The police used their authority primarily against those typically subjected to increased police surveillance. These included those persons generally unable to adequately assert their rights through the political process,[29] such as the poor, juveniles and minorities.[30]

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22. *Morales III*, 119 S. Ct. 1847, 1857 n.20 (1999), *aff'g* 687 N.E.2d 53 (Ill. 1997). The Alabama statute included "any runaway, stubborn servant or child" and "a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause." *Id.* (citing T. WILSON, BLACK CODES OF THE SOUTH 76 (1965)); *see also* Robin Yeamans, *Recent Development*, 20 STAN. L. REV. 782 (1968) (providing a detailed history of vagrancy/loitering laws in the United States).

23. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595 (1997).

24. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 216 (1989) (discussing how vagrancy laws, dating back to early America, had become "bloated and distorted" by the middle of the twentieth century and ordinances became "longer and more detailed as legislators . . . continued to confront challenges to social order and community life by enlarging [their] scope"); *see also Papachristou*, 405 U.S. at 156 n.1 (citing a Jacksonville, Florida ordinance classifying "rogues," "vagabonds," "common drunkards," "common night walkers," "disorderly persons," and "persons wandering or strolling around from place to place without any lawful purpose or object," among others, as vagrants subject to criminal sanctions).

25. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-991(4) (West 1956) (repealed 1977) (discussing the vagrancy law that targeted idle or dissolute itinerants).

26. *E.g.*, COLO. REV. STAT. § 40-8-19 (1963) (discussing the vagrancy law including this designation, among others).

27. *E.g.*, FLA. STAT. ANN. § 856.02 (West 1965) (repealed 1972) (including jugglers, common pipers, fiddlers, among others).

28. Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting) (describing the detriments of an overly vague law that empowers the police with unfettered discretion).

29. *See* Livingston, *supra* note 23, at 596 (citations omitted).

Virtually all of these laws went unchallenged until 1963, when the United States Supreme Court recognized that indigent defendants in felony criminal prosecutions in state courts had the right to counsel.[31] Until that time, those who were most likely to be arrested and prosecuted under these vagrancy laws, the homeless and indigent, lacked the means to bring any constitutional challenge.[32]

A. *Constitutional Challenges to Loitering Laws*

The two most frequent constitutional challenges to loitering laws are the void-for-vagueness and overbreadth doctrines.[33] The void-for-vagueness doctrine stems from the Due Process Clauses of the Fifth and Fourteenth Amendments.[34] This doctrine requires that a law: (1) give persons of "ordinary intelligence fair notice" of what conduct is prohibited; and (2) provide definite standards to police officers to prevent arbitrary and discriminatory enforcement.[35] The overbreadth doctrine, on the other hand, emanates from the First Amendment.[36] Under this doc-

30. *See id.*; *see also* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 (1992) (noting that traditional loitering and vagrancy laws have been "politically tolerable" because people acquiesced to police authority when it was utilized against "undesirables").

31. *See* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963). In *Gideon*, the Court ended the dispute among federal and state courts and held that criminal defendants had the right to counsel pursuant to the Sixth Amendment, which the Court made obligatory on the states via the Fourteenth Amendment. *See id.*

32. *See Morales III*, 119 S. Ct. 1849, 1857 n.20 (1999) *aff'g* 687 N.E.2d 53 (Ill. 1997) (observing that anti-loitering laws were rarely challenged until indigents obtained the right to counsel pursuant to *Gideon*).

33. *See* Poulos, *supra* note 18, at 382. Although the void-for-vagueness and overbreadth doctrines are the two most common constitutional challenges to loitering ordinances, they are not the only mechanisms available. *See id.* Loitering laws have also been challenged on other grounds. *See, e.g.*, Farber v. Rochford, 407 F. Supp. 529, 533 (N.D. Ill. 1975) (discussing Eighth Amendment implications and stating that "one cannot be constitutionally punished because of one's status"); Wyche v. State, 619 So.2d 231, 238 (Fla. 1993) (Kogan, J., concurring) (dealing with a challenge based on the Equal Protection Clause); City of Milwaukee v. Nelson, 439 N.W.2d 562, 569-72 (Wis. 1989) (involving Fourth Amendment safeguards against unreasonable search and seizure).

34. The Fifth Amendment, which applies to the federal government, provides that "[n]o personal shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment, which applies to the states, provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

35. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). For additional analyses of the void-for-vagueness doctrine, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Mark A. Richard, Comment, *The Void-For-Vagueness Doctrine in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.: Revision or Misapplication?*, 34 HASTINGS L.J. 1273 (1983).

36. The First Amendment provides that "Congress shall make no law . . . abridging the free-

trine, if a law proscribes activities that are not constitutionally protected while at the same time covers activities that are protected by the First Amendment, the law may be deemed overbroad.[37]

1. Void-For-Vagueness

Although the void-for-vagueness doctrine is rooted in due process concerns, the doctrine also promotes the fundamental values of First Amendment freedoms. [38] That is, it serves to prevent the deterrent or "chilling effect" that certain laws may have upon otherwise innocent behavior.[39] It is a rudimentary principle of due process that in order for a law to proscribe specific conduct, that law must distinctly set forth the forbidden behavior.[40] Thus, the vagueness doctrine has limited the range of activities that loitering laws may bring within their scope,[41] thereby protecting activities that may fall within the scope of the First Amendment.[42]

The traditional focus of the void-for-vagueness doctrine, however, has centered on the facets of notice requirements and equitable enforcement guidelines. Pursuant to the Court's historic formulation of the notice requirement, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . ."[43] Notably, however, a state may satisfy the doctrine's notice requirement simply by publishing a law, re-

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dom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

37. *See* Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (striking down an Alabama statute that unconstitutionally restrained freedom of speech and press by prohibiting any person from going near or loitering about, without just cause, a business establishment of any other person conducting a lawful business). For additional analyses of the overbreadth doctrine, see Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259 (1979); J.W. Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974).

38. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

39. *See* Poulos, *supra* note 18, at 383; *see also Grayned*, 408 U.S. at 109. The *Grayned* Court noted, "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotations and citations omitted).

40. *See* Poulos, *supra* note 18, at 389-90 (citing United States v. Harriss, 347 U.S. 612, 617 (1954)).

41. *See id.* at 390-91.

42. *See Grayned*, 408 U.S. at 108.

43. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Connally v. General Constr. Co., 269 U.S. 385 (1926)). In *Connally*, the Court held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law." *Connally*, 269 U.S. at 391.

gardless of how inaccessible the notice may be to the average citizen.[44] Indeed, comprehending the scope and ramifications of a law often entails in-depth legal investigation and analysis, which is unlikely to be undertaken by an ordinary citizen.[45]

Nevertheless, absent the state's failure to provide notice, "ignorance of the law is no defense"[46] and the offender may still face punitive sanctions.[47] Given the limited amount of actual notice that is required to constitute notice in our justice system, the premise of fair warning provides little help to the ordinary citizen.[48] As such, it is not surprising that commentators have consistently professed that the notice requirement is not the strongest rationale for the use of the vagueness doctrine.[49]

Importantly, the United States Supreme Court has also indicated that a far more compelling basis for the use of the vagueness doctrine is the prevention of arbitrary and discriminatory enforcement of laws.[50] This rationale for the vagueness doctrine is analogous to the legal principle of the "rule of law,"[51] which "signifies the constraint of arbitrariness in the exercise of government power."[52] Through its insistence on precise guidelines, the vagueness doctrine attempts to prevent law enforcement authorities from relying on irrational, subjective criteria, such as race and ethnicity.[53] Absent precise guidelines, law enforcement authorities are forced to discern obscure and sometimes non-existent principles.[54]

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44. *See* Jeffries, *supra* note 35, at 207.

45. *See id.* at 208.

46. Poulos, *supra* note 18, at 390.

47. *See* Jeffries, *supra* note 35, at 208-09; *see also Morales III*, 119 S. Ct. 1849, 1865 (1999) (Kennedy, J., concurring in part and concurring in the judgment), *aff'g* 687 N.E.2d 53 (Ill. 1997). In *Morales III*, Justice Kennedy stated:

> [S]ome police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team . . . It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order.

Id. (Kennedy, J., concurring in part and concurring in the judgment).

48. *See* Poulos, *supra* note 18, at 390.

49. *See, e.g.*, Jeffries, *supra* note 35, at 205-12 (asserting that the notice requirement is not the principal underpinning of the vagueness doctrine).

50. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (citations omitted) (holding that a California statute was void-for-vagueness).

51. *See* BLACK'S LAW DICTIONARY 1332 (6th ed. 1990). BLACK'S LAW DICTIONARY defines the rule of law as "a legal principle . . . provid[ing] that decisions should be made by the application of known principles or laws without the intervention of discretion." *Id.*

52. Jeffries, *supra* note 35, at 212.

53. *See id.* at 213.

54. *Cf.* Poulos, *supra* note 18, at 390.

Given this obscurity and lack of guidance, law enforcement authorities' interpretation of a vague law may vary with respect to its operation and implementation, thereby resulting in arbitrary and discriminatory enforcement.[55] Thus, commentators have recognized the essential role that the vagueness doctrine plays in enabling the judiciary to eliminate the underlying bias and prejudice in law enforcement.[56]

Certain commentators further believe that, in general, legislators should attempt to draft laws that provide guidelines to enable enforcement officials to objectively apply such laws.[57] Even though it may not be practical to create a mechanical or exact legal system, it is nevertheless necessary to create laws that "promote regularity, certainty [and] predictability . . . ."[58] Absent such guidelines, however, individuals faced with laws that are unevenly administered[59] may ultimately have their constitutional right to equal protection of the law squandered by

55. *See id.* (proposing that vague laws encourage arbitrary and subjective motivations and implementation of laws by officers).

56. *See, e.g.*, Jeffries, *supra* note 35, at 212 (discussing the vagueness doctrine and its relation to the concept of the rule of law).

57. *See id.* Certain commentators have maintained that although it may be impossible to draft a law with such precision that it leaves absolutely no discretion to enforcement authorities, it is feasible to provide guidelines "by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct." *Id.* These commentators further assert that laws should seek to "retard[ ] . . . misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection." *Id.* Additionally, commentators contend that authorities should continue to seek the evenhanded administration of the laws for all individuals, regardless of their race, ethnicity, gender or personal affiliations. *See id.* at 213-14.

58. *Id.* at 213.

59. The problem of uneven administration of the laws is exacerbated by the fact that, since the 1990s, there has been a resurgence in the participation of local community residents in the policing of their neighborhoods. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160 (1998) (attributing this resurgence to the fact that "[a]pproximately three-quarters of the Nation's 200 largest cities now have curfew laws"). Indeed, along with an increase in both resident contact with government officials and involvement in community organizations, this new type of community policing also involves an increase in discretionary policing strategies. *See id.* at 1161-62. For example, in some cities public housing officials attempted to augment police authority to the extent that police would be permitted to conduct warrantless searches after receiving accounts of random gunfire in the area. *See id.* at 1161 (citation omitted). Despite this increased discretion, advocates of community policing have argued that this strategy is necessary to preserve American cities. *See generally* Livingston, *supra* note 23, at 558 (citing JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 29-54 (1961)). Specifically, advocates contend that this strategy will reduce crime, largely because of community members' increased awareness of activity occurring in neighborhoods. *See id.* at 559. Moreover, citizens are willing to accept these discretionary police strategies and the corresponding abridgment of liberty interests in order to maintain safety and security in their communities. *See Morales III*, 119 S. Ct. 1849, 1867 (1999) (Scalia, J., dissenting) (asserting that it is within the rights of Chicagoans to decide whether it is worth restricting some of their freedom to eliminate the gang problems by proscribing loitering without an apparent purpose) *aff'g* 687 N.E.2d 53 (Ill. 1997).

such disparate enforcement.[60] Therefore, by promoting the "rule of law" principle and substantially restricting the vagueness permitted in a law, the vagueness doctrine diminishes the potential for these constitutional violations to occur.[61]

2. Overbreadth Doctrine and First Amendment Freedoms

Like the void-for-vagueness doctrine, the overbreadth doctrine seeks to prevent laws that are overly broad from infringing upon certain innocent conduct, particularly conduct that is protected by the First Amendment.[62] Indeed, the primary rationale for the overbreadth doctrine is to provide "breathing space" for First Amendment freedoms.[63] Laws that are overly broad, like those that are overly vague, may have a deterrent effect on a person's willful exercise of his or her constitutional rights.[64] In particular, if individuals are unable to determine whether their actions will cause a law to be invoked against them and subsequently whether the courts will shield their actions, they may abandon the exercise of their First Amendment freedoms out of fear of recrimination.[65] Finally,

60. *See* United States v. Armstrong, 517 U.S. 456, 464-65 (1996) (finding that "[a] defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts 'to a practical denial' of equal protection of the law") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

61. *See* Poulos, *supra* note 18, at 390 (proposing that strictures on the law will encourage uniform enforcement).

62. *See* NAACP v. Alabama, 357 U.S. 449 (1958). In *NAACP v. Alabama*, the Court held unconstitutional Alabama's demand that the NAACP disclose the names and addresses of all its Alabama members. *See id.* at 466. This demand was the result of an injunction action brought in 1956 to stop the organization from conducting activities in Alabama. *See id.* at 452. The Court stated that Alabama's disclosure demand "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.* at 462.

63. *See* Jeffries, *supra* note 35, at 216 (noting that when "legal uncertainty threatens free expression, the search for indefiniteness has a special rigor"). In particular, the First Amendment includes the freedom of speech, press, assembly and religion. *See generally* Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 517 (1999) (discussing how previously these guaranties only "applied to restrictions imposed by the federal government").

64. *See* NAACP v. Button, 371 U.S. 415, 433 (1963). The *Button* Court stated that "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.*; *see also* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1327 (13th ed. 1997) (stating that the Supreme Court assumes an overbroad law might induce others not before the Court to refrain from speech or expression guaranteed by the Constitution).

65. *See* Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) (holding unconstitutional on grounds of vagueness and overbreadth a Georgia statute that charged a misdemeanor against any person who, in the presence of another and without provocation, used obscene language that tended to cause a breach of the peace).

another rationale for the overbreadth doctrine is to prevent the arbitrary and discriminatory enforcement of the laws.[66]

As previously noted, a law will be deemed overly broad under this doctrine if, while proscribing conduct that is not constitutionally protected, it also "sweeps within its coverage activities that are protected by the First Amendment."[67] In its earliest application of the overbreadth doctrine, the Supreme Court found a statute unconstitutionally broad when it encompassed constitutionally unprotected activities, as well as constitutionally protected ones.[68]

The Supreme Court significantly limited early applications of the overbreadth doctrine through its decision in *Broadrick v. Oklahoma*.[69] In *Broadrick*, the Court differentiated between laws governing pure speech and those fundamentally restricting conduct.[70] In connection with laws governing pure speech, the Court did not modify the overbreadth doctrine.[71] The Court did, however, modify the overbreadth doctrine in connection with laws regulating conduct, even conduct with an expressive element that implicates a First Amendment freedom.[72] In this context, the majority surmised that for facial invalidation[73] to be proper "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[74] Therefore, according to the *Broadrick* Court, the mere existence of expressive conduct is insufficient to invoke an overbreadth analysis.[75]

B. Modern Treatment of Loitering Laws in the United States

Loitering laws have long been attacked under the vagueness doctrine

66. *See* Poulos, *supra* note 18, at 392.

67. *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 97 (1940), which held unconstitutional a statute that banned all picketing).

68. *See Thornhill*, 310 U.S. at 97. Therefore, regardless of a state's interest in a law, if a court determined that a law was overly inclusive in its reach of First Amendment activities, it struck down the law as overbroad. *See id.*

69. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

70. *See id.* at 615.

71. *See* Poulos, *supra* note 18, at 392 (construing *Broadrick*, 413 U.S. at 601).

72. *See id.*

73. For facial invalidation to be applicable, there must be no set of circumstances under which a statute could be valid. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

74. Poulos, *supra* note 18, at 392 (quoting *Broadrick*, 413 U.S. at 615) (internal quotation marks omitted).

75. *See id.* Thus, for cases encompassing conduct, *Broadrick* recast "the overbreadth analysis from a mechanical method of adjudication to a qualitative evaluation of a law's impermissible applications in light of its permissible scope." *Id.*

because they are susceptible to potential arbitrary and discriminatory enforcement.[76] Moreover, the courts have become increasingly critical of loitering laws that fail to join the act of loitering with an additional element of criminal conduct.[77]

The term "loitering" is defined as "[t]o be dilatory. . . to stand around or move slowly about; to stand idly around; to saunter; to lag behind; to linger or spend time idly."[78] As defined, the term "loitering" is normally not associated with illegal, even though potentially unwelcome, conduct. The difficulty with loitering ordinances, then, is that they often reach innocent, non-criminal conduct.[79] Moreover, the ambiguity in the definition of loitering may lead to differing interpretations of the term. Thus, although one observer may believe someone is loitering, another observer could believe that the same person's conduct has an apparent purpose.[80] Indeed, that purpose may even include certain constitutionally protected rights such as freedom of association.[81]

1. Supreme Court Interpretations of Loitering Laws

The Supreme Court has required the presence of some type of improper conduct in addition to the act of loitering in order for a loitering law to be upheld as constitutional. For example, in *Shuttlesworth v.*

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76. *See* Jeffries, *supra* note 35, at 214-18.

77. *See* City of Chicago v. Morales, 687 N.E.2d 53, 60 (Ill. 1997) (stating that laws that ban loitering without other criminal activity are most likely unconstitutional) [hereinafter "*Morales II*"], *aff'd*, 119 S. Ct. 1849 (1999); *see also* State v. Bitt, 798 P.2d 43, 48-50 (Idaho 1990) (holding unconstitutionally vague an ordinance that criminalized loitering at unusual times or places because the ordinance did not provide sufficient guidelines, thereby granting the police the sole discretion in making arrests); People v. Villaneuva, 318 N.Y.S.2d 167, 168, 171 (N.Y. City Ct. 1971) (holding unconstitutionally vague an ordinance that prohibited loitering under suspicious circumstances with no apparent purpose and that required a person to provide a credible reason for his or her presence to a law enforcement officer); Howard v. State, 617 S.W.2d 191, 192 (Tex. Crim. App. 1979) (en banc) (holding unconstitutionally vague an ordinance that rendered illegal being out at night under suspicious circumstances if unable to provide a satisfactory explanation of purpose).

78. BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

79. *See Morales II*, 687 N.E.2d at 60-61 (noting that the definition of loitering in the Ordinance drew no distinction "between innocent conduct and conduct calculated to cause harm").

80. For example, the Ordinance at issue in the *Morales* decisions defined "loiter" to mean "to remain in any one place with no apparent purpose." *Morales III*, 119 S. Ct. 1849, 1854 n.2 (1999) (citing CHICAGO, ILL., MUN. CODE § 8-4-015(c)(1) (1992)), *aff'g* 687 N.E.2d 53 (Ill. 1997). Under this definition, "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." *Morales II*, 687 N.E.2d at 61. Indeed, a "person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose . . . however, that purpose will rarely be apparent to an observer." *Id.*

81. *See* City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989) (discussing the constitutionally protected right of freedom of association).

City of Birmingham,[82] the Court noted that when read literally, the city's loitering ordinance stated that a person could only stand on a public sidewalk at the whim of a law enforcement officer.[83] Under such an interpretation, the Court held that the ordinance did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman," and accordingly, was impermissibly vague.[84] Therefore, absent an additional requirement of actual undesirable behavior in connection with the act of loitering, the Court held that such an ordinance is unconstitutional.[85]

In contrast to *Shuttlesworth*, *Coates v. City of Cincinnati*[86] provides an example of the type of ordinance that is invalid because it reaches a certain type of constitutionally protected conduct.[87] The ordinance implicated in *Coates* made it a criminal offense for "'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.'"[88] The *Coates* Court held that this ordinance was unconstitutionally vague on its face because it "subject[ed] the exercise of the right of assembly to an unascertainable standard."[89] In addition, the Court held that the ordinance was unconstitutionally broad because it permitted penalization of the constitutionally protected right of free assembly and association.[90] Finally, the Court explained that the constitutionally protected rights of freedom of association and assembly may not be abridged solely on the basis of public intolerance or animosity.[91]

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82. Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

83. *See id.* at 90; *see also* City of St. Louis v. Burton, 478 S.W.2d 320, 321-23 (Mo. 1972) (holding an ordinance that prohibited, among other things, loitering on a street corner and refusing a law enforcement authority's request to disperse as unconstitutional based on vagueness and overbreadth); State v. Hudson, 274 A.2d 878, 879-80 (N.H. 1971) (striking down an ordinance that barred loitering in front of business establishments after being instructed by a law enforcement authority to disperse).

84. *Shuttlesworth*, 382 U.S. at 90 (quoting Cox v. Louisiana, 379 U.S. 536, 579 (1965)) (internal quotation marks omitted).

85. *See id.* at 91.

86. Coates v. City of Cincinnati, 402 U.S. 611 (1971).

87. *See id.* at 615.

88. *Id.* at 611 (quoting CINCINNATI, OH., CODE OF ORDINANCES § 901-L6 (1956)).

89. *Id.* at 614 (holding that the ordinance violated the due process standards of vagueness, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all").

90. *See id.* at 615.

91. *See id.* at 615; *see also* Street v. New York, 394 U.S. 576, 592 (1969) (holding that use of the word "damn" could not support a conviction under a New York statute because of the constitutional guarantee of free speech); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (finding a Louisiana statute that disallowed congregation with others with an intent to provoke a breach of peace violated free speech rights); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (overturning

2. The Seminal Case: *Papachristou v. City of Jacksonville*

The most important case addressing loitering ordinances[92] is *Papachristou v. City of Jacksonville*.[93] In *Papachristou*, the Supreme Court implicitly recognized the freedom to loiter for innocent purposes as a constitutionally protected liberty interest.[94] The ordinance at issue in *Papachristou* prohibited, among other things, "'wandering or strolling around from place to place without any lawful purpose or object.'"[95] The Court held the law was void-for-vagueness because it: (1) failed to give people of ordinary intelligence fair notice that their intended conduct was forbidden;[96] (2) encouraged arbitrary and erratic arrests;[97] (3) made criminal those activities which by modern standards are normally innocent;[98] and (4) placed unfettered discretion in the hands of the police.[99]

In so holding, the Court focused first on the lack of notice ordinary citizens received under the ordinance.[100] The Court noted that with any law, it is supposed that all persons are entitled to be informed of what conduct is prohibited.[101] The ordinance at issue in *Papachristou*, how-

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criminal convictions because speech that stirred anger and unrest in others was free speech); Terminiello v. Chicago, 337 U.S. 1, 6 (1949) (holding that petitioner did not violate a Chicago ordinance for excited speech due to First Amendment rights); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (upholding right of free speech, finding conduct was not a menace to the public peace); Schneider v. State, 308 U.S. 147, 161 (1939) (stating that courts have a duty to examine and possibly overturn legislation that abridges rights to free speech and press).

92. Although the ordinance at issue in *Papachristou v. City of Jacksonville* involved a vagrancy law, it should be noted that "loitering" is a term included within the definition of "vagrancy." *See* BLACK'S LAW DICTIONARY 1549 (6th ed. 1990).

93. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

94. *See id.* at 164. In *Papachristou*, Justice Douglas, writing for a unanimous Court, stated that "these activities [walking, wandering and strolling] are historically part of the amenities of life as we have known them." *Id.* Although acknowledging that these amenities "are not mentioned in the Constitution or Bill of Rights," Justice Douglas asserted that, nevertheless, these activities are deeply embedded in our traditional notions of freedom. *Id.*

95. *Id.* at 156-57 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

96. *See id.* at 162.

97. *See id.*

98. *See id.* at 164. The *Papachristou* Court noted that the ordinance's qualification "'without any lawful purpose or object' may be a trap for innocent acts. Persons 'neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold and served' would literally embrace many members of golf clubs and city clubs." *Id.* (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)). The Court further stated that the broad sweep of this vagrancy ordinance allowed the legislature to "'set a net large enough to catch all possible offenders,'" leaving the courts to decide who should be detained and who should be set free. *Id.* at 165 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)).

99. *See id.* at 168.

100. *See id.* at 162 (citing United States v. Harriss, 347 U.S. 612, 617 (1954)).

101. *See id.* (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

ever, failed to define the specific prohibited conduct and, therefore, neglected to adequately apprise citizens of its potential application to their activities.[102] As a result, the law subjected indigents, minorities and ordinary citizens to arbitrary and erratic arrests.[103]

Next, the Supreme Court found that the conduct the ordinance intended to proscribe was of the type that is normally considered innocent.[104] For example, the ordinance made "nightwalking" criminal.[105] The Court determined that an ordinary citizen could not have been aware that such activity was illegal in the City of Jacksonville, particularly when the activity had "historically [been] part of the amenities of life."[106]

Finally, the Supreme Court decided that the ordinance placed unfettered discretion "in the hands of the Jacksonville police."[107] Indeed, the Court found that the vagrancy law was merely a facade enabling police to obtain an arrest based on undisclosed grounds.[108] Although police are permitted only to make arrests based on probable cause, the ordinance essentially permitted police to arrest anyone they believed to be "suspicious" under the veil of the vagrancy law.[109] As such, the Court found that the ordinance attempted to circumvent the probable cause requirement by incorporating inherently vague language.[110]

C. Chicago's Need for An Anti-Gang Loitering Ordinance

In 1992, the City of Chicago enacted the Anti-Gang Loitering Ordinance in an effort to combat the pervasive criminal gang activity on its city streets.[111] Shortly thereafter, the City began enforcing the Ordi-

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102. *See id.*

103. *See id.* (citing Thornhill v. Alabama, 310 U.S. 88 (1940)).

104. *See id.* at 163. The Court stated that "[w]e know, however, from experience, that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result." *Id.*

105. *See id.* at 156 n.1 (citing JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

106. *Id.* at 164.

107. *Id.* at 168.

108. *See id.* at 169.

109. *See id.* The *Papachristou* Court stated, "[w]here . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups.'" *Id.* at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

110. *See id.* at 169 (stating that police may only make arrests on probable cause—"a Fourth and Fourteenth Amendment standard applicable to the States as well as to the federal government"—and that arresting a person on suspicion is unacceptable in our system and future criminality is no justification for vagrancy statutes).

111. *See infra* note 117 (setting forth the Chicago City Council's findings regarding the effects of gang activity in the city).

nance following passage of General Order 92-4 (the "Order" or "General Order") which was intended to provide general guidelines for enforcement of the Ordinance.[112] Under the Order, police were permitted to issue an order to disperse whenever they reasonably believed that one of the persons loitering in an area was a gang member.[113]

Prior to enacting the Ordinance, the City Council conducted public hearings during which numerous witnesses testified to the effects of gang activity on their neighborhoods and their daily lives.[114] Local residents provided testimony regarding how gang members "loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents."[115] Further testimony also revealed that street gangs caused various forms of criminal activity in an area, including drug dealing, drive-by shootings, vandalism and intimidation.[116]

Following the hearings, the City Council determined that it was necessary to promulgate an ordinance that would control criminal gang activity and stated its findings in the preamble to the Ordinance.[117] These

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112. *See* City of Chicago v. Youkhana, 660 N.E.2d 34, 36-37 (Ill. App. Ct. 1995), *aff'd sub nom. Morales III*, 119 S. Ct. 1849 (1999). The Order delineated conditions under which police officers were permitted to enforce the Ordinance. The court in *Youkhana* construed the Order as allowing police to:

> [O]rder persons loitering in a designated area 'to disperse and remove themselves from the area' when there is probable cause to believe that at least one of those persons is a criminal street-gang member. [Police] are then directed to arrest and charge 'any person who does not promptly obey such an order.' The order requires the arresting officer to complete the arrest report for each arrest, which provides specific reasons for a conclusion of probable cause that the arrestee was either a criminal street gang or a person loitering in a group with a gang member.

Id. (quoting General Order No. 92-4, at 3 (1992)).

113. *See id.*

114. *See Morales III*, 119 S. Ct. 1849, 1887 (1999) (Thomas, J., dissenting) (quoting testimony of one Chicago resident that "[t]here is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop") (citation omitted), *aff'g* 687 N.E.2d 53 (Ill. 1997).

115. *Morales II*, 687 N.E.2d 53, 57-58 (Ill. 1997), *aff'd*, 119 S. Ct. 1849 (1999).

116. *See id.* at 58.

117. *See id.* The preamble provides:

> WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and
>
> WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
>
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
>
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

findings were the result of testimony from those living in the communities most directly effected by gang activity and also from testimony of church leaders and other community activists.[118]

D. Background of Morales III

Shortly after the City began enforcing the Ordinance, certain individuals challenged the constitutionality of the Ordinance in separate court proceedings, in which they were defendants. Of the thirteen challenges to the Ordinance's constitutionality, eleven trial court judges held the Ordinance unconstitutional, while only two trial court judges upheld the Ordinance as valid.[119] In one case, the court convicted defendant Jesus Morales, who was arrested because his blue and black clothing, the colors of a local street gang, led an officer to believe he belonged to a gang.[120]

Yet, in another challenge, a trial court held that the Ordinance failed to notify persons of what conduct was proscribed and encouraged arbitrary enforcement by police.[121] In addition, the court held that the Ordinance inappropriately permitted arrests based on a person's status, and was "facially overbroad" under the First Amendment of the United States Constitution.[122] Subsequently, the City appealed the trial court's decision to the Illinois Appellate Court, which affirmed the lower court's ruling holding the Ordinance unconstitutional.[123]

> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
>
> WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and
>
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear.

Id. (quoting CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

118. *See* Robert Davis, *Special Units to Police Loiterers, City Wants to Make New Anti-Gang Law Hold Up in Court,* CHI. TRIB., June 19, 1992, § 2, at 3; John Kass, *Old Tactic Sought in Crime War,* CHI. TRIB., May 15, 1992, § 2, at 1. *See generally* Kevin Johnson, *Chicago's New Gang Ordinance Creates Concern,* USA TODAY, July 8, 1992, at 5A.

119. *See* Poulos, *supra* note 18, at 384 n.26 (citing each of the trial court decisions).

120. *See* City of Chicago v. Youkhana, 660 N.E.2d 34, 37 (Ill. App. Ct. 1995), *aff'd sub nom. Morales III*, 119 S. Ct. 1849 (1999).

121. *See id.* at 39.

122. *See id.* at 38. In addition, the trial court judge noted that the Ordinance was also overbroad under Article 1, Section 5 of the Illinois Constitution. *See id.* at 39.

123. *See id.* at 36.

1. The Illinois Appellate Court's Treatment of the Ordinance

The Illinois Appellate Court held that the Ordinance: (1) violated First Amendment guarantees of freedom of association, assembly and expression;[124] (2) violated due process rights because it was unconstitutionally vague;[125] (3) unconstitutionally criminalized status;[126] and (4) allowed arrests without probable cause in violation of the Fourth Amendment.[127]

Based on its decision in *City of Chicago v. Youkhana,* the Illinois Appellate Court consolidated and affirmed other pending appeals and reversed defendant Morales's conviction, along with several others.[128] The City then appealed the consolidated cases to the Illinois Supreme Court, which affirmed the appellate court's ruling.[129]

2. The Illinois Supreme Court's Decision in *Morales II*

The Illinois Supreme Court also held the Ordinance unconstitutional on the grounds that it violated due process of law because it was "impermissibly vague on its face and [was] an arbitrary restriction on personal liberties."[130] Although the court found the Ordinance unconstitutional on these grounds, it refused to opine on whether the Ordinance violated First Amendment rights, criminalized status or permitted

124. *See id.* at 38. In *City of Chicago v. Youkhana,* the Appellate Court interpreted the Ordinance to mean that even when only one gang member is mingling with "a group of innocent non-gang members," all persons can be ordered to disperse, with the threat of arrest for failing to do so. *Id.* The court noted, "this smacks of a police-state tactic and clearly violates the first amendment rights of the innocent persons." *Id.*

125. *See id.* at 40-41 (holding that the Ordinance's failure to sufficiently define the term "loiter" renders it void-for-vagueness in that it does not give reasonable people adequate notice of what conduct is proscribed).

126. *See id.* at 42 (rejecting the City's argument that the Ordinance applies equally to all loiterers regardless of their status as a gang member). The court stated that once the Ordinance is triggered it applies equally to all loiters; however, the Ordinance cannot be triggered unless a gang member is present. *See id.* That is, the Ordinance "prohibits gang members from loitering because they are gang members, not because they are loitering." *Id.* In reaching this conclusion, the appellate court relied in part on *Robinson v. California,* 370 U.S. 660 (1962), which held unconstitutional a state statute making it a misdemeanor for anyone to be a drug addict. *See Youkhana,* 660 N.E.2d at 42 (citing *Robinson,* 370 U.S. at 666-67). The Supreme Court held that the statute at issue in *Robinson* violated the Eighth Amendment's cruel and unusual punishment clause. *See Robinson,* 370 U.S. at 667.

127. *See Youkhana,* 660 N.E.2d at 42 (holding that the Ordinance imperils the rights guaranteed under the Fourth Amendment, which allows police officers to arrest a party only when they have probable cause that such party has committed a crime).

128. *See* City of Chicago v. Morales, Nos. 1-93-4039, et al. (Ill. App. Ct., Dec. 29, 1995) [hereinafter "*Morales I*"].

129. *See Morales II,* 687 N.E.2d 53, 57, 59 (Ill. 1997), *aff'd,* 119 S. Ct. 1849 (1999).

130. *Id.* at 59.

arrests without probable cause.[131] The court limited its decision to finding the Ordinance void-for-vagueness[132] and an infringement on personal liberty interests, specifically the freedom of movement.[133]

a. Void-For-Vagueness

The court found that the Ordinance failed to meet the two basic criteria to satisfy the vagueness doctrine.[134] That is, the court first determined that the Ordinance was not sufficiently definite to give persons of ordinary intellect reasonable opportunity to discern lawful conduct from proscribed conduct.[135] Second, the Ordinance did not clearly define the unlawful conduct in such a way that would not promote discriminatory enforcement.[136]

With respect to the first criterion, the court determined that the requirement of adequate notice was absent in the Ordinance as drafted.[137] Specifically, the court found the Ordinance's definition of the term "loiter"—"to remain in any one place with no apparent purpose"[138]—unconstitutionally vague because it reached innocent, lawful conduct and did not inform persons of the prohibited conduct.[139] According to the court, "people with entirely legitimate and lawful purposes [would] not always be able to make their purpose apparent to an observing police officer."[140] Thus, the court explained that for such an

131. *See id.*

132. *See id.* at 63. For a discussion of the vagueness doctrine, see *supra* Part II.A.1.

133. *See Morales II*, 687 N.E.2d at 65.

134. *See id.* at 60-61.

135. *See id.* at 60.

136. *See id.* at 61-62.

137. *See id.* at 63.

138. *Id.* at 61 (citing CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

139. *See id.* The court noted that several other jurisdictions have similarly invalidated analogous ordinances that failed to specify the type of proscribed conduct. *See id.* (citing United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974) (loitering without apparent purpose), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975); In re C.M., 630 P.2d 593 (Colo. 1981) (loitering without legitimate reason); People v. Berck, 300 N.E.2d 411 (N.Y. 1973) (loitering without apparent reason)).

140. *Morales II*, 687 N.E.2d at 61. The City argued that even if the Ordinance language does not clearly indicate to persons what conduct it prohibits, once a police officer gave an order to disperse, adequate notice would then be apparent to persons of ordinary intelligence. *See id.* at 62. The court rejected this argument, stating that the refusal of a command to disperse does not alleviate the vagueness in the Ordinance regarding what conduct elicited such a police command in the first place. *See id.* The court asserted that this holding was consistent with its prior precedent in *City of Chicago v. Meyer*, 253 N.E.2d 400 (Ill. 1969). *See Morales II*, 687 N.E.2d at 62. In *Meyer*, the Illinois Supreme Court held that police have the authority to arrest persons for failing to obey an order to cease "otherwise lawful conduct where they have made all reasonable efforts to maintain order, but the conduct is producing an imminent threat of uncontrollable vio-

ordinance to be held valid, the ordinance must connect loitering with a second specific element of criminal conduct.[141] The court found that this Ordinance did not make the required connection.[142]

The court also held that the second criterion of vagueness, the possibility of arbitrary enforcement by police officers, was inherent in the Ordinance.[143] Indeed, the court found that the Ordinance vested police with almost unfettered discretion[144] in determining whether a suspect's conduct violated the Ordinance.[145] As a result, the Ordinance illegitimately conferred seemingly limitless power on police to arrest suspected violators.[146] Moreover, the court rejected the City's argument that the General Order set forth the limits within which police could implement the Ordinance.[147] The court observed that the responsibility for establishing guidelines in the criminal law cannot be abdicated to law enforcement officers in the field who would then be applying their own subjective criteria when enforcing the Ordinance.[148]

b. Infringement on Personal Liberty Interests

The court agreed with defendants that the Ordinance permitted arbitrary exercise of the City's police power in violation of substantive due process.[149] In rejecting the City's argument that the Ordinance in-

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lence or riot." *Meyer*, 253 N.E.2d at 400.

141. *See Morales II*, 687 N.E.2d at 61; *see also* Arizona *ex rel.* Williams v. City Court, 520 P.2d 1166 (Ariz. Ct. App. 1974) (upholding an ordinance that prohibited loitering for purpose of begging); People v. Superior Court, 758 P.2d 1046 (Cal. 1988) (upholding an ordinance prohibiting loitering to solicit lewd or unlawful act); State v. Armstrong, 162 N.W.2d 357 (Minn. 1968) (upholding an ordinance that prohibited loitering with intent to solicit prostitution).

142. *See Morales II*, 687 N.E.2d at 61.

143. *See id.* at 63.

144. *See id.* The court stated: "Where a criminal ordinance vests unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance, it 'entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

145. *See id.*

146. *See id.*

147. *See id.* at 64. The court noted that although the Order attempts to set forth criteria for an officer to determine whether a suspect is a member of a criminal gang, the Order "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." *Id.* In fact, the court further explained, the Order expressly states that an officer may *not* establish that a suspect is a criminal gang member based solely on the type of clothing he or she is wearing, if such clothing would be available to the general public. *See id.* at 64 n.1; *see also* City of Chicago v. Youkhana, 660 N.E.2d 34, 37 (Ill. App. Ct. 1995), *aff'd sub nom. Morales III*, 119 S. Ct. 1849 (1999). Nevertheless, this is exactly the basis upon which defendant Morales was arrested, thus demonstrating the susceptibility of the Order to arbitrary and discriminatory enforcement. *See Morales II*, 687 N.E.2d at 64 n.1.

148. *See Morales II*, 687 N.E.2d at 64.

149. *See id.*

fringed upon no constitutionally protected activity, the court relied upon the United States Supreme Court's decision in *Papachristou v. City of Jacksonville.*[150]

As stated above,[151] the Supreme Court noted in *Papachristou* that although not expressly mentioned in the United States Constitution, activities such as loafing, night walking and loitering are part of the amenities of life.[152] The Illinois Supreme Court found that the activities at issue under the Ordinance and the activities in *Papachristou* were analogous and, relying on established legal precedent, held that such harmless activity "is an aspect of the personal liberties protected by the due process clause."[153] The court concluded that the Chicago Ordinance infringed upon the general right to travel,[154] the right of freedom of movement[155] and the general right to associate with others.[156] Accordingly, the Illinois Supreme Court declined to give the Ordinance a limiting construction that would have enabled it to declare the Ordinance valid in its application.[157] Therefore, the United States Supreme Court, in its review, was obliged to construe the Ordinance no more narrowly than the highest court of the state.[158]

III. DISCUSSION

On June 10, 1999, the United States Supreme Court decided *Morales III.*[159] This decision affirmed the Illinois Supreme Court's decision, which held the Ordinance void-for-vagueness.[160] Despite the clear necessity to address the City's valid concerns, the Supreme Court found the application of the City Council's Ordinance impermissibly vague and both arbitrary and discriminatory in enforcement.[161] Specifically, in a six to three decision,[162] the Court's majority held the Chicago Anti-

150. *See id.* (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

151. *See supra* Part II.B.2 (analyzing the Supreme Court's decision in *Papachristou*).

152. *See Papachristou*, 405 U.S. at 164.

153. *Morales II*, 687 N.E.2d at 64.

154. *See id.* at 65 (citing Shapiro v. Thompson, 394 U.S. 618, 629 (1969)).

155. *See id.* (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

156. *See id.* (citing Swank v. Smart, 898 F.2d 1247, 1252 (7th Cir. 1990)).

157. *See id.* at 63.

158. *See Morales III*, 119 S. Ct. 1849, 1861 n.31 (1999) (citing Boos v. Barry, 485 U.S. 312, 329-30 (1988), which determined that although the statute at issue, if literally read, could have been deemed void-for-vagueness, the court of appeals had provided a limiting construction that alleviated this problem).

159. *See id.* at 1849.

160. *See id.* at 1856.

161. *See id.* at 1860-61.

162. *See id.* at 1853. Despite the six to three vote, the Court was very splintered. Justice Ste-

Gang Loitering Ordinance unconstitutionally vague because the Ordinance's definition of loitering—"to remain in any one place with no apparent purpose"[163]—gave police officers too much discretion to determine what constituted loitering.[164] Despite the six to three vote, however, there was little agreement among the Justices regarding fundamental liberty interests in connection with loitering activities.[165]

A. *A Narrow Holding by the Majority*

The only issue that elicited agreement in the majority was that the "broad sweep of the [O]rdinance 'violate[d] the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[166] All six Justices in the majority agreed that the Ordinance's language conferred vast discretion upon police to enforce the law in an arbitrary and discriminatory manner.[167] The majority, acknowledging that the Illinois Supreme Court's interpretation of the language was consistent with its findings,[168] held that the Ordinance was unconstitutionally vague in that it failed to clearly define the proscribed behavior.[169]

1. Insufficient Limitations on Discretion

The City argued that the Illinois Supreme Court's interpretation of the Ordinance was erroneous in three ways. First, the Ordinance did not allow a police officer to issue a dispersal order to those persons who had

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vens wrote the opinion of the Court. However, Justices O'Connor, Kennedy and Breyer each wrote separate concurring opinions and did not join Part III (acknowledging the freedom to loiter for innocent purposes as part of the liberty interests protected by the Due Process Clause of the Fourteenth Amendment), Part IV (holding that the Ordinance failed to give citizens of ordinary intelligence notice of what conduct was proscribed), and Part VI (finding the Ordinance did not meet constitutional standards for definiteness and clarity and therefore making it unnecessary to determine whether the Ordinance is unconstitutional as a deprivation of substantive due process) of the Court's opinion. Justices Scalia and Thomas each wrote dissenting opinions. Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's dissenting opinion. *See id.*

163. *Id.* at 1854 n.2 (citing CHICAGO, ILL., MUN. CODE § 8-4-015(c)(1) (1992)).

164. *See id.* at 1861-62.

165. *See infra* Part III.B (discussing the portion of Justice Stevens's opinion that acknowledged the freedom to loiter for innocent purposes as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment).

166. *Morales III*, 119 S. Ct. at 1861 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

167. *See id.* at 1861-62.

168. *See id.* at 1861. The majority recognized that it had no authority to interpret the language of this Ordinance more narrowly than the highest court of the State of Illinois. *See id.*; *see also* Smiley v. Kansas, 196 U.S. 447, 455 (1905) (stating "[t]he power . . . to determine the meaning of a . . . statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined").

169. *See Morales III*, 119 S. Ct. at 1862.

an apparent purpose.[170] Second, there was no violation of the Ordinance if individuals obeyed the Order.[171] Third, a police officer could not issue a dispersal order if none of the loiterers were street gang members.[172] The majority rejected each of these arguments as insufficient, noting that the mandatory language of the Ordinance required a police officer "to issue an order without first making any inquiry about their possible purposes."[173] The Court explained that the mere fact that there was no inquiry regarding a person's purpose caused the Ordinance to criminalize even innocent and lawful behavior.[174] Furthermore, the Court also stated the fact that an order to disperse must be disobeyed before a violation of the Ordinance occurred was immaterial because it did not provide the police officer with any guidance regarding whether a dispersal order should be issued in the first place.[175] As the Court hypothesized, "[i]t matters not whether the reason that a gang member and his father . . . might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark."[176] Under both circumstances, the Ordinance would mandate that an officer order the individuals to disperse.[177]

2. Subjective Standard Without Further Limitation is Impermissible

According to the Court, the Ordinance's definition of loitering—"to remain in any one place with no apparent purpose"[178]—created an inherently subjective standard for police officers when enforcing the law.[179] The Court explained that this standard was subjective because it may not be clear to the officer what apparent purpose a bystander may have; yet it may seem perfectly clear to the bystander that his conduct conveys his purpose.[180] The Court particularly noted that although a bystander's conduct may be completely innocent, the Ordinance required dispersal, even for harmless conduct.[181]

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170. *See id.* at 1861.

171. *See id.*

172. *See id.*

173. *Id.*

174. *See id.*

175. *See id.*

176. *Id.*

177. *See id.*

178. *Id.* at 1854 n.2 (citing CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

179. *See id.* at 1862. The vast discretion conferred upon police in this Ordinance stems from the definition of "loitering." *See id.* at 1861.

180. *See id.* at 1862.

181. *See id.* Since issuing an order to disperse is left to the subjective determination of an officer, most idlers would be unaware that their actions were proscribed. *See id.* Furthermore, as

The requirement that a police officer reasonably believe that one of the loiterers be a gang member, the Court stated, placed no limitation on the officer's authority to issue a dispersal order.[182] The Court did point out that if the Ordinance's definition of loitering contained an additional element of harmful conduct,[183] then such reasonable belief may provide an adequate limitation on police authority.[184] The Court explained that in the absence of such an additional element, however, the term "loiter," as defined, was impermissibly vague and left the Ordinance susceptible to arbitrary enforcement.[185]

B. *Plurality*[186] *Opinion Finds a Protected Liberty Interest in Freedom to Loiter for Innocent Purposes*

Only three Justices[187] concluded that the freedom to loiter for innocent purposes was a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[188] The plurality expressly recognized this "right to remove from one place to another according to inclination" as "an attribute of personal liberty."[189] The plurality reached this conclusion by relying on that part of *Papachristou v. City of Jacksonville* that extolled the virtues of walking, strolling and wandering as historic

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the Court hypothesized, "[p]resumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive." *Id.* In addition, an overly eager officer, knowledgeable of the City's concern for gang violence, may ignore the text of the Ordinance and issue a dispersal order, despite evidence of an actual, illicit purpose. *See id.*

182. *See id.*

183. *See id.*; *see also* Arizona *ex rel.* Williams v. City Court, 520 P.2d 1168 (Ariz. App. Ct. 1974) (upholding an ordinance that prohibited loitering for purpose of begging); People v. Superior Court, 758 P.2d 1046 (Cal. 1988) (upholding an ordinance prohibiting loitering to solicit a lewd or unlawful act); State v. Armstrong, 162 N.W.2d 357 (Minn. 1968) (upholding an ordinance that prohibited loitering with intent to solicit prostitution).

184. *See Morales III*, 119 S. Ct. at 1862. In addition, if the Ordinance applied only to persons reasonably believed to be criminal gang members and did not apply to those merely in the presence of a suspected gang member, then maybe such a limitation would appropriately curb police discretion. *See id.*

185. *See id.* at 1862-63.

186. This author follows the dissenting Justices in their use of the term "plurality" to describe those portions of the opinion, which were authored by Justice Stevens and joined only by Justices Ginsburg and Souter. *See id.* at 1872 (Scalia, J., dissenting).

187. Justice Stevens, the opinion's author, was joined by Justices Ginsburg and Souter in the portion of the opinion recognizing the freedom to loiter for innocent purposes as a protected liberty interest. *See id.* at 1854. In fact, Justices Ginsburg and Souter were the only other Justices signing on to the Court's opinion in its entirety. *See id.*

188. *See id.* at 1857.

189. *Id.* (quoting Williams v. Fears, 179 U.S. 270, 274 (1900)).

amenities of life.[190] Moreover, in response to the City's citation to historical precedent against recognizing loitering as a fundamental right,[191] the Court's plurality noted that although anti-loitering ordinances may have a long history in American heritage, such "does not ensure their constitutionality."[192] Accordingly, the plurality juxtaposed a liberty interest in freedom to loiter with the fundamental right to freedom of movement historically recognized by the Court.[193]

Despite its recognition of this fundamental liberty interest, the plurality did not find that the Ordinance reached constitutionally protected First Amendment rights.[194] Because the term "loiter" is defined as remaining in one place "with no apparent purpose,"[195] the plurality contended that "it is also clear that [the Ordinance] does not prohibit any

190. *See Morales III*, 119 S. Ct. at 1857 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972)). In *Papachristou*, the Court noted that activities such as walking, strolling and wandering are "historically part of the amenities of life as we have known them." *Papachristou*, 405 U.S. at 164. Even though these amenities are not explicitly mentioned in the Constitution, "[t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence. . . . These amenities have dignified the right of dissent and have honored the right to be non-conformists and the right to defy submissiveness." *Id.*

191. *See, e.g.*, Colten v. Kentucky, 407 U.S. 104 (1972) (holding the First Amendment guaranty of free speech simply does not encompass a claim of right to remain in any particular place on public thoroughfares—even if an individual's intent is to speak to another person). The defendant in *Colten* was convicted of disorderly conduct because he attempted to intercede with a police officer on behalf of a friend who was receiving a traffic ticket and failed to obey a police order to move on. *See id.* at 106-07. The *Colten* Court held that there was no question that the defendant's conduct, refusing to move on after being ordered, was not protected by the First Amendment. *See id.* at 109. The Court's holding, however, was limited by the Kentucky court that had interpreted the statute so as to confine its reach. *See id.* at 111. As construed by the Kentucky court, the statute was violated "only where there [was] no bona fide intention to exercise a constitutional right." *Id.*; *see also* City of Dallas v. Stanglin, 490 U.S. 19 (1989) (upholding an ordinance that regulated youth dances in such a way that it prevented older persons from attending dances with younger ones). In *Stanglin*, the Court rejected the assertion that the Constitution recognized a sweeping right of social association and determined that the ordinance did not impinge upon any constitutionally protected right. *See Stanglin*, 490 U.S. at 25.

192. *Morales III*, 119 S. Ct. at 1857 n.20.

193. *See id.* at 1857-58 ("It is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage.'") (citation omitted).

194. *See id.* The First Amendment freedoms implicated with a loitering ordinance generally include the freedoms of assembly and association. *See generally* Brief for Respondent, *Morales III*, 119 S. Ct. 1849 (1999) (No. 97-1121), *available in* 1998 WL 614302. "It is hardly a controversial proposition that laws that interfere with citizens' peaceful enjoyment of public streets, sidewalks, and parks directly implicate all of the closely allied First Amendment rights of speech, assembly, and association." *Id.* at *53-54. In particular, respondent's brief cited *Coates v. City of Cincinnati* as an example of a loitering ordinance that directly implicated the right of assembly. *See id.*; *see also supra* Part II.B.1 (discussing *Coates v. City of Cincinnati*).

195. *Morales III*, 119 S. Ct. at 1854 n.2 (providing the Ordinance's definition of "loiter") (quoting CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

form of conduct that is apparently intended to convey a message."[196] Thus, the plurality asserted that pursuant to the language of the Ordinance, it is inapplicable to "assemblies that are designed to demonstrate [their] support of, or opposition to, a particular point of view."[197] Moreover, the plurality stated that the impact the Ordinance may cause "on the social contact between gang members and others does not impair the First Amendment 'right of association.'"[198]

C. *Dissenting Opinions Find No Vagueness in Ordinance*

The *Morales III* decision elicited two strongly worded dissenting opinions by Justices Scalia and Thomas.[199] Justice Scalia asserted that the majority struck down a clearly reasonable ordinance and further disagreed with the plurality's[200] recognition of a constitutionally guaran-

196. *Id.* at 1857.

197. *Id.*

198. *Id.* (citing City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989)). There were also three concurring opinions in *Morales III*. Justice O'Connor, joined by Justice Breyer in her concurring opinion, concluded that the Ordinance was void-for-vagueness due to its inadequate standards to guide law enforcement officials in administering the Ordinance and its failure to clearly define what conduct was proscribed. *See id.* at 1863-65 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, because this vagueness alone was sufficient to hold the Ordinance unconstitutional, Justice O'Connor declined to address the other issues addressed by the plurality, such as whether there is a fundamental liberty interest in innocent loitering and whether the Ordinance impinged upon any First Amendment freedoms. *See id.* at 1864 (O'Connor, J., concurring in part and concurring in the judgment). Nevertheless, Justice O'Connor proceeded to indicate how future courts may be able to legitimately uphold a similar ordinance by providing a narrowing construction at a lower court level. *See id.* at 1864-65 (O'Connor, J., concurring in part and concurring in the judgment). In addition, Justice O'Connor indicated that a similar ordinance may avoid vagueness arguments if the ordinance required the act of loitering to be coupled with an additional element of criminal conduct. *See id.* (O'Connor, J., concurring in part and concurring in the judgment). For example, a void-for-vagueness argument could have been avoided if the Illinois Supreme Court had interpreted the term "loiter" to include remaining in any one place with the intent to intimidate others from entering the area or for the purpose of concealing illegal activity. *See id.* (O'Connor, J., concurring in part and concurring in the judgment).

On the other hand, in his concurrence, Justice Breyer determined that the Ordinance was unconstitutional, *not* because it provided insufficient notice, but because the Ordinance did not provide sufficient minimal standards to guide law enforcement authorities in their application of the Ordinance. *See id.* at 1866 (Breyer, J., concurring in part and concurring in the judgment).

Justice Kennedy, in a very limited concurring opinion, concluded that "[a]s interpreted by the Illinois Supreme Court, the . . . [O]rdinance would reach a broad range of innocent conduct." *Id.* at 1865 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy, however, did not expand upon what exactly the nature of such innocent conduct would encompass. *See id.* (Kennedy, J., concurring in part and concurring in the judgment). Therefore, it is unclear whether Justice Kennedy would find that such innocent conduct included any First Amendment freedoms.

199. *See Morales III*, 119 S. Ct. at 1867 (Scalia, J., dissenting); *id.* at 1879 (Thomas, J., dissenting).

200. Justice Scalia, in his dissent, continually referred to the "majority's" finding of a consti-

teed freedom to loiter for innocent purposes.[201] On the other hand, Justice Thomas, in his dissent, opined on the social decline in city neighborhoods, the national tragedy caused by criminal gangs and the reasonableness of the Ordinance enacted by the City of Chicago in response.[202] Justice Thomas concluded that the Ordinance was not vague and did not violate due process because the freedom to loiter for innocent purposes is not a liberty interest traditionally recognized in our nation's history.[203]

Similar to Justice Thomas, Justice Scalia attacked the plurality's finding of a constitutionally protected right to loiter.[204] Justice Scalia asserted that the plurality recklessly used the term "constitutional right" in the absence of the "slightest evidence" supporting a constitutional right to loiter.[205] Indeed, Justice Scalia found no historical underpinnings in our nation's history that would support the finding of such a fundamental liberty interest.[206] Justice Scalia further asserted that the plurality ignored the established method for due process analysis by not "carefully and narrowly describing the asserted right, and then examining whether that right is manifested in '[o]ur Nation's history, legal traditions and practices.'"[207]

Next, Justice Scalia assailed the majority's conclusion that the Ordinance was constitutionally vague because it lacked the requisite speci-

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tutional right to loiter. *See id.* at 1867 (Scalia, J., dissenting). However, only Justices Ginsburg and Souter joined that part of Justice Stevens's opinion that discussed such a finding. *See id.* at 1856-57. In fact, neither Justices O'Connor, Kennedy, nor Breyer's concurring opinions explicitly accepted the proposition that there was a constitutionally protected freedom in the right to loiter. *See id.* Accordingly, where Justice Scalia referred to the "majority" in connection with the fundamental right to loiter, this author has instead referred to it as the plurality.

201. *See id.* at 1867 (Scalia, J., dissenting).

202. *See id.* at 1879-81 (Thomas, J., dissenting).

203. *See id.* at 1879 (Thomas, J., dissenting).

204. *See id.* at 1872 (Scalia, J., dissenting). Justice Scalia quoted the plurality's description of the constitutional right at issue as the right to "remain in a public place of his choice." *Id.* (Scalia, J., dissenting).

205. *See id.* (Scalia, J., dissenting).

206. *See id.* at 1872-73 (Scalia, J., dissenting). "It is simply not maintainable that the right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or at the time of adoption of the Fourteenth Amendment." *Id.* (Scalia, J., dissenting).

207. *Id.* at 1873 (Scalia, J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)). Justice Scalia stated that this established method of analyzing due process claims is a limitation on the Court's recognition of new liberty interests. *See id.* (Scalia, J., dissenting). Justice Scalia contended "[t]he plurality opinion not only ignores this necessary limitation, but it leaps far beyond any substantive-due-process atrocity we have ever committed, by actually placing the burden of proof upon the defendant to establish that loitering is *not* a 'fundamental liberty.'" *Id.* (Scalia, J., dissenting).

ficity to prevent arbitrary and discriminatory enforcement.[208] Justice Scalia asserted that the dispersal order at issue under the Ordinance "could hardly be clearer."[209] Specifically, he argued that the requirement that police officers "'reasonably believ[e]' that one of the group to which the order [was] issued [was] a 'criminal gang member'" sufficiently resembled probable cause, eliminating the possibility of arbitrary or discriminatory enforcement.[210]

Justice Thomas, in his dissenting opinion, forcefully argued the public policy reasons for upholding the Ordinance and elaborated upon the "human costs exacted by criminal street gangs."[211] Justice Thomas argued that the majority's holding rebuffed the well-established principle that the police have the authority and duty to disperse those persons who are gathered in such a way as to threaten the public peace.[212] In addition, Justice Thomas rejected both the plurality's conclusion that the Ordinance was constitutionally invalid because it infringed upon the constitutional right to loiter and the majority's conclusion that the Ordinance was vague on its face.[213]

Like Justice Scalia, Justice Thomas contended that the freedom to loiter, recognized by the plurality, was not deeply rooted in our nation's history, legal traditions or practices.[214] To the contrary, Justice Thomas explained that only laws that invade fundamental rights and liberties affront the Due Process Clause and are therefore unconstitutional.[215] Moreover, Justice Thomas asserted that the plurality's decision sacrifices the rights of law-abiding citizens to live in safe neighborhoods, while guaranteeing that gang members have the constitutionally protected right to loiter freely.[216]

IV. ANALYSIS

The majority in *Morales III* found that the Ordinance was void-for-vagueness because "[t]he broad sweep of the [O]rdinance . . . violate[d] 'the requirement that a legislature establish minimal guidelines to gov-

208. *See id.* at 1876 (Scalia, J., dissenting).

209. *Id.* (Scalia, J., dissenting).

210. *Id.* (Scalia, J., dissenting).

211. *Id.* at 1879 (Thomas, J., dissenting).

212. *See id.* at 1881 (Thomas, J., dissenting).

213. *See id.* (Thomas, J., dissenting).

214. *See id.* (Thomas, J., dissenting).

215. *See id.* (Thomas, J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

216. *See id.* at 1880-81 (Thomas, J., dissenting).

ern law enforcement.'"[217] As a result, the majority asserted that the Ordinance, pursuant to the General Order, was an insufficient limitation on the discretionary authority endowed in the police[218] and will inevitably lead to arbitrary and discriminatory enforcement. The majority, in limiting its holding to this narrow branch of the void-for-vagueness doctrine, failed to appreciate the broad reach that this type of ordinance has in affecting certain constitutionally protected rights.[219] Indeed, the *Morales III* Court's narrow ruling has neglected to adequately protect one of our Nation's most cherished freedoms, the freedom of assembly.[220]

A. Failure to Invoke the Overbreadth Doctrine

The plurality, and presumably the majority in light of its silence, have failed to recognize the reach of the language in this Ordinance.[221] Specifically, the Court declined to rely upon the overbreadth doctrine in evaluating this Ordinance because it believed that no First Amendment rights were implicated.[222] An ordinance that prohibits loitering for no apparent purpose, however, clearly encompasses the type of conduct that is contemplated in our First Amendment freedoms.[223] As the Court's majority acknowledges, it may be impossible for a casual observer to determine what an individual's purpose may be in remaining

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217. *Id.* at 1861 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

218. *See id.* at 1861-62. Moreover, the Court found that the City Council's findings failed to indicate why the Ordinance should apply to non-gang members if the source of the evil that they were trying to combat is criminal gang activity. *See id.* at 1862.

219. *See id.* at 1857. The plurality refused to apply the overbreadth doctrine because it contended that the Ordinance did not have a "sufficiently substantial impact on conduct protected by the First Amendment." *Id.* Arguably, however, an overbreadth analysis is warranted in this case because such an analysis "measures how enactments that prohibit conduct fit with the universe of constitutionally protected conduct." City of Tacoma v. Luvene, 827 P.2d 1374, 1381 (Wash. 1992). In the instant case, where the prohibited conduct is the gathering of individuals for no apparent purpose, it is appropriate to investigate how an ordinance prohibiting such conduct interferes with constitutional freedoms. It is this analysis that the Court failed to undertake.

220. *See Morales III*, 119 S. Ct. at 1857 (noting that the Ordinance, by its terms, is "inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view").

221. *See id.* ("Because the term 'loiter' is defined as remaining in one place with 'no apparent purpose,' it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message."). The plurality also asserts that the Ordinance's "impact on the social contact between gang members and others does not impair the First Amendment 'right of association'" as previously recognized by the Court. *Id.* (citing Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989)).

222. *See id.* at 1867.

223. *See supra* notes 188-98 (discussing First Amendment freedoms and their relation to loitering ordinances).

idle on a street corner.[224] Likewise, it would be impossible for an observer to determine whether or not an individual's action or inaction itself was intended to convey a message.[225] Moreover, the goals this Ordinance sought to accomplish could easily have been achieved through the use of laws then existing,[226] instead of promulgating a law that criminalized conduct protected under the First Amendment.[227]

The Illinois Appellate Court appropriately recognized the ramifications of the Ordinance when it stated that the "ordinance clearly reaches conduct that the government has no business prohibiting."[228] Even without an explicit constitutional guarantee to stand in one place with no apparent purpose, it seems inconceivable that the government should be permitted to regulate harmless conduct.[229] If the Constitution protects the freedom of expression, it is likely that it equally protects an individual's or a group's freedom to remain in one place and abstain from any manner of expression whatsoever, which, in and of itself, is a form of expression.[230]

In addition, when the Supreme Court analyzed the Ordinance for infringement of First Amendment rights, it failed to properly rely on precedent such as *Coates v. City of Cincinnati*.[231] The ordinance implicated in *Coates* was virtually indistinguishable from the Ordinance in

224. *See Morales III*, 119 S. Ct. at 1861-62 ("The 'no apparent purpose' standard for making that decision [whether to issue a dispersal order] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene.").

225. *See id.* at 1856 n.14.

226. The City of Chicago has numerous laws, currently in effect, which may be utilized to promote safety in troubled neighborhoods. *See* 720 ILL. COMP. STAT. ANN. § 5/12-6 (West 1998) (Intimidation); *see also* 720 ILL. COMP. STAT. ANN. § 5/25-1 (West 1998) (Mob Action); 720 ILL. COMP. STAT. ANN. § 570/405.2 (West 1998 & Supp. 1999) (Streetgang Criminal Drug Conspiracy); 740 ILL. COMP. STAT. ANN. § 147/1-35 (West 1998 & Supp. 1999) (Illinois Streetgang Terrorism Omnibus Prevention Act). Several of these existing laws appear to address precisely the type of conduct that the Ordinance also seeks to combat.

227. *See Morales III*, 119 S. Ct. at 1854 n.2 (providing the relevant portions of the Ordinance) (citing CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

228. City of Chicago v. Youkhana, 660 N.E.2d 34, 38 (Ill. App. Ct. 1995), *aff'd sub nom. Morales III*, 119 S. Ct. 1849 (1999).

229. *See* U.S. Sup. Ct. Official Transcript at *52, *Morales III*, 119 S. Ct. 1854 (1999) (No. 97), *available in* 1998 WL 873033. In oral argument before the United States Supreme Court, Harvey Grossman, on behalf of Respondent Morales, stated "[i]f you try to regulate conduct in a public forum on the streets, on the sidewalks, in our parks . . . I think that you have to understand that you will sweep within it not simply hanging out, but a multitude of human activity that this Court would give protection to." *Id.*

230. *See Youkhana*, 660 N.E.2d at 38 ("Standing in one place with no apparent purpose cannot be made a crime, just as assembling on the sidewalks in a manner annoying to passersby could not be made a crime in *Coates*.") (citation omitted).

231. Coates v. City of Cincinnati, 402 U.S. 611 (1971).

the instant case,[232] yet the Court completely failed to analogize *Coates* and utilize an overbreadth analysis.[233]

Specifically, in 1971, the *Coates* Court held that a Cincinnati ordinance violated the right of free assembly and association.[234] These same rights were undoubtedly violated by the Chicago Ordinance and are no less worthy of protection in 1999 than they were in 1971.[235] Had the Court juxtaposed the two ordinances, it would have been clear that the behavior proscribed in the Chicago Ordinance, loitering for no apparent purpose,[236] and the conduct proscribed in *Coates,* annoying behavior,[237] each similarly offend the freedoms of assembly and association.[238] By not utilizing a strict overbreadth analysis, the Court failed in its responsibilities to protect the essence of the United States Constitution and its citizens' freedoms.

B. Finding Little Support for a Fundamental Liberty Interest

Although the Court neglectfully dismissed the implications for the freedom of association that are clearly affected by an ordinance of this nature, the plurality found a fundamental liberty interest in the right to loiter for innocent purposes.[239] The Court, however, missed an opportunity to pick up where its predecessors left off in 1972 with the ruling in *Papachristou v. City of Jacksonville.*[240] The Court made its decision in *Papachristou* without undertaking a substantive analysis of why innocent loitering should be a constitutionally protected individual liberty

232. *See supra* notes 86-91 and accompanying text (discussing the ordinance at issue in *Coates*). The ordinance in *Coates* required that "if three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person." *Coates*, 402 U.S. at 614. The *Coates* Court noted that it is clearly within the power of a city to enact an ordinance that prevents people "from blocking sidewalks, obstructing traffic . . . or engaging in countless other forms of antisocial conduct . . . [however] [i]t cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id.*

233. *See Morales III*, 119 S. Ct. at 1857 (establishing the plurality's decision not to analyze the Ordinance under the overbreadth doctrine).

234. *See Coates*, 402 U.S. at 615.

235. *See Youkhana*, 660 N.E.2d at 38 (holding that "the Ordinance clearly implicates the first amendment rights of assembly, association, and expression").

236. *See Morales III*, 119 S. Ct. at 1854 n.2 (setting forth the definition of "loiter" as provided in the Ordinance) (citing CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

237. *See Coates*, 402 U.S. at 611 (citing CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)).

238. *See Youkhana*, 660 N.E.2d at 38.

239. *See Morales III*, 119 S. Ct. at 1857.

240. *See supra* Part II.B.2 (discussing *Papachristou v. City of Jacksonville*).

interest.[241] Rather than building on *Papachristou*, Justice Stevens made only a passing reference to the *Papachristou* case and neglected to go forward with the requisite analysis necessary to garner the majority's support for recognizing a fundamental liberty interest in the right to innocently "loiter."[242]

Moreover, in recognizing a fundamental liberty interest, the plurality completely ignored the standards set forth in its earlier decision in *Washington v. Glucksberg*,[243] regarding the process that must be adhered to in finding a fundamental liberty interest.[244] Indeed, in light of *Glucksberg* and that Court's strict test for finding a fundamental liberty interest,[245] the Court should have equated the conduct prohibited in the Ordinance with an infringement upon constitutionally protected First Amendment freedoms.[246] As Justice Thomas explained in his dissent, the plurality noted that loitering laws had been a part of American history, yet they nevertheless swept this history aside and found that such a liberty should be protected by the Due Process Clause.[247] Indeed, only three of the six Justices in the majority signed on to that portion of the opinion that found a fundamental liberty interest in the freedom to loiter for innocent purposes.[248]

Clearly, if strictly applied, even an ordinance the Court does not find to be constitutionally vague still runs the risk of deterring the freedoms individuals should enjoy pursuant to their First Amendment rights.[249] That is, the Court runs the risk of upholding an ordinance as constitutional even if some residents will have to sacrifice their freedom to loi-

241. *See supra* Part II.B.2.

242. *See Morales III*, 119 S. Ct. at 1857. "We have expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution." *Id.* (quoting Williams v. Fears, 179 U.S. 270, 274 (1900), and citing Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972)).

243. Washington v. Glucksberg, 521 U.S. 702 (1997).

244. *See id.* at 720-21; *see also supra* note 207 and accompanying text (discussing the Court's method for recognizing a new fundamental liberty interest under due process).

245. *See Morales III*, 119 S. Ct. at 1881 (Thomas, J., dissenting) (citing *Glucksberg*, 521 U.S. at 720-21) (reiterating the Court's earlier holding in *Glucksberg* which stated that in order for a law to infringe upon a fundamental liberty, that liberty must be part of our "'Nation's history and tradition'").

246. *See supra* note 36 (providing relevant text of the First Amendment to the United States Constitution).

247. *See Morales III*, 119 S. Ct. at 1881-83 (Thomas, J., dissenting).

248. *See supra* Part III.B (discussing the views of the plurality).

249. *See generally* Brief for Respondent at *53-68, *Morales III*, 119 S. Ct. 1849 (1999) (No. 97-1121), *available in* 1998 WL 614302 (discussing how the Ordinance is overly broad and therefore violative of the First Amendment).

ter.[250] Although Justice Scalia argued that this is a decision that should be left to the community,[251] others may argue, and this author would agree, that infringement of any constitutionally protected freedom is impermissible.[252]

C. *Passing Constitutional Muster*

Although the *Morales III* Court declared the Ordinance unconstitutional, certain Justices also indicated that, with minor revisions, a similar ordinance may be able to survive constitutional scrutiny in the future.[253] Although Justice O'Connor's opinion made specific reference to suggested language,[254] as the dissent points out, that language appears to be equally vague.[255] Any city attempting to draft a law it believes could pass constitutional muster will inevitably be walking a fine line between one that the Court would find unconstitutionally vague and one that it would not.[256]

It is disconcerting that this Court so readily dismissed the notion that any First Amendment freedoms are implicated in this type of ordinance.[257] Although there is little argument that American cities are faced with numerous difficulties stemming from gang activity, neither

250. *See Morales III*, 119 S. Ct. at 1867 (Scalia, J., dissenting) (asserting that it is within a citizen's rights to decide whether it is worth restricting some of her freedom in order to eliminate the problems that plague her community).

251. *See id.* at 1877 (Scalia, J., dissenting).

252. This position is distinguished in the instant case, in that the dissent in *Morales III* did not find that innocent loitering is a constitutionally protected freedom. *See id.* at 1867 (Scalia, J., dissenting). The plurality, however, asserted that there is such a constitutionally guaranteed right worthy of protection. *See id.* at 1857; *see also* Robert S. Greenberger, *Antiloitering Law is Declared Unconstitutional*, WALL ST. J., June 11, 1999, at B8 (noting that "in many crime-plagued areas, there is an inherent tension between the freedom to assemble and the rights of citizens to live securely and safely in their neighborhoods").

253. *See Morales III*, 119 S. Ct. at 1860-61 (noting that an ordinance may not be unconstitutionally vague if its definition of loitering clearly defined the conduct that was forbidden); *see also id.* at 1864 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor asserted that an ordinance's vagueness may be cured if it "applied only to persons reasonably believed to be gang members" because it "would have directed the manner in which the order was issued by specifying to whom the order could be issued." *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

254. *See supra* notes 198, 253 (discussing language suggested by Justice O'Connor).

255. *See Morales III*, 119 S. Ct. at 1878-79 (Scalia, J., dissenting) (suggesting that if the Court finds the current ordinance language vague, the Court would likely find similar vagueness problems in the language proffered by Justice O'Connor to cure the Ordinance's constitutional shortcomings).

256. *See supra* Part II.B (discussing the modern treatment of loitering laws in the United States).

257. *See supra* Part IV.A (discussing the *Morales III* Court's failure to find the implication of any First Amendment freedoms).

this Court, nor the American people, should permit a "chipping away" of any of our First Amendment freedoms.[258] The Court's inability to reach consensus on the issue of an individual liberty interest in innocent loitering and its lack of recognition of First Amendment implications denotes serious concern for the future of our most basic freedoms.[259] In fact, Justice Scalia, in his dissent, dismissed the implications of the Ordinance when he asserted that the Ordinance places only a "minor limitation upon the free state of nature."[260]

The Court appears to have provided a guideline for lawmakers in drafting similar ordinances that would eliminate some of the defects that afflicted the Chicago Ordinance, particularly, those concerning notice, police discretion and vagueness in the Ordinance's definition of the term "loiter."[261] An ordinance, however, cured of these defects may, by its very nature, potentially infringe on certain First Amendment freedoms, which this Court has failed to recognize.[262] Because the Court may not construe an ordinance any more narrowly than the highest court of a state, the responsibility initially lies with the Illinois Supreme Court which, importantly, did not determine whether the Ordinance impinged upon any First Amendment rights.[263] The Illinois Supreme Court and others that follow should not avoid these First Amendment issues by falling back on a less stringent void-for-vagueness analysis. The responsibility to protect individual freedoms begins with the courts of each state.

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258. *See* Thomas L. Doerr, Jr., Note, *A Failed Attempt to Take Back Our Streets - A Constitutional Triumph For Gangs: City of Chicago v. Morales*, 82 MARQ. L. REV. 447, 449 (1999) (discussing the fine line lawmakers must walk in order to draft an ordinance that is neither vague nor an infringement upon personal liberties).

259. The Illinois Supreme Court has not given the Ordinance such a narrow construction "as to remove the seeming threat or deterrence to constitutionally protected expression." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). The courts, with respect to this Ordinance, have failed to acknowledge the potential deterrent effect an ordinance of this type may have on those wishing to exercise, inter alia, their constitutionally protected freedom of assembly.

260. *Morales III*, 119 S. Ct. at 1867 (Scalia, J., dissenting).

261. *See supra* note 198 (discussing the concurrence's suggested changes in language to enable the Ordinance to pass constitutional scrutiny).

262. *See supra* notes 173-85 and accompanying text (discussing objectionable language in the Ordinance).

263. *See Morales II*, 687 N.E.2d 53, 65 (Ill. 1997) (finding the Ordinance violated substantive due process and therefore deeming it unnecessary to determine whether the Ordinance violated the First Amendment right "of expressive association or the fundamental right of intimate association, both of which [would] command a much higher level of scrutiny"), *aff'd*, 119 S. Ct. 1849 (1999).

In fact, one state court, in *State v. Rucker*, [264] recently distinguished the "no apparent purpose" language in the Chicago Ordinance from a Kansas statute that utilized the phrase "no legitimate purpose" in a stalking law. In *Rucker*, pursuant to state statute, law enforcement officials were permitted to determine whether a suspect's conduct constituted "harassment," which the statute defined as "no legitimate purpose."[265] The Kansas Supreme Court held that the phrase "no legitimate purpose" was not comparable to the phrase contained in the Chicago Ordinance, which the *Morales* Court held to be unconstitutional.[266] Accordingly, the Kansas Supreme Court held that the language was not so vague as to render it unconstitutional because any reasonable law enforcement authority could readily determine whether a "legitimate purpose" was present.[267]

V. IMPACT

The varying opinions in *Morales III* demonstrate a keen awareness of the difficulties facing communities in connection with their efforts to combat the dilatory effects that gang violence has on urban neighborhoods.[268] The opinion provides a foundation upon which supporters of community policing may build their grass roots efforts in encouraging city leaders to more aggressively police problem neighborhoods.[269] Accordingly, community activists will be encouraged in light of the Court's apparent willingness to uphold an ordinance that is worded such that it eliminates any ambiguities regarding notice and police discre-

264. *See* State v. Rucker, Nos. 80106 & 80753, 1999 WL 499745, at *17 (Kan. July 16, 1999).

265. *See id.* at *11 (citing KAN. STAT. ANN. § 21-3438(d)(2) (1995)).

266. *See id.* at *17.

267. *See id.*

268. *See Morales III*, 119 S. Ct. 1849, 1856 (1999) (acknowledging that the "basic factual predicate for the city's ordinance is not in dispute"), *aff'g* 657 N.E.2d 53 (Ill. 1997); *see also id.* at 1879-80 (Thomas, J., dissenting). Justice Thomas stated that, "[t]he human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have '[v]irtually overtak[en] certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents.'" *Id.* (Thomas, J., dissenting) (quoting OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, MONOGRAPH: URBAN STREET GANG ENFORCEMENT 3 (1997)). Justice Thomas's dissent went even further: "Today, the Court focuses extensively on the 'rights' of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods." *Id.* at 1887. (Thomas, J., dissenting).

269. *See id.* at 1864 (O'Connor, J., concurring in part and concurring in the judgment) (providing a roadmap for lawmakers to possibly draft a similar ordinance that may not be deemed constitutionally vague).

tion.[270] In fact, when this Court is confronted with a more specifically worded ordinance, which avoids the mire of vagueness, the Court will likely find that community safety concerns outweigh an individual's fundamental liberty interests.

In all likelihood, cities nationwide will undertake efforts to draft similar legislation, guided by this opinion,[271] and will inevitably enact ordinances that in most respects would result in the same type of discriminatory enforcement. Unfortunately, the nature of most loitering ordinances inevitably leads to the harassment of many youths who are innocently strolling their neighborhoods.[272]

As suggested by Justice O'Connor, it appears that certain inconsequential revisions may enable the Court to deem a loitering statute constitutional.[273] First, as Justice O'Connor suggested, by merely interpreting the term "loiter" to include a second element of criminal activity, a similar ordinance may pass constitutional muster.[274] Second, legislatures will also need to take an additional step of providing sufficient guidelines for law enforcement authorities to prevent arbitrary and discriminatory enforcement.[275] Neither of these suggestions, however, will further the protection of individual freedoms which may nevertheless be threatened by such ordinances.

Because only three of the six Justices in the majority agreed that loitering is a constitutionally protected liberty interest,[276] the future of this individual freedom is tenuous. The *Morales III* Court did not extol the virtues of a person's freedom to wander or stroll from place to place as the Court did unanimously twenty-seven years earlier in *Papachristou*.[277] Therefore, it is unclear to what extent the Court will allow a

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270. *See supra* Part III.A (discussing the majority's findings).

271. In response to the news of this holding, Chicago Mayor, Richard M. Daley, indicated that work would begin immediately to devise a law that will correct the defects of the current Ordinance and allow the city to move forward in its efforts to combat gang activity. *See* Jan Crawford Greenburg, *Top Court Ruling Shows Way to a Legal Anti-Loitering Law*, CHI. TRIB., June 11, 1999, § 1, at 1.

272. *See generally* Warren Friedman, *Wasted Opportunities?*, 4 NEIGHBORHOODS 2 (Fall 1998).

273. *See Morales III*, 119 S. Ct. at 1864-65 (O'Connor, J., concurring in part and concurring in judgment); *supra* notes 198, 253 and accompanying text (discussing Justice O'Connor's concurring opinion).

274. *See Morales III*, 119 S. Ct. at 1864-65 (O'Connor, J., concurring in part and concurring in judgment).

275. *See id.* (O'Connor, J., concurring in part and concurring in judgment).

276. *See supra* Part III.B (discussing the plurality's finding of a protected liberty interest in freedom to loiter for innocent purposes).

277. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); *see also* Tony Mauro, *First Amendment Not a Victor in Defeat of Chicago Anti-Gang Ordinance* (visited June

trade off between public protection and such individual freedom in the future.[278]

VI. CONCLUSION

A severely divided Court has failed to adequately protect the freedom of individuals to wander the streets of America—without apparent purpose—without fear of recrimination by police. This Court, in opting for the middle ground, in all likelihood has placed the value of community safety above that of individuals and their personal freedom to move freely throughout their community. In other words, when this Court is presented with a more precisely worded ordinance, it will surely find that there are legitimate state interests that outweigh certain fundamental individual rights and will uphold such an ordinance. The true test will come when a similar statute that is not deemed unconstitutionally vague is presented to the Court and the Court decides whether to apply a stricter overbreadth analysis in furthering the fundamental principles of our Constitution. The *Morales III* decision does not provide much com-

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21, 1999) <http://www.freedomforum.org/assembly/1999/6/11sctantigang.asp> (noting that the Supreme Court struck down an ordinance similar to that in *Papachristou*, "but with none of the same lofty language and scant mention of the First Amendment and the *Papachristou* ruling itself").

278. Following the Court's decision in *Morales III*, lower courts have already begun acknowledging its holdings. For example, in *In re Jason Allen D.*, a Maryland appellate court failed to address a defendant's constitutional challenges to a trespassing statute and, ultimately, reversed the defendant's conviction on other grounds. *See In re* Jason Allen D., 733 A.2d 351, 353 (Md. Ct. Spec. App. 1999). The statute at issue allowed a police officer to order an individual to disperse from public housing property when the individual was standing idly by, even in the absence of complaints of criminal activity. *See id.* at 353. In reaching its decision, the Maryland court noted the United States Supreme Court's holding in *Morales III* that: (1) there is a fundamental liberty interest to loiter for innocent purposes; and (2) the Ordinance did not impact the social contact between gang members and others in the community and, therefore, did not infringe upon the First Amendment right of association. *See id.* at 366 & n.6.

Similarly, in *State v. Pussel*, the Ohio court affirmed defendants' convictions under an Ohio disorderly conduct statute. *See* State v. Pussel, Nos. CA98-07-153 & CA98-07-154, 1999 WL 543828, at *6 (Ohio Ct. App. July 19, 1999). After attending a rally, police ordered the defendants to disperse from the immediate area due to what the police deemed to be a likelihood of serious public inconvenience. *See id.* at *3-4. Defendants failed to obey the dispersal order and the police subsequently charged and convicted them for failure to disperse. *See id.* at *1-2. Defendants asserted that the convictions violated their First Amendment rights. *See id.* at *5. The court held that the defendants' arrests occurred after the rally had ended and, thus, the protected activity had ceased prior to the arrests. *See id.* In addition, the court explained that although the freedom to loiter for innocent purposes is a protected liberty interest as recognized in *Morales III*, "the right to assemble may be constitutionally limited" pursuant to *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965). *Id.* at *5.

fort that this Court will advance the premise that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty."[279]

ANGELA L. CLARK

279. Kolender v. Lawson, 461 U.S. 352, 357 (1983).