Chicago v. Morales: Constitutional Principles at Loggerheads with Community Action

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CHICAGO v. MORALES: CONSTITUTIONAL PRINCIPLES AT LOGGERHEADS WITH COMMUNITY ACTION

INTRODUCTION

The year 1990 was ominous for Chicago. Although the city's population had dropped by more than 200,000 people in a year, there were increases in homicides, robbery, aggravated assault, and motor vehicle theft. Chicago had the fourth highest per capita rate of violent crime in the nation. Drive-by shootings, drug dealing, and other gang-related activities were so prevalent in Chicago that residents had been effectively robbed of their streets and public areas. Gang presence made it impossible for any sense of community to flourish.

For the greater part of this century, police have combated the gang epidemic by responding to reported infractions of the criminal law. However, with increasing frequency localities are turning to community-based policing, where the response is based on a combined police/community effort to shore up the structure of a neighborhood.

1. See William Recktenwald, Man shot dead at gas station; City's skyrocketing homicide total closing in on 800, CHI. TRIB., Nov. 30, 1990, §2 at 6 (“The homicide rate in Chicago, already at its highest level in nearly a decade, continued to climb with four slayings reported Wednesday evening.”).
3. See id.
4. Ms. D'Ivory Gordon, a resident of Chicago's 7th Ward, testified during Police and Fire Committee hearings prior to the City Council's enactment of the Gang Congregation Ordinance:
   "When I leave work these same guys are out there every evening. When you walk down the street, the first thing they do is run up to you .... They watch you. They know where you live .... I am afraid of them .... I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them.
5. See U.S. Dept. of Justice Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) (“From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages in their own homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence ... is ... debilitating.”).
7. See infra note 29 and accompanying text.
The potential power of a structured neighborhood is beautifully illustrated in Alexis de Tocqueville’s conception of the New England township:

The native of New England is attached to his township because it is independent and free: his co-operation in its affairs ensures his attachment to its interests; the well-being it affords him secures his affection; and its welfare is the aim of his ambition and of his future expectations. He takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.9

No doubt, Tocqueville’s vision of community is powerful. If Chicago residents were allowed to re-institute a structure—clearing their street corners of menacing gangs—perhaps they too could acquire a taste for order, and garner the fruits of democracy in America.10 Such a solution to the City of Chicago’s problem, peppered with visions of community and easy logic, sounds too good to be true. Indeed, it is. The United States Supreme Court recently declared the community-backed Chicago Gang Congregation Ordinance (Ordinance) unconstitutional in City of Chicago v. Morales.11

What could possibly be wrong with the community and police working together to rid a neighborhood of the most conspicuous roadblock to normalcy? The answer emanates from the Due Process Clause of the Fifth and Fourteenth Amendments. The vagueness doctrine requires that strictures be sufficiently specific in order to give the public notice of what activities are illegal and to constrain police officers’ use of discretion in arbitrary or capricious ways.12 The Court held that the Ordinance’s loose language left too much to the judgment of the Chicago Police.13

While this Note recognizes that the terms of the Ordinance were too broad to effectively limit the police officer’s discretion,14 it takes issue with the Court’s failure to deal with Chicago’s sub-constitutional

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9. Id. (quoting Alexis de Tocqueville, Democracy in America 71 (Vintage 1945)) (emphasis added).
10. See id.
15. See infra notes 227-235 and accompanying text.
attempts to constrain police discretion.\textsuperscript{16} The Chicago Police promulgated General Order 92-4 (Order) to accompany the enforcement of the Ordinance in order to tailor the Ordinance's language to the Council's stated purpose.\textsuperscript{17} Surprisingly, the Court gave the Order short shrift, and recanted a mantra-like vagueness analysis that ignored the need to frame new and effective forms of crime prevention in a constitutional light.\textsuperscript{18} Unfortunately, the \textit{Morales} Court missed an opportunity to give direct guidance to the number of jurisdictions experimenting with new types of policing.

Part I of this Note provides a background to the interests at issue in \textit{Morales}.\textsuperscript{19} Part I outlines the development of both the community-policing movement and the vagueness doctrine.\textsuperscript{20} Through that lens, it becomes more clear why community-policing measures, like the Ordinance, necessarily conflicts with the vagueness doctrine.\textsuperscript{21} Part II relates the lively array of opinions in \textit{Morales}.\textsuperscript{22} Part III analyzes the \textit{Morales} rationale, arguing that the Court missed the perfect opportunity to provide guidance, thus contending that the Court should have given explicit recognition to the usefulness of administrative regulations like General Order 92-4 that can effectively constrain the discretion of the police.\textsuperscript{23} This Part concludes that the Court was too passively reliant on the vagueness doctrine, and thus, failed to recognize the real plight of gang-plagued neighborhoods.\textsuperscript{24} Finally, Part IV assesses the new Ordinance that was passed by the Chicago City Council on January 12, 2000.\textsuperscript{25} In addition, Part IV maintains that the new Ordinance represents a conscientious response to the \textit{Morales} Court.\textsuperscript{26} This Part concludes that the tighter language and continued use of a police regulation strikes the necessary balance between a community that pines for order, and the Constitution that demands a notified public and constrained police force.\textsuperscript{27}

\begin{footnotes}
\item[16] See infra Part III.
\item[17] See infra notes 111-123 and accompanying text.
\item[18] See infra Part III.
\item[19] See infra Part I.
\item[20] See infra Part I.
\item[21] See infra Part I.
\item[22] See infra Part II.
\item[23] See infra Part III.
\item[24] See infra Part III.
\item[25] See infra Part IV.
\item[26] See infra Part IV.
\item[27] See infra Part IV.
\end{footnotes}
II. Background

In examining the core concepts at issue throughout the controversy, the community policing movement and the vagueness doctrine, it can be concluded that the enactment of the Ordinance, and the contentious litigation that followed, dismissed a perfect opportunity to support a new community policing system which would make the streets of the community safe.

A. Community Policing

With increasing frequency, jurisdictions are adopting police measures that fall under the rubric of community policing. Since the concept of community policing is broad, it will be helpful to examine the emergence of community policing before turning to its application in this Note.

The introduction of the community-policing phenomenon has been portrayed as a reaction to the earlier system that failed. Community policing has been part of a cyclical process. Although aspects of community policing were existent in early America, the concept waned throughout the greater part of the Twentieth Century, and reemerged during the tumultuous 1960s and 1970s.

Throughout the Nineteenth Century, law enforcement was largely based in the community, and many of the services performed by the
police pertained directly to the maintenance of the community. Since police officers were intimately connected with community life, their work was embroiled in local politics and the graft that attached to city politics at the turn of the century. In the early Twentieth Century, a reform movement was under way to break the ward bosses' hold over police. Reformers proposed the establishment of a centralized, quasi-military, police administration that would derive its power exclusively from the criminal laws promulgated by the legislature. The reform era police force was premised on an aversion to corruption, and it sought to avoid corruption by distancing itself from the communities. As a consequence of the "retreat," the police became less concerned with the general order of the neighborhoods and more concerned with the enforcement of specific infractions of the criminal law.

31. See Livingston, supra note 29, at 566-67. In the nineteenth century, the police performed a large number of social service and constabulary functions. They ran soup kitchens and disciplined young people for harmful but non-criminal behavior; they maintained order in public places, preventing public alcohol use, for instance; they also provided temporary lodging for recent immigrants. Id.

32. See, e.g., James F. Richardson, Urban Police in the United States 55-56 (1974). The neighborhood policeman had a strong influence over the type of character the neighborhood would adopt. See id. at 55. For instance, the criminal elements of the late nineteenth century relied upon a sympathetic police officer in their precinct—"[t]hey couldn't operate with an 'untouchable,' a 'crusader,' or a '100 percent copper'" in their midst. Id. at 56. The criminal elements were fond of police officers like Alexander "Clubber" Williams, who was transferred to New York's red-light district in the early 1880s. Id. "On learning of his transfer, he told a reporter that he had been living on salt chuck long enough, now he was going to get some of that tenderloin." Id. "The Tenderloin" has been adopted as the name for major vice areas of other cities. Id.

33. See Livingston, supra note 29, at 565-66.

34. See id. at 566; see also Richardson, supra note 32, at 62. "The reformers conceived of the city as a corporation responsible for the provision of certain services and believed that municipal governments should be rated as to how effectively they provided them . . . . [T]hey did not approve of cities embarking on a wider range of social services for the less well-to-do." Id.

35. See Livingston, supra note 29, at 566 (noting that some departments prohibited police officers from talking to citizens except in the line of duty); Goldstein, supra note 29, at 22 (noting similarly that some departments prohibited police officers from talking to citizens except in the line of duty). Prior to the reforms, most departments required that officers be residents of the city for more than a year before they could serve on the force. See Richardson, supra note 33, at 48. But when reform came, many cities followed the example of Theodore Roosevelt, head of the reform board in New York City. Id. Roosevelt appointed a considerable number of "upstaters" to the department. Id. Grumpy Tammanyites called the new arrivals "bushwackers," claiming that the new appointees could not find their way to a single station house. Id.

36. See Livingston, supra note 29, at 567. Interestingly, the sweeping changes of the late nineteenth century were not wholeheartedly supported by the populace:

While the structural reformers may have talked about democracy, they were often more interested in efficiency, honesty, businesslike government, and fearless and impartial law enforcement, which were the last things many of the people wanted. Efficiency and businesslike government might mean cutting the public payroll, increasing
Technological advancement in law enforcement also served to widen the gap between communities and the police. Police departments around the country incorporated the automobile shortly after its appearance on the American scene. Foot patrols in many departments were totally abandoned. In addition, the telephone and two-way radio further distanced the police from regular contact with the community. Calls were placed to report specific infractions of the criminal law, and the police, in turn, responded to specific infractions. Under a call-and-respond system, the police were not concerned with the general order of the community; rather, they were concerned with responding quickly to specific instances of crime.

While the American police force became faster and more efficient, the crime rate escalated, rising dramatically in the 1960s, and continuing to rise into the mid-1970s. The mass disorder of this period forced the police to re-examine their tactics that had become removed from the community. Indeed, the urban riots of the 1960s were the most fundamental challenge to modern police tactics. Almost every riot was sparked by incidents with police. As riots became more frequent in the late 1960s, the National Advisory Commission on Civil Disorders was established to assess the cause of large-scale unrest in the work load, and decreasing the job security of municipal employees. Thorough law enforcement could mean no beer on Sunday, and impartiality would destroy the value of contacts and connections.

Richardson, supra note 32, at 65 (emphasis added).
37. See Livingston, supra note 29, at 567.
38. Id.
39. Id.
40. See Richardson, supra note 32, at 117 (“In contrast to the situation where anyone needing a policeman had to find one on the streets or go to the stationhouse [sic], the spread of the telephone allowed citizens to mobilize police services quickly.”).
41. See Livingston, supra note 29, at 567.
42. See Richardson, supra note 32, at 117 (recognizing the increased efficiency of police departments around the country).
43. See Livingston, supra note 29, at 568.
44. See Livingston, supra note 29, at 572 (“Professionally orientated police departments . . . confronted their inability to deal with urban unrest and their profound estrangement from many of the communities they policed.”).
45. See Richardson, supra note 32, at 190.

The 1960s saw a marked increase in mass confrontations from the sit-ins and freedom rides of the early years of the decade in the South to the mass eruptions of the black areas of New York, Los Angeles, Cleveland, Washington, Newark, Detroit, and a host of smaller cities from 1964 on. Housed in overcrowded, rat-infested slums, with limited job opportunities and having to buy inferior merchandise at inflated prices and ruinous credit rates, the people of these areas obviously had a much wider range of grievances than simply police performance. It is significant, however, that in all of the major riots before the assassination of Martin Luther King, the precipitating incident involved a hostile contact between a policeman and a civilian.

Id.
the urban communities.\textsuperscript{46} The Commission, popularly referred to as the Kerner Commission, found that an aggravating factor in the recent unrest was the police force's use of roving patrol cars that moved into communities and conducted intensive street stops on residents.\textsuperscript{47} These incidents were cited as a main source of community resentment for a police force that was out of touch with the community.\textsuperscript{48} Thus, external and internal examination of police procedure, coupled with the unmistakable rise in crime, led to police departments experimenting with tactics that were more focused on the community.\textsuperscript{49}

The turn to a more community-oriented policing can also be attributed to a scholarly campaign.\textsuperscript{50} James Q. Wilson and George L. Kelling's seminal article, Broken Windows, posited the theory that quality-of-life concerns could have a direct bearing on crime rates.\textsuperscript{51} Broken Windows directed an increased attention to quality-of-life concerns, which helped start the community-policing movement of the 1980s.\textsuperscript{52} Wilson and Kelling's argument recognized that residents of neighborhoods with a regular police foot patrol felt more secure than residents of other neighborhoods.\textsuperscript{53} They observed that the former "tended to believe that crime had been reduced, and seemed to take fewer steps to protect themselves from crime."\textsuperscript{54} From this recogni-

\begin{itemize}
\item \textsuperscript{46} See Report of the National Advisory Commission on Civil Disorders 1-16 (1968) [hereinafter Kerner Report]. See Livingston, supra note 29, at 571.
\item \textsuperscript{47} See id.; see also Richardson, supra note 32, at 191 (recognizing the Kerner Commission's finding that policemen did not understand the residents of the urban areas that they served, and consequently, the policemen were likely to unwittingly engage in actions that were highly inflammatory).
\item \textsuperscript{48} See Goldstein, supra note 29, at 22-23.
\item \textsuperscript{49} It took the racial disturbances of the 1960s to call [the gulf between citizens and police] into question. The outpouring of hostility toward the police, evidenced in the riots and documented in the studies that were subsequently conducted, awakened the police and the citizenry generally to just how removed the police had become from minority communities. The police were commonly characterized as "an occupation army" whose practices offended the residents living in these areas.
\item \textsuperscript{50} See Livingston, supra note 29, at 578.
\item \textsuperscript{51} See James Q. Wilson & George L. Kelling, Broken Windows: The police and neighborhood safety, 249 ATL. MONTHLY 29-38 (March 1982).
\item \textsuperscript{52} See id.; see also Stewart, Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions, 107 YALE L.J. 2249, 2252 (1998) (calling Broken Windows "enormously influential," and noting that it helped increase demands for new approaches to crime fighting); Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 YALE L.J. 1165, 1171 (1996) (explaining how pervasive Broken Windows had become).
\item \textsuperscript{53} See Wilson & Kelling, supra note 51, at 29.
\item \textsuperscript{54} Id.
\end{itemize}
tion. Wilson and Kelling argued that the reform era police tactics had invested too much time and energy in solving serious crimes and not enough in tending to the day-to-day order of the neighborhoods. The authors contended that day-to-day order in a neighborhood was vital because disorderly conditions can instill a pervasive fear in the neighborhood that causes residents to draw back, ceding the streets to those who will only accentuate the disorder. Thus, maintaining the order of the neighborhood is essential to crime prevention because it informs criminals that the neighborhood cares.

The failed system of the past, and the quality-of-life concerns of today, made community policing an implemented system in jurisdictions around the country. Generally, the new community policing programs feature a greater effort to confront problems in terms of the specific places, times, and situations in which they occur, and a greater reliance on the residents immediately affected by the problems. Thus, community policing efforts attempt to reconfigure the police of-

55. Id. at 32-33.
56. Id. at 31, 33. Accord James Q. Wilson & George L. Kelling, Making Neighborhoods Safe, 263 ATL. MONTHLY at 48 (Feb. 1989) ("[L]aw-abiding citizens who are afraid to go out onto the streets filled with graffiti, winos, and loitering youths yield control of these streets . . . . A vicious cycle begins of fear-induced behavior increasing the sources of that fear."); Kelling, supra note 8, at 93 (explaining that the "dramatic consequence [ ] of fear" is the abandonment of neighborhoods); Kahan & Meares, supra note 28, at 1164 ("In a community pervaded by disorder, law-abiding individuals are likely to avoid the streets, where their simple presence would otherwise be a deterrent to crime . . . . The law-abiders' fear of crime thus facilitates even more of it.").
57. See Wilson & Kelling, supra note 51, at 31. To illustrate their argument, Wilson and Kelling drew the following analogy:

Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in run-down ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired window is a signal that no one cares, and so breaking more windows costs nothing.

58. See supra note 28 and accompanying text.
ficer’s relationship to the community. Rather than exercising the detached role of enforcer, the community-oriented police mesh themselves into the community, working with it to solve and avoid problems.

Community policing efforts already underway have been lauded by commentators and courts alike. However, not everyone is sold on community policing. Chief among the movement’s problems is finding a legal basis for the police officer’s “new relationship” with the community. To many, this “new relationship” is of special concern because police indiscretions of the past and present do not square with the new role of the police that requires greater trust. Thus, those hasty to start community policing efforts on a grand scale are reminded of constitutional concerns, such as the vagueness doctrine.

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60. See generally Livingston, supra note 29 (arguing that community policing efforts require a changed police role); Goldstein, supra note 29 (arguing that the police need to cultivate an entirely different type of relationship with the citizens they serve).

61. See Livingston, supra note 29, at 574-78; McElroy, supra note 59, at 2. The interactive relationship between the community and police is aptly illustrated by the following caption in a Chicago neighborhood’s newsletter:

Future CAPS [Chicago Alternative Policing Strategy] Beat Meetings will have special importance. We, the community, are being asked to identify gang hot spots to implement the new (Supreme Court approved) Gang Loitering Ordinance. The Superintendent of Police will be required to keep an up-to-date written list of such locations. Beat meetings are specifically written into the law as a bona fide source of information.


62. See, e.g., Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 Harv. L. Rev. 1255, 1273 (1994) (contending that many of the communities targeted by the community strictures will in fact benefit from them); Kahan & Meares, supra note 28, at 1164-65 (“[T]he new community policing does more than transform perceptions: it also reinforces the community structures that discourage crime. . . . It promises—and has delivered—effective relief from crime. And yet it does so at a much smaller cost. . . . than do severe prison sentences.”).

63. See People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997) (praising the use of anti-gang civil injunctions in the “urban war zone”). The California Supreme Court concluded: To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense . . . [p]reserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented.

Id. at 618.

64. See, e.g., Stewart, supra note 52, at 2254-55 (“At best, Wilson and Kelling’s thesis suggests that we might someday want to expand police officers’ already significant discretionary powers . . . . The authors have done nothing . . . . to indicate that such a retreat from ‘rule-of-law’ approach is justified.”) (emphasis in original).

65. Id.

66. See id. (arguing that expansion of the police officer’s already significant discretionary powers should occur only once he has proven that his racial biases do not affect his work).

67. See Morales, 527 U.S. at 64.
B. The Vagueness Doctrine

An exhaustive survey of the vagueness doctrine is beyond the scope of this Note. However, a brief sketch of the doctrine's development is necessary to illustrate its juxtaposition to community policing.

The vagueness doctrine is based on the due process requirements of the Fifth and Fourteenth Amendments. The doctrine requires laws to be clearly articulated by the legislature in an effort to make the citizenry aware of the conduct that is prohibited and to assure their even-handed and fair administration. In demanding that laws be specific, the judiciary ensures that the elected body, rather than the police officer on his beat, defines misconduct. Specific laws present the police and administrators of the law with guideposts that limit their discretionary power: "The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection."

1. Early Cases

The United States Supreme Court developed the vagueness doctrine throughout the Nineteenth Century. The roots of the vagueness doctrine are not in the Constitution, but rather within the judiciary's common-law practice of refusing to enforce legislative acts that were too uncertain to be applied. For instance, in United States v. Brewer, the Court reviewed a federal criminal statute that punished election officers for neglecting duties that had been imposed by either state or federal law. The defendants were indicted under a

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70. See John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 196 (calling the vagueness doctrine "the operational arm of legality").
71. Id. at 202.
72. Id. at 212.
74. See, e.g., Ralph W. Aigler, Legislation in Vague or General Terms, 21 Mich. L. Rev. 831, 831 (1923) ("It is believed . . . that in many of the cases in which legislation is declared of no effect because of vagueness or uncertainty in the language used there is no need of tying the conclusion to any particular constitutional inhibition."); Note, Void for Vagueness: An Escape from Statutory Interpretation, 23 Ind. L.J. 272, 278 (1948) ("It should be emphasized that at this time [late nineteenth century] the concept was still primarily a principle of construction and had not yet received the sanctity of being associated with the constitutional requirement of due process.").
75. 139 U.S. 278 (1891).
76. Id. at 279-80.
state statute that required election officers to count ballots only after the polls had closed.\textsuperscript{77} The prosecution asked the Court to construe the statute as requiring election officers to keep the ballot-box at the polling place.\textsuperscript{78} However, the Court refused, recognizing that laws "which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."\textsuperscript{79} The Court concluded, "[b]efore a man can be punished, his case must be plainly and unmistakably within the statute."\textsuperscript{80}

Subsequent cases brought vagueness decisions within the parameters of the Constitution.\textsuperscript{81} In \textit{Connally v. General Construction Co.},\textsuperscript{82} the Court reviewed a state statute that made it a crime for a contractor performing government work to pay laborers less than the current rate of wages in the locality where the work was performed.\textsuperscript{83} A contractor brought suit in federal court to enjoin enforcement of the statute on the theory that the uncertainty of the statute deprived him of liberty and property without due process of law.\textsuperscript{84} The Court's holding in \textit{Connally} has become the classic formulation\textsuperscript{85} of the vagueness test:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And 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 dif-

\textsuperscript{77} Id. at 280-82. The statute read as follows in pertinent part:

Every officer of an election . . . who neglects or refuses to perform any duty in regard to such election . . . or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or result thereof; or who fraudulently makes any false certificate of the result of such election . . . shall be punished . . . .

\textit{Id.} at 279-80.

\textsuperscript{78} Id. at 282.

\textsuperscript{79} Id. at 288.

\textsuperscript{80} 139 U.S. at 288 (citing \textit{U.S. v. Lacher}, 134 U.S. 624, 628 (1889)).

\textsuperscript{81} See Amsterdam, supra note 68, at 67 n.2.

Obviously, though, Supreme Court review of state criminal administration, which has been the most significant sphere of operation of the void-for-vagueness doctrine, cannot be supported on principles deriving directly from natural law or the \textit{jus gentium}; whatever its initial origin, the doctrine must in these cases find its present foundation in the fourteenth amendment.

\textit{Id.}

\textsuperscript{82} 269 U.S. 385 (1926).

\textsuperscript{83} Id. at 388.

\textsuperscript{84} Id. at 390.

\textsuperscript{85} See Poulos, supra note 69, at 390.
fer as to its application, violates the first essential of due process of law.  

However, the above formulation was not applied to all laws. Prior to the constitutional reforms of the 1960s and 1970s, the police performed an order maintenance function under the color of broad laws that could include virtually anyone’s conduct. The venerable Justice Frankfurter expressed his concern over the order maintenance laws, explaining, “[they] 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.” However, Justice Frankfurter’s concern was not shared by a majority of the Court.

2. Constitutional Reform

By the 1960s, there was a clamoring throughout the legal community for reform in the area of broad order maintenance laws. Commentators railed against the laws’ proneness for an assembly line type justice that punished a person’s status rather than his or her acts.

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86. 269 U.S. at 391.
87. See Livingston, supra note 29, at 595 (explaining that the vagueness doctrine was not strictly applied to broad order-maintenance laws prior to constitutional reforms).
88. Id.; see also Robert Force, Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance, 46 Tul. L. Rev. 367, 399 (1972) (examining the use and abuse of broad order-maintenance laws). Force argued that the interrelationship between the police arrest power and broad, vaguely worded statutes created a “formidable weapon” for police because “if statutes are so encompassing that virtually any unconventional, improper, or immoral conduct or status may arguably be included within their provisions, then the power to arrest is concomitantly broad.” Id. at 399 (emphasis in original). He concluded that, together, those twin tendencies allowed the police to arrest anyone they wanted to arrest. Id.
89. 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).
90. Id.
91. See Livingston, supra note 29, at 585-91. See generally William O. Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960) (focusing on the fact that vagrancy statutes were almost exclusively enforced upon the poor and dissidents); Sanford H. Kadish, The Crisis of Overcriminalization, 7 Am. Crim. L.Q. 17, 30 (1968) (explaining that the sheer breadth of the order maintenance laws allowed the police too much discretion).
92. See Force supra note 88, at 400 (recognizing that order maintenance cases were processed in an inequitable fashion). Force illustrated the unjust atmosphere surrounding petty offenses with the following quote from a New York City municipal judge:

The court system in New York City is so constructed that I cannot effectively operate as a good judicial officer. The method of selection of judges there militates against getting the best possible men, and after a judge is selected he is given no training whatsoever except on-the-job training at the expense of the defendant. He is also faced with the peculiar task of making workable with respect to an individual defendant a system totally inefficient from an administrative standpoint . . . . The judges can spend no more than one or two minutes in considering the question of bail with respect to any defendant. Now, if that is justice, I’ll eat my hat.
The case of *Papachristou v. City of Jacksonville* is the seminal case that utilized the vagueness doctrine to invalidate the broad reach of order maintenance laws. The eight defendants in *Papachristou* were convicted under a Jacksonville ordinance that encompassed everything from "persons who use juggling or unlawful games or plays," to "persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame . . . ." In *Papachristou* the defendant Heath was driving up to the residence of his girlfriend. The defendants noticed that police were present at the residence, and they began backing out of the driveway. The officers arrested both defendants under the ordinance. The co-defendant was charged with loitering because he was standing in the driveway, despite the fact that he was standing there at the command of the officers.

Writing for the Court, Justice Douglas concluded that the "ordinance was void for vagueness, both in the sense that it 'fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by the statute,' and because it encourage[d] arbitrary and erratic arrests and convictions." The Court observed

*Id.* at 400-01 n.175 (quoting *Mass Production Justice and the Constitutional Ideal* 147 (C. Whitebread ed. 1970) (emphasis in original). See generally Gary V. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102 (1962) (finding that the courts handled an immense volume of these cases in a short period of time, paying little attention to the state's evidentiary burden).


94. See, e.g., *Cass R. Sunstein, Legal Reasoning and Political Conflict* 102 (1996) (contending that *Papachristou* illustrates that the void-for-vagueness doctrine is one of the "most important guarantees of liberty under law").

95. *405 U.S. at 156 n.1*. The Jacksonville ordinance provided:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished [by 90 days' imprisonment, a $500 fine, or both].

*Id.* (quoting *Jacksonville, Fla. Ordinance Code* § 26-57).

96. *405 U.S. at 160.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 162 (quoting United States v. Harris, 347 U.S. 612, 617 (1953)).

101. *405 U.S. at 162* (citing Thornhill v. Alabama, 310 U.S. 88 (1939); Herndon v. Lowry, 301 U.S. 242 (1936)).
that the ordinance served to criminalize conduct that was revered in America. "Persons ‘wandering or strolling’ from place to place have been extolled by Walt Whitman and Vachel Lindsay." Further, Justice Douglas demonstrated that the Jacksonville stricture was overinclusive, arguing that “[p]ersons ‘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.” The stricture’s broad indefinite language prompted the Court to echo previous dicta that “[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” Justice Douglas observed that the general Jacksonville populace was not implicated by the ordinance’s imprecise terms; rather, “poor people, nonconformists, dissenters, [and] idlers—may be required to comport themselves according to a life style deemed appropriate by the Jacksonville police and the courts.” Thus, the Court concluded that the ordinance was plainly unconstitutional because it resulted “in a regime in which the poor and unpopular are permitted to ‘stand on a public sidewalk . . . only at the whim of any police officer . . . ’.”

The Papachristou Court clearly stated that a police officer’s unbounded authority under vague order maintenance statutes was unconstitutional. However, the Court was less explicit in determining whether the police could constitutionally perform any type of order maintenance function. Consequently, the post Papachristou application of the vagueness doctrine, especially in regard to order maintenance laws, has been far from uniform.

102. Id. at 164.
103. Id. at 164.
104. Id.
105. Id. at 165 (quoting U.S. v. Reese, 92 U.S. 214, 221 (1875)).
106. Id. at 170.
107. 405 U.S. at 170 (quoting Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965)).
108. Id.
109. See Livingston, supra note 29, at 602.
110. Compare, e.g., Commonwealth v. Williams, 479 N.E.2d 687, 687 (Mass. 1985) (holding that a statute proscribing “[n]o person shall saunter and loiter in a street in such a manner as to obstruct or endanger travellers” was unconstitutionally vague because it lent too much discretion to the police), with Watts v. Florida, 463 So. 2d 205, 206-07 (Fla. 1985) (holding that a statute proscribing “loiter[ing] or prow[ling] in a place, at a time, or in a manner not usual for law-abiding individuals” was not unconstitutionally vague because the police had sufficient factors on which to base their arrests).
In May of 1992, the Committee on Police and Fire of the Chicago City Council began to conduct hearings investigating the need for an ordinance that would clear some of the neighborhood street corners of gang-related congregations. Based on the hearings, the City Council made a number of findings that were incorporated into the Gang Congregation Ordinance. The Ordinance passed on June 17,

111. See Chicago City Council Committee on Police and Fire, Transcripts of Proceedings (May 11, 1992). The origin of the Ordinance has been the subject of heated debate because some scholars maintain that the Ordinance should not have been strictly construed if it was backed by the community it would affect. Compare Tracey L. Meares & Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales, 1998 U. Chi. Legal F. 197, 199 (“In response to voluminous citizen complaints about drive-by shootings, fighting, and open-air drug dealing, Alderman William Beavers, the representative of a predominantly black ward . . . sought to introduce an ordinance to restrict gang-related congregations in public ways in 1992.”), with Albert W. Alschuler & Stephen J. Schulhofer, Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan, 1998 U. Chi. Legal F. 215, 217 (“Concerned by the increasing presence of gangs like the ‘Spanish Cobras’ in their neighborhoods . . . a community group based in a predominantly white section of Chicago . . . negotiated with city officials about anti-gang legislation.”).

112. The Council’s findings were incorporated into the preamble of the Ordinance. The preamble reads:

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 WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know 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.


113. Chicago, Ill., Mun. Code § 8-4-015 (1990) provides:

(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.

As used in this section:
1992, by a margin of thirty-one to seven.\textsuperscript{114}

Prior to enforcement of the Ordinance, the Chicago Police Department promulgated General Order 92-4, in an attempt to guide the enforcement of the Ordinance.\textsuperscript{115} The Order granted the authority to make arrests of gang members under the Ordinance to sworn mem-

\begin{itemize}
  \item "Loiter" means to remain in any one place with no apparent purpose.
  \item "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 enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
  \item "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members: The following sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug-induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault-discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or explosive or incendiary devices), subsections (a)(6), (a)(7), (a)(9), or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses); or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).
  \item "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this section.
  \item "Public place" means the public way and any other location open to the public, whether publicly or privately owned.
  \item 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.
\end{itemize}

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to Section 1-4-120 of this code.

\begin{itemize}
  \item CHICAGO, ILL., MUN. CODE § 8-4-015 (1990).
  \item See Official Journal of Proceedings, City of Chicago 18293 (June 17, 1992).
  \item See Chicago Police Dep't., General Order No. 92-4 (Aug. 8, 1992). The Illinois Supreme Court noted that representatives from both the Chicago police and law departments informed the City Council that any limitations on the discretion police would have enforcing the Ordinance would best be developed through police policy, rather than placing such limitations into the Ordinance itself. See Morales, 687 N.E.2d at 59.
\end{itemize}
bers of the Gang Crime Section and other youth officers with the greatest knowledge of criminal street gangs.\textsuperscript{116} The Order required that the Ordinance be enforced in specific portions of Chicago where loitering street gangs had posed a demonstrable problem for the surrounding community.\textsuperscript{117} In deciding which areas to designate, district commanders were required to consult with knowledgeable members of the department, appropriate community groups, crime pattern information, citizen complaints, police observations, local public officials, and other reliable members of the community.\textsuperscript{118} Authorized officers were required to order persons loitering in a designated area to disperse and remove themselves from the area when there was probable cause to believe that at least one of the persons was a member of a criminal street gang.\textsuperscript{119}

For every arrest under the Ordinance, the Order required the arresting officer to complete an arrest report which provided specific reasons for concluding that the arrestee was a member of a gang or a person loitering in a group with a gang member.\textsuperscript{120} The probable cause to believe the arrestee was a gang member was to be substantiated by the officer’s experience and knowledge of the alleged offenders, other reliable information like admission of membership, use of gang symbols, or identification by other reliable informants.\textsuperscript{121} Furthermore, the Order required district commanders to maintain and update gang information files that contained names of individuals that the department had concluded were members of criminal street gangs.\textsuperscript{122} The Order stated that this, and other gang information, was to ensure that the police were working with specific facts, rather than hunch and suspicion.\textsuperscript{123}

The City of Chicago (City) began to aggressively enforce the Ordinance in August of 1992.\textsuperscript{124} From the beginning, most trial courts held

\begin{footnotes}
\item 116. Chicago Police Dep’t. General Order 92-4 at 2, 3.
\item 117. \textit{Id}.
\item 118. \textit{Id}.
\item 119. \textit{Id}.
\item 120. \textit{Id}.
\item 121. \textit{Id}.
\item 122. Chicago Police Dep’t. General Order 92-4 at 2, 3. The Police Department must have probable cause to believe the individuals were gang members. \textit{Id}.
\item 123. \textit{Id}.
\item 124. During the three years of the Ordinance’s enforcement—August 1992 through December 1995—the police issued over 85,000 dispersal orders and arrested over 42,000 people. \textit{See} \textbf{Richard M. Daley \& Terry Hilliard, City of Chicago Gang and Narcotic Related Violent Crime: 1993-1997}, at 7 (June 1998). In its brief to the Court, the City maintained that the Ordinance was directly responsible for a significant decline in gang-related homicides. \textit{See} Morales, 527 U.S. at 49 n.7. The City directed the Court’s attention to statistics that showed that the gang related homicide rate fell by 26 percent in 1995, the last year the Ordinance was en-
\end{footnotes}
the Ordinance unconstitutional.\textsuperscript{125} The Illinois Appellate Court affirmed a trial court's ruling that the Ordinance was unconstitutional, and affirmed other pending appeals accordingly.\textsuperscript{126} The City appealed the consolidated decisions to the Illinois Supreme Court. The Court affirmed and held that the Ordinance violated the Due Process Clause because it was impermissibly vague on its face, and placed arbitrary restriction on personal liberties.\textsuperscript{127} The Supreme Court of the United States granted certiorari.\textsuperscript{128}

III. \textit{CHICAGO v. MORALES}\textsuperscript{129}

On June 10, 1999, the United States Supreme Court delivered a six to three opinion affirming the Illinois Supreme Court's holding that the Ordinance was unconstitutional.\textsuperscript{130} However, the votes were not quietly cast; the issues raised in \textit{Morales} produced a heated interplay amongst the Justices, resulting in six opinions and a narrow holding.\textsuperscript{131}

\textbf{A. Sample of the Facts}

This Note will examine five of the sixty-six fact patterns that were in controversy before the \textit{Morales} Court.\textsuperscript{132} One fact pattern involved "Jose Renteria—a member of the Satan Disciples gang—who was observed by the arresting officer loitering on a street corner with other gang members."\textsuperscript{133} The officer issued a dispersal order, but when the officer returned to the same corner twenty minutes later, Renteria and his group were still present.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item[125.] See Poulos, \textit{supra} note 69, at 384 n.26 (citing trial court decisions).
\item[127.] 687 N.E.2d at 59.
\item[128.] See 523 U.S. 1071 (Apr. 20, 1998).
\item[129.] 527 U.S. 41 (1999).
\item[130.] \textit{See id.}
\item[131.] \textit{Id.} at 67 ("It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding.") (O'Connor, J., concurring).
\item[132.] Each pattern is distinct from the rest, occurring in its own time and place. Although this sampling may seem woefully incomplete without the facts of Jesus Morales' case, his Appellate Court decision was unpublished, and could not be obtained by the author. City of Chicago v. Morales, Nos. 1-93-4039, et al. (Ill. App. Ct., 1995), \textit{aff'd} 687 N.E.2d 53 (Ill. 1997), \textit{aff'd} 527 U.S. 41 (1999).
\item[133.] 527 U.S. at 82 (Scalia, J., dissenting).
\item[134.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
James Youkhana, Fernando Cota, Jose Merced, Roosevelt McMillan, Jr., Johnny Newsome, Anthony Cordero, Julio Barroso, Hermie Khamo, Lamont Jordan, Lisa Gonzales, and Florentine Soto were arrested for violating the Ordinance. According to the complaint filed against the group, they were observed “loitering at 1433 W. Carmen, a public place with one or more persons at least one of whom was member [sic] of the Latin Kings criminal street gang, and . . . failed to disperse and remove [themselves] from the area when ordered to do so . . . .”

Another fact pattern involves “Daniel Washington and several others—who admitted they were members of the Vice Lords gang—were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using the sidewalks.” The officer issued two dispersal orders before arresting the group under the Ordinance.

Similarly, Sabrina Brown, Tasha White, and Renee Goodwill were arrested and charged with violating the Ordinance because they were standing in the vicinity of 1528 West Morse in Chicago. The arrest report indicated that the defendants were all members of the Gangster Disciples street gang. Sabrina Smith’s and Tasha White’s arrest reports stated that they were found loitering in the same area at 11:00 p.m. However, the complaint filed against the group alleged that after being warned to leave the area at 9:45 p.m., the group was found loitering in the same area at 10:00 p.m.

Gregorio Gutierrez, an admitted member of the Latin Kings gang, was observed by the arresting officer standing on the street corner with two other men. The officer arrested the men under the Ordinance after issuing a dispersal order, driving around the block, and finding the group in the same place as before.

135. 660 N.E.2d at 37.
136. Id. The Morales Court took notice of the fact that of the 66 respondents before it, 34 of them were only accused of being in the presence of a gang member, not of being gang members themselves. 527 U.S. at 63 n.34.
137. 527 U.S. at 82-83.
138. Id.
139. 660 N.E.2d at 37.
140. Id.
141. Id.
142. 527 U.S. at 83 (Scalia, J., dissenting).
143. Id.
B. The Legal Framework

The Court framed the general issue as "whether the Supreme Court of Illinois correctly held that the Ordinance violate[d] the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." From that generality, Justice Stevens proceeded to lay a legal framework that splintered into six differing opinions.

First, Justice Stevens recognized that a statute could be attacked on its face under two different doctrines, overbreadth and vagueness. "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible application of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" Justice Stevens concluded that the Ordinance did not have a "sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional." Justice Stevens contrasted a group of loitering gang members with an assembly showing support or opposition to a point of view, reasoning that the gang members' social contacts did "not impair the First Amendment['s] 'right of association.'"

Justice Stevens' ruling neared holding that the impact of the Ordinance on the constitutional right to loiter was sufficient to support a facial challenge under the overbreadth doctrine. However, he de-

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144. Id. at 46. As mentioned, the vagueness doctrine is based in the Due Process Clauses of the Fifth and Fourteenth Amendments. See supra note 70 and accompanying text.

145. See Morales, 527 U.S. at 52. A facial attack is a claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally. BLACK'S LAW DICTIONARY 223 (7th ed. 1999).

146. 527 U.S. at 52 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973)). The main rationale for the overbreadth doctrine "is to provide 'breathing space' for First Amendment freedoms." See Poulos, supra note 70, at 392. The doctrine works from the premise that a person's inability to discern whether a law will be invoked against his activity and whether such activity will be protected by the courts will cause him to forgo his First Amendment rights altogether. Id. Justice Marshall summed up the doctrine by stating:

That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence—for the value of the sword of Damocles is that it hangs—not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all.


With regard to facial challenges under the overbreadth doctrine, the Court has crafted a specialized exception to the general rule that the challenger prove the statute is unconstitutional in all its applications; the Court has stated that such an exception is justified in light of the risk that an overbroad statute will chill free expression. See, e.g., Broadrick, 413 U.S. at 611-2 (stating that it has "long been recognized" that the First Amendment needs breathing space).

147. 527 U.S. at 52-53.


149. Id. at 55.
clined, reasoning that it was “clear that the vagueness of this enactment makes a facial challenge appropriate.” Justice Stevens maintained that the Ordinance was subject to a facial attack under the vagueness doctrine because it lacked a mens rea requirement and therefore infringed upon constitutionally protected rights.

In addition, Justice Stevens set forth the criteria to be used in judging the vagueness of the Ordinance, recognizing that “[v]agueness may invalidate a criminal law for either of two independent reasons.

150. Id.
151. Id. Respondent’s facial attack gave way to one of the more lively exchanges between the Justices. In his dissent, Justice Scalia first called into question the very existence of facial invalidation in the federal courts:

The rationale for our power to review federal legislation for constitutionality, expressed in Marbury v. Madison, [5 U.S.] 1 Cranch 137, (1803), was that we had to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to this party, in the circumstances of this case . . . to go further and pronounce that the statute is unconstitutional in all applications . . . seems to me no more than an advisory opinion—which a federal court should never issue at all . . . I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?

Id. at 74, 77.

Additionally, Justice Scalia stringently maintained that the Salerno standard—which established that successful facial challenges to legislative acts must prove that no set of circumstances exists under which the Act could be valid—was controlling. 527 U.S. at 80. Justice Scalia took exception to the plurality’s stance that “many” other third-party rights must be infringed for a statute to be facially invalid. Id. at 81. He noted that

in some recent facial-challenge cases The Court has, without any attempt at explanation, created entirely irrational exceptions to the ‘unconstitutional in every conceivable application’ rule when the statutes at issue concerned hot-button social issues on which ‘informed opinion’ was zealously united. See Romer v. Evans, 517 U.S. 620, 643 (1996) (SCALIA, J., dissenting) (homosexual rights); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895 (1992) (abortion rights)).

Id. Justice Scalia concluded, “[b]ut the present case does not even lend itself to such a ‘political correctness’ exception—which though illogical, is at least predictable. It is not a la mode to favor gang members and associated loiterers over the beleagured law-abiding residents of the inner city.” Id.

Justice Scalia punctuated his opposition to the facial invalidation by expressing his outrage at some of the respondents’ inability to show that the Ordinance was unconstitutional as applied to them: “[T]he ultimate demonstration of the inappropriateness of the Court’s holding of facial invalidity is the fact that it is doubtful whether some of these respondents could even sustain an as-applied challenge on the basis of the majority’s own criteria.” Id. at 82.

Justice Stevens answered “Justice Scalia’s . . . facial challenge to the facial challenge doctrine . . . ” by concluding that “we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been a decisive factor in any decision of this Court, including Salerno itself . . . .” Id. at 56 n.22. He concluded that “Justice Scalia’s assumption that state courts must apply the restrictive Salerno test [was not only] incorrect as a matter of law, [but it also] contradict[ed] the ‘essential principles of federalism.’” 527 U.S. at 55 n.22 (citing Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 284 (1994)).
First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”

C. The Majority and Police Discretion

Justice Stevens wrote the majority opinion in which Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Justice Stevens maintained that the “broad sweep of the ordinance also violated ‘the requirement that a legislature establish minimal guidelines to govern law enforcement.’” He observed that the enactment’s language offered no guidance to the police; rather, it directed an officer “to issue an order without first making any inquiry about possible purposes.” Justice Stevens, a native Chicagoan, illustrated his point with the following city scene:

It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she “shall”—order them to disperse.

Justice Stevens disagreed with the City’s arguments that the Ordinance limited police discretion. He reasoned that the “‘no apparent purpose’ standard for making that decision was inherently subjective because its application depended on whether some purpose was ‘apparent’ to the officer on the scene.” The majority was troubled by the concept that 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

152. Id. at 56 (citing Kolender v. Lawson, 461 U.S. at 357). The Court and commentators have maintained that the discretion-prong of the vagueness doctrine is the more important of the two. See Kolender, 461 U.S. at 358 (“The more important aspect of the vagueness doctrine is... the requirement that a legislature establish minimal guidelines to govern law enforcement.”); Jeffries, supra note 70, at 218 (“The susceptibility of the law in question to arbitrary and discriminatory enforcement..., is the most persuasive justification for vagueness review generally.”). But see The Supreme Court, 1999 Term—Leading Cases, 113 Harv. L. Rev. 276, 276 (1999) (contending that by treating the discretion-prong in isolation, “the Court reached a result that may be inappropriate to the specific facts and failed generally to recognize that discretion, notice, and the implication of constitutional rights are inter-connected—not independent—aspects of a single vagueness test”).

153. 527 U.S. at 45.
154. Id. at 60 (citing Kolender v. Lawson, 461 U.S. at 358).
155. Id.
156. Id.
157. Id.
158. Id. at 62.
be apparent if he suspected a different ulterior motive.”
Furthermore, Justice Stevens maintained that the Ordinance’s gang member requirement placed an insufficient limit on the authority to disperse because the Ordinance could be applied to gang and non-gang members alike: “Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.”

Justice Stevens noted that the Ordinance had the “perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment.” He reasoned that “the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang’s dominance of certain territory, . . . or . . . to conceal [an] ongoing commerce in illegal drugs.”

The majority opinion concluded by dismissing the City’s argument that the Order, which accompanied the Ordinance’s enforcement, was sufficient to limit police discretion. The majority reasoned that the Order was adopted internally, and would not provide a defense for a loiterer who was arrested outside the area specified by the Order.

D. The Plurality and Insufficient Notice

Justice Stevens wrote an opinion that was joined by Justices Souter and Ginsburg which maintained that the Ordinance failed to give Chicagoans notice of what it criminalized. “It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an ‘apparent purpose.’ If she were talking to another person would she have an apparent purpose?” Justice Stevens disagreed with the City’s contention that the police dispersal order provided individuals with sufficient notice, observing that an unjustified dispersal order would constitute an impairment of liberty. Justice Stevens was concerned that an officer

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159. See Morales, 527 U.S. at 62.
160. Id. at 63.
161. Id.
162. Id.
163. Id.
164. Id.
165. 527 U.S. at 56.
166. Id. at 56-57.
167. Id. at 58. Justice Stevens stated that: “[i]f the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in Shuttlesworth v. Birmingham.” Id. (citation omitted). Justice Stevens illustrated this by demonstrating that “Literally read . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.” Id. at n.29.
could issue a dispersal order after the prohibited conduct had already occurred; therefore, he concluded that the Ordinance could not “provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.”

Justice Stevens also found that the dispersal order was vague in its own right. He asked: “[H]ow long must the loiterers remain apart? How far must they move?” While recognizing that the nondescript dispersal order did not render the Ordinance unconstitutional, Justice Stevens maintained the plurality’s conclusion that the Ordinance failed to give citizens notice of what was prohibited under the Ordinance.

In addition to finding that the Ordinance provided insufficient notice, the plurality concluded that the freedom to loiter was part of an individual’s liberty subsumed in the Due Process Clause. Justice Stevens wrote, “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.’”

E. Justice O’Connor’s Concurrence

Justice O’Connor wrote a concurring opinion, in which Justice Breyer joined. Justice O’Connor agreed with the Court that the Ordinance was unconstitutionally vague because “any person standing on the street has a general ‘purpose’—even if it is simply to stand—the ordinance permits police officers to choose which purposes are permissible.” However, Justice O’Connor was careful to point out that there remained alternative ways to “combat the very real threat

168. Id. at 59.
169. 527 U.S. at 59.
170. Id. at 59-60.
171. Id. at 53. Unsurprisingly, the plurality’s substantive due process analysis drew barbed responses from the dissenters. “For the plurality, however, the historical practices of our people are nothing more than a speed bump on the road to the ‘right’ result.” Id. at 84 (Scalia, J., dissenting).

The plurality’s sweeping conclusion that this ordinance infringes upon a liberty interest ... withers when exposed to relevant history ... The plurality’s contrary assertion calls to mind the warning that “[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.” Id. at 103-06 (Thomas, J., dissenting) (quoting Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J. dissenting)).

172. Id. at 54 (citing and quoting Kent v. Dulles, 357 U.S. 116, 126 (1958)).
173. 527 U.S. at 64.
174. Id. at 66.
posed by gang intimidation and violence.”\textsuperscript{175} She noted that the Court properly distinguished the Ordinance “from laws that require loiterers to have a ‘harmful purpose,’ from laws that target gang members only, and from laws that incorporate limits on the area and manner in which the laws may be enforced.”\textsuperscript{176}

Justice O'Connor concluded by noting that the Illinois Supreme Court had misapplied Supreme Court precedent when reasoning that it was required to hold the Ordinance vague because it was intentionally drafted in a vague manner.\textsuperscript{177} She maintained that the Court had never held that the intent of the drafters should be used to determine if a law was vague.\textsuperscript{178} Despite Justice O'Connor's reasoning, she concluded that the Court “cannot impose a limiting construction that a state supreme court has declined to adopt.”\textsuperscript{179}

\textbf{F. Justice Kennedy's Concurring Opinion}

Justice Kennedy was not persuaded by the City's argument that a police officer's order had to be disobeyed to be in violation of the Ordinance.\textsuperscript{180} Justice Kennedy recognized situations when a police officer's unexplained order would have to be obeyed.\textsuperscript{181} However, he reasoned that it did not follow “that any unexplained police order must be obeyed without notice of the lawfulness of the order.”\textsuperscript{182} Justice Kennedy observed that a person engaged in innocent conduct was not likely to know when he was subject to a dispersal order under the Ordinance because the order was largely based on the officer's knowledge of the people in a group.\textsuperscript{183}

\textbf{G. Justice Breyer's Concurring Opinion}

Justice Breyer took exception to Justice Scalia's dissent. First, Justice Breyer maintained that the Ordinance created more than what Justice Scalia characterized as a “'minor limitation upon the free state of nature,'” because the Ordinance granted police unlimited discre-

\begin{itemize}
\item \textsuperscript{175} Id. at 67.
\item \textsuperscript{176} Id. (citations omitted).
\item \textsuperscript{177} Id. at 68.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} 527 U.S. at 68 (citing Kolender, 461 U.S. at 355-56 n.4).
\item \textsuperscript{180} Id. at 69.
\item \textsuperscript{181} Id. (“Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team . . . .”).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. at 69-70.
\end{itemize}
tion to close off major portions of the city to innocent people.\footnote{184} Second, Justice Breyer disagreed with Justice Scalia's contention that the majority had violated the rules governing facial challenges.\footnote{185} Justice Breyer maintained that the facial invalidation was wholly legitimate because the police enjoyed too much discretion under the Ordinance in every case.\footnote{186} He reasoned that if every application of the Ordinance represented an exercise of boundless discretion, then the Ordinance was invalid in all of its applications.\footnote{187} Justice Breyer concluded by noting that the City had constitutional alternatives; or because “the Constitution might well have permitted the city to apply [a more specific ordinance] . . . to circumstances like those present here.”\footnote{188}

\section*{H. Justice Scalia's Dissenting Opinion}

In his dissent, Justice Scalia maintained that the Ordinance was simply a local government legitimately exercising its police power.\footnote{189} He analogized the Ordinance to speed limit laws that infringe upon the freedoms of all, but are nevertheless considered constitutional.\footnote{190} Furthermore, Justice Scalia questioned the constitutional legitimacy of a facial challenge, not only in the instant case, but in all cases.\footnote{191} In his assessment, Justice Scalia thought it would be quite improper . . . to ask the constitutional claimant before us: Do you just want to ask us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all of its applications?\footnote{192}

Justice Scalia railed against the plurality's recognition of a constitutional right to loiter. “The plurality tosses around the term ‘constitutional right’ in [a] renegade sense, because there is not the slightest evidence for the existence of a genuine constitutional right to loiter.”\footnote{193} He contended that the plurality short circuited the recently established substantive due process analysis, concluding that “the his-

\begin{thebibliography}{99}
\bibitem{184} Id. at 70. Justice Breyer further noted that: “To grant a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a ‘minor,’ ‘limitation on the free state of nature.’” \textit{Id.} at 70.
\bibitem{185} 527 U.S. at 71.
\bibitem{186} \textit{Id.}
\bibitem{187} \textit{Id.}
\bibitem{188} \textit{Id.} at 73.
\bibitem{189} \textit{Id.} at 73-74.
\bibitem{190} \textit{Id.} at 73.
\bibitem{191} 527 U.S. at 74. \textit{See supra} note 151 (providing an extensive account of Justice Scalia’s argument and Justice Stevens’ response regarding facial challenges).
\bibitem{192} 527 U.S. at 77.
\bibitem{193} \textit{Id.} at 84.
\end{thebibliography}
torical practices of our people are nothing more than a speed bump on
the road to the ‘right’ result.”

In addition to attacking some of the majority and plurality’s stances
on collateral issues, Justice Scalia attacked the Court’s vagueness anal-
ysis. First, he contended that the plurality’s concern over the Ordin-
ance’s insufficient notice was unfounded. To Justice Scalia,
“[w]hat counts for purposes of vagueness analysis . . . [is] the refusal to
obey a dispersal order, as to which there is no doubt of adequate no-
tice of the prohibited conduct.” Second, Justice Scalia disagreed
with the majority conclusion that the Ordinance provided insufficient
standards for the police. He contended that the Ordinance’s re-
quirement that the police officer reasonably believe a loitering group
contained a gang member resembled the probable cause standard.
Further, Justice Scalia noted that the probable cause standard was
made explicit in the Order, as a result, he concluded that the twin
tendencies of the Ordinance and the Order gave the Chicago Police
sufficient standards to guide their arrests.

Justice Scalia punctuated his dissent by reiterating his contention
that the Ordinance represented a simple act of the democratic major-
ity in Chicago. He casted the Ordinance in terms of a trade that the
majority was willing to make, concluding that the “Court has no busi-
ness second-guessing either the degree of necessity or the fairness of
the trade.”

194. Id.
195. Id. at 90-91.
196. Id. at 90.
197. Id. Justice Scalia continued:
The plurality’s suggestion that even the dispersal order itself is unconstitutionally
vague, because it does not specify how far to disperse (!) . . . scarcely requires a re-
sponse. If it were true, it would render unconstitutional for vagueness many President-
ial proclamations issued under that provision of the United States Code which requires
the President, before using the militia or the Armed Forces for law enforcement, to
issue a proclamation ordering the insurgents to disperse. President Eisenhower’s pro-
clamation relating to the court-ordered enrollment of black students in public schools at
Little Rock, Arkansas, read as follows: “I . . . command all persons engaged in such
obstruction of justice to cease and desist therefrom, and to disperse forthwith.”

527 U.S. at 91 (citations omitted) (emphasis in original).
198. Id. at 91.
199. Id. at 92.
200. Id.
201. Id. at 97.
202. Id. at 98.
I. Justice Thomas’ Dissenting Opinion

Justice Thomas wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Scalia. Justice Thomas disagreed with the Court’s position that the Ordinance gave police officers too much discretion. “[T]he ordinance merely enabled police officers to fulfill one of their traditional functions . . . . In their role as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse.”

Justice Thomas argued that police performed a peace-keeping function, and necessarily had to exercise some discretion in the execution of their duties. He contended that the law could not constrain police action, thus concluding that such an approach could not “be reconciled with common sense, longstanding police practice, or this Court’s Fourth Amendment jurisprudence.”

Justice Thomas also took issue with the idea that the Ordinance failed to give citizen’s notice of what was forbidden. He subscribed to the view of Justice White: “If any fool would know a particular category of conduct would be within the reach of the statute, if there is an unmistakeable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face.”

Justice Thomas argued that any fool would know whether or not he was within the Ordinance’s proscription, noting that the plurality was underestimating the intellectual capacity of the citizens of Chicago.

Finally, Justice Thomas summarized the impact of the majority decision:

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 . . . . By focusing exclusively on the imagined “rights” of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice Stevens elevates above all else—the “freedom of movement.” And that is a shame.

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203. 527 U.S. at 98.
204. Id. at 106-07.
205. Id. at 109.
206. Id. at 109-10.
207. Id. at 112.
208. Id. (quoting Kolender, 461 U.S. at 370-71 (White, J., dissenting)).
209. 527 U.S. at 114.
210. Id. at 114-15 (footnotes omitted).
IV. Analysis

The United States Supreme Court’s grant of certiorari in *Morales* surprised the legal community. Some commentators speculated that the Court would take the opportunity to clarify its murky vagueness doctrine. Alternatively, some critics guessed that the Court would address the growing number of community-policing measures that cede certain liberties in exchange for greater police protection. Unfortunately, the Court failed to address either issue, and as a consequence, left hundreds of jurisdictions speculating on questions that were ripe for review. Jurisdictions questioned whether the police could constitutionally be granted discretion to perform an order maintenance functions, and whether freedoms could be traded for increased police protection. Rather than responding to the national questions present in *Morales*, the Court reproduced its familiar vagueness analysis, leaving only hints and references to burning questions.

The amount of discretion the Ordinance lent to the police officer on his beat was limited by the General Police Order 92-4. In ignoring the constraining effects of the Order, the Court exaggerated the amount of discretion that Chicago Police exercised under the Ordinance. The police must be given some measure of discretion so that they are able to perform an order maintenance function in the communities that pine for order and normalcy. The Court’s treatment of Chicago as a community was unfavorable because the Ordinance was a community solution to a community problem. Yet, the Court did not review the Ordinance, by way of the Order, from the perspective of the community that supported the Ordinance.

A. How Much Discretion Can The Community Afford The Police?

The *Papachristou* Court issued a broad legislative directive to enact penal statutes that did not allow for discriminatory enforcement. However, the *Papachristou* opinion did not address whether the Constitution afforded police any discretion to generally maintain order in public places. *Papachristou* and the vigorous application of the

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211. See, e.g., Toni Massaro, *The Gang’s Not Here*, 2 *Green Bag* 2d 25, 26 (1998) (“Far more surprising was the United States Supreme Court’s decision granting certiorari on *Morales*.”).
212. Id. “One possible reading of the grant of certiorari is that the Court wishes to clarify its murky (indeed opaque) vagueness doctrine . . . .” Id.
213. Id. (“[T]he grant of certiorari might signal the Court’s desire to review more generally the increasingly prevalent grants of broad discretionary authority to urban police, and the ‘broken windows’ refrain that is being intoned in support of these measures.”).
214. See supra note 28 and accompanying text.
215. See supra notes 100-110 and accompanying text.
216. See supra note 109 and accompanying text.
vagueness doctrine left courts, legislatures, and police with no uniform guide for how much discretion a statute could give a police officer.\textsuperscript{217} This uncertainty posed a special problem for community policing because one of the movement’s tenets is a police force that is present in the community to spontaneously fix problems.\textsuperscript{218} Morales presented the Court with an opportunity to inform community-police jurisdictions how much discretion they could constitutionally afford their police.\textsuperscript{219} As can be seen by the outcome of Morales, this opportunity was wasted.

1. The Justices Balk at Specifics

The Morales majority held that the Ordinance was vague because it “necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat.”\textsuperscript{220} The majority reasoned that the “no apparent purpose” standard for determining who was loitering was inherently subjective because it left the officer to determine whether a loiterer had an apparent purpose.\textsuperscript{221} Justice O’Connor clarified the majority’s “inherently subjective” position slightly by reasoning that some degree of police discretion was necessary to allow the police to perform their peace-keeping function.\textsuperscript{222} However, O’Connor maintained that the “no apparent purpose” standard granted the police too much discretion because the Ordinance permitted the police to decide which purposes were permissible.\textsuperscript{223}

The Court and Justice O’Connor’s line of reasoning implies that the police are not entitled to any discretion. However, if the Court will not entrust lawmaking to the moment-to-moment judgment of the policeman on his beat, then a policeman’s subjective judgment has been identified as an ill in itself. Thus, the majority’s conclusion directs legislatures and courts toward enacting and construing strictures that would enable the police to perform their peacekeeping function with robotic precision. The Court sets an impractical standard, offering little to refute the inference that the police cannot be granted any sort of discretion.

Justice Thomas argued on the other end of the spectrum. He maintained that rather than allotting an unconstitutional amount of discre-

\textsuperscript{217} See supra note 110 and accompanying text.
\textsuperscript{218} See supra notes 58-61 and accompanying text.
\textsuperscript{219} The Court has kept the doctrine flexible by couching it in generalities like “the Constitution does not require impossible standards.” United States v. Perillo, 332 U.S. 1, 7-8 (1947).
\textsuperscript{220} 527 U.S. at 110.
\textsuperscript{221} Id. at 62.
\textsuperscript{222} Id. at 65.
\textsuperscript{223} Id.
tion, the Ordinance merely enabled the police to perform their
traditional function of preserving the public peace. He reasoned
that the Court had always entrusted officers with their own judgments
in making “spur-of-the-moment determinations” about whether or
not there was “probable cause,” or “reasonable suspicion.” In his
view, the Court’s hesitation in trusting the police officer’s moment-to-
moment judgment could not “be reconciled with common sense, long-
standing police practice, or this Court’s Fourth Amendment jurisprudence.”

Justice Thomas’ opinion did nothing more than refute an extreme
position with an equally extreme position. His reply was conclusory,
offering no reasons to explain why trust in police judgment was justi-
fied, rather, he simply concluded it was. In this light, Justice Thomas’
riposte boils down to a sort of “yes we can” to the Court’s “no we
cannot.” The Morales opinions left an inquiring public with little
more than the extreme stances on the perplexing issue of police
discretion.

The community policing movement needed an informed middle-
ground. For instance, Justice O’Connor should have gone beyond
merely recognizing the police’s peace-keeping function; she should
have gone on to define the police discretion that would necessarily be
involved in that function. Likewise, Justice Thomas should have gone
beyond merely defining roles that already allow the police discretion.
Justice Thomas should have recognized that the “no apparent pur-
pose” standard was possibly more amorphous than the probable cause
standard. If the Justices had moved past the conclusional, courts and
legislatures would have had some benchmark with which to measure
the amount of discretionary judgment police are allowed. Since the

224. Id. at 101-02. Unsurprisingly, Justice Thomas looked to history in support of his conclu-
sion that the police have a public maintenance function. He quoted the following passage from
the 1887 Police Manual for the City of New York:

It is hereby made the duty of the Police Force at all times of day and night, and the
members of such Force are hereby thereunto empowered, to especially preserve the
public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insur-
rections, disperse unlawful or dangerous assemblages, and assemblages which obstruct
the free passage of public streets, sidewalks, parks and places.

Id. at 108 (emphasis in original).

225. 527 U.S. at 109-10.

Just as we trust officers to rely on their experience and expertise in order to make spur-
of-the-moment determinations about amorphous legal standards such as ‘probable
cause’ and ‘reasonable suspicion,’ so we must trust them to determine whether a group
of loiterers contains individuals . . . whom the city has determined threatens the public
peace.

Id. (citing Ornelas v. U.S., 517 U.S. 690, 695, 700 (1996)).

226. Id. at 110.
Court failed to take such an approach, communities are left guessing as to the amount of discretion they can lend their police to keep the public peace.

2. The Justices' Short Shrift on Discretion

The Court's failure with regard to discretion was disappointing; however, the disappointment was aggravated by the Court's disregard of General Order 92-4. The City attempted to correct potential discretionary vagueness with the Order. However, the Court paid the City's effort little heed, missing an opportunity to give guidance on an innovative and effective way to limit police discretion.

Surprisingly, the Court did not address in any detail whether or not internal orders like General Order 92-4 sufficiently limited police discretion. Rather, the majority confined its analysis of the Order to a conclusion: "[The Order] would not provide a defense to a loiterer who might be arrested [outside the designated areas]. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse . . . ." In short, the Court roundly concluded that the Chicago police may not follow their own internal rules.

Ultimately, the Court's conclusion was legitimate. The Ordinance and the Order both failed to address how each was related to the other. The defendant who was arrested outside a nominated gang-plagued area, or the defendant who was arrested by an unauthorized officer, may not have had a defense in court because the Order was not explicitly incorporated into the Ordinance. Yet, however cogent the Court's conclusion, it should have at least recognized the Order's curative effects, or at the very least, distinguished precedent that makes its holding problematic.

228. 527 U.S. at 63.
229. Id. Scholars have disagreed on the extent to which police can be delegated the authority to develop rules guiding their arrest discretion in the enforcement of criminal laws. Compare Ronald J. Allen, The Police and Substantive Rulemaking: A Brief Rejoinder, 125 U. Pa. L. Rev. 1172, 1174-79 (1977) (contending that police should be required to enforce laws as provided by the legislature), and Ronald J. Allen, The Police and Substantive Rulemaking: Reconciling Principles and Expediency, 125 U. Pa. L. Rev. 62, 76-81, 86-98 (1976) (arguing that separation of powers and nondelegation prohibit police rulemaking that affects the scope of a criminal law, at least in absence of explicit legislative authorization "accompanied by precise standards") (quoted material at 98), with Kenneth Culp Davis, Police Rulemaking on Selective Enforcement: A Reply, 125 U. Pa. L. Rev. 1167, 1168-70 (1977) (arguing that police inherently have the authority to promulgate rules regulating arrest discretion).
230. 527 U.S. at 63-64.
231. Id.
The Court failed to address authority that was clearly on point. "Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." Even closer to the mark, "administrative regulations 'will often suffice to clarify a standard with an otherwise uncertain scope.'"

The Court was remiss in not addressing the above authority because administrative regulations are useful for community policing measures like the Ordinance. Regulations allow the police to tailor ordinances to the very specific and changing needs of the community. For instance, the Order limited enforcement of the Ordinance to portions of the City where gangs had posed a demonstrable problem. The City Council could not possibly have reached that kind of specificity because that limitation can change rapidly. The Order was extremely useful because the district commanders, with the help of knowledgeable community members, could specifically tailor the Ordinance to the areas of the city that had an immediate gang problem, leaving unaffected communities outside the Ordinance's necessarily broad sweep. Thus, the Order allowed a constrained police force to spontaneously respond to community nominated problems.

The Court should have instructed Chicago on how to constitutionally utilize administrative regulations. Regrettably, the Court's curt treatment of the Order leaves Chicago and other community-police jurisdictions uninformed. These communities can only hope that the Order was insufficient because the defendants could not utilize it in court. If this proposition is true, then jurisdictions could simply incorporate the regulations into their statutes, allowing the police force to adapt to the changing neighborhoods, while being ever-constrained in the exercise of their discretion.

3. Compounding Actual Police Discretion

The Supreme Court's failure to review General Order 92-4 caused the Court to exaggerate the actual discretion the Ordinance afforded the police. For example, in her concurrence, Justice O'Connor maintained that the "no apparent purpose" standard allowed "[a]ny police

232. Id. at 92 n.10 (Scalia, J., dissenting) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989)).
233. Id. (quoting Hoffman Estates, 455 U.S. at 504).
234. See Chicago Police Dep't General Order 92-4 at 2, 3.
235. Id.
officer in Chicago . . . to order at his whim any person standing in a public place with a suspected gang member to disperse.”236 She continued, “the ordinance applies to hundreds of thousands of persons who are not gang members, standing on any sidewalk or in any park, coffee shop, [or] bar . . . .”237 This is representative of the Court’s gross mischaracterization of the discretion the Ordinance afforded the police.238 Both Justice O’Connor and the Court asserted that the Ordinance allowed the police city-wide discretion to disperse loiterers; however, both the Court and Justice O’Connor omitted General Order 92-4 from their analyses.239

The Order was promulgated to ensure that the Ordinance was not enforced in an arbitrary or discriminatory way.240 The purpose of the Order was to limit the enforcement of the Ordinance to authorized officers, who had a special understanding of gangs and gang membership,241 and to the communities that were experiencing a gang problem.242 The Order required that the enforcing officer have probable cause to think that one of the loiters was a gang member.243 The probable cause was to be based not only on the officer’s experience and knowledge of the alleged offenders, but also on documented information such as reliable witness testimony, reputed gang colors, signs, or other markings.244 Therefore, the Order placed numerous limitations on police discretion.

Contrary to Justice O’Connor’s assertion, any person standing with a suspected gang member could not be ordered to disperse; the police were required to have probable cause to believe that at least one person in the group was a gang member. Furthermore, a person was not subject to dispersal from any park, coffee shop, or bar. The Ordinance could only be enforced in portions of the City where gang loi-

236. 527 U.S. at 66 (emphasis added).
237. Id. (second and third emphasis added).
238. “The Court” is referred to because the majority characterized the Ordinance similarly: But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.
239. See id.
241. Id. at 2, 3.
242. Id.
243. Id.
244. Id.
rtering posed a demonstrable problem for the surrounding community. Finally, not just any Chicago police officer could give a valid dispersal order under the Ordinance. Only officers who had special knowledge of gangs could give dispersal orders and make arrests under the Ordinance.

In the wake of Morales, communities questioning the amount of discretion their police force can constitutionally be afforded are left to rely on individual policemen and women to help them in their daily lives. Here, the Order offered a compromise between the ills of police discretion and the community need for police aid. Unfortunately, the Court failed to offer guidance. First, the Court was uninformative with regard to the measure of discretion allowed to a policeman on his beat. Second, the Court balked at the opportunity to review an innovative administrative means of police restraint. Finally, the Court inflated the discretion afforded the police under the Ordinance because it refused to recognize any of the Order’s curative effects. Morales represented a distinct opportunity for the legal bases of community policing to be spelled out, but the opportunity passed unrealized.

B. Can Communities Exchange Freedoms For Police Protection

The community policing movement calls for a police force that will be present in the community to spontaneously maintain order. Parts of the legal community speculated that the Morales Court would review the questionable constitutionality of the movement’s call, and contend that communities could not trade in liberties for increased police protection. While the Court did not take up the issue directly, Justice Stevens’ plurality, and Justice Scalia’s dissent, brought the opposing sides of the contentious topic into sharp relief. Just-

245. A Chicago resident shared the following with the City Council:
I have never had the terror that I feel every day when I walk down the streets of Chicago . . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it’s come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that.

1 Transcript of Proceedings before the City Council of Chicago, Committee on Police and Fire 124-25 (May 11, 1992).

246. See supra notes 59-61 and accompanying text.

247. See, e.g., Massaro, supra note 211, at 26 (predicting that the Court granted certiorari in order to pass judgment on the community policing movement).

248. Compare, e.g., Randall Kennedy, Race, Crime, and the Law 10 (1997) (“Some critics attack as racist police crackdowns on violent gangs because such actions will disproportionately affect black members . . . [b]ut are black communities hurt by police crackdowns on violent gangs or helped by the destabilization of gangs that terrorize those who live in their midst?”), and Kahan and Meares, supra note 28, at 1163 (“[B]ecause crime disrupts so many social institu-
tice Stevens recognized a constitutional right to loiter, signaling that Chicago communities were trading in on a right that was too valuable. In contrast, Justice Scalia perceived loiterers' rights to be minimal at best, contending that such minimal rights could be freely traded as the community saw fit. Justice Stevens erred on the side of protecting the loiterers' freedoms, while Justice Scalia erred on the side of protecting the communities democratic will, each erring at the expense of the other's concern.

Both of the Justices' concerns were legitimate. Justice Stevens worried that the community had had a valuable right unwittingly traded away by the City Council. Justice Scalia was disturbed that the City Council was not being allowed to passionately assert its will. While the Justices' positions seemed diametrically opposed, they were similar in the respect that they both viewed the problem from the perspective of the City Council. However, this is also the source of the problem. The Justices should have taken the Order into account because it would have allowed them to analyze the Ordinance from the communities' perspective. Additionally, the Justices would have found that the Order balanced their competing concerns by affording the aggressive Ordinance only to those communities that wanted its protection.

1. Concerns of Justices Stevens and Scalia

While the Court failed to give specific guidance to communities wishing to allow their police force greater authority in their neighborhood, Justice Stevens' plurality, and Justice Scalia's dissent, offer two very different perspectives on the issue. After recognizing the parameters of their extreme positions, the underlying concerns of the justices become apparent.
a. A Fundamental Right to Loiter

Justice Stevens implicitly rejected the idea that a community can trade certain freedoms for more police protection. This rejection can be inferred from his recognition that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." The elevation of loitering to a fundamental right by Justice Stevens made it incumbent on the City of Chicago to show the Court that its law was necessary to achieve a compelling objective. Thus, Justice Stevens rejected the idea that Chicagoans could trade in the right to loiter for clear street corners because Chicagoans would be trading on a fundamental right.

Extending full constitutional protection to loitering seems to be a stretch, a thought buttressed by Justice Stevens' minimal support. However, the plurality opinion represented the concern for individual resident's rights under the Ordinance. The opinion's bold position stood in rebuke to the contention that the Ordinance had support from the communities that would be affected. Justice Stevens' vigorous protection of the communities' freedoms signaled his concern that some residents would involuntarily lose important rights under the Ordinance.

b. A Free Exercise of Community Will

Justice Scalia viewed the Ordinance as a simple act of the public will in reaction to a problem that faced the community. For Justice Scalia, the Ordinance was a prophylactic measure that reasonably in-

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255. 527 U.S. at 253.
256. Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (explaining that the more exacting compelling interest standard requires the state to show that the classification created by the state statute is necessary to promote a compelling state interest). The Court employs a strict judicial scrutiny when a fundamental right is implicated by a statute. See id. Strict scrutiny has long been viewed as an insurmountable hurdle. See Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (noting that many view the Court's strict scrutiny review as "strict in theory, but fatal in fact"); see also Gerald Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (commenting on the outcome-determinative effect of the Court's strict scrutiny analysis).
257. 527 U.S. at 53-54.
258. Id. at 103-06 (Thomas, J., dissenting) ("Tellingly, the plurality cites only three cases in support of the asserted right to 'loiter for innocent purposes'...[and] only one...addressed the validity of a vagrancy ordinance...[and it] did not undertake the now-accepted analysis applied in substantive due process cases....").
259. Id. at 73. Justice Scalia drew the following analogy:
The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average
fringed upon the freedoms of all, in order to liberate the street corners from the presence of unruly gangs. Justice Scalia contended that the City of Chicago could legitimately proscribe loitering in a wholesale fashion because loitering was of no constitutional significance. He reasoned that the infringement of protected rights, like speech or religion, would cause such a prophylactic measure to be called into question, but remaining in one place was not so protected. He concluded, “it is up to the citizens of Chicago—not us—to decide whether the trade off is worth it.” Thus, underlying Justice Scalia’s stance was a concern for the community’s right to passionately assert its will in order to fix a problem.

As evidenced above, Justice Stevens and Justice Scalia’s difference in opinion was great. However, their opinions shared a similarity, both focused on the problem from the perspective of the City Council. For instance, Justice Stevens was concerned that the City Council was trading away the citizens’ rights. From the same perspective, Justice Scalia was concerned that the majority will, as voiced in the City Council, was being silenced. Indeed, both Justices analyzed this progressive stricture from an age-old perspective, and consequently, failed to move beyond an age-old division. This Ordinance should have been analyzed from a new perspective because community policing strictures recast law enforcement in light of its relationship to the community. For example, the Ordinance was engendered by, written for, and reliant on Chicago communities. Naturally, a searching analysis should be keen to the tendencies of community action, rather than those of a governing body.

2. A Balancing of Concerns

Concomitant with the vision of an orderly neighborhood is the need for a police force that is present in the neighborhood and able to spontaneously fix problems that threaten the order. The new community-policing framework features a police role that is juxtaposed to the role that police had throughout the Twentieth Century. During the

\( Id. \)

260. Id. at 73-74.
261. Id. at 84, 94.
262. 527 U.S. at 84.
263. Id. at 94.
264. See infra notes 277-280 and accompanying text.
265. See supra notes 58-61 and accompanying text.
266. See discussion supra Part I.A.
reform era, police isolated themselves from the community and founded their legitimacy on the narrow mandate to respond to infractions of the criminal law. In contrast, community policing places a premium on the police force’s direct contact with the community on a daily basis. The police respond to the community as a whole, developing a close working relationship in order to identify “community nominated problems.” If the police are going to return to the neighborhoods, they will need some legal basis to perform their order maintenance function. Justice Stevens reasoned that the Ordinance did not provide a sufficient basis because it allowed the police an order maintenance authority that could infringe upon activity that was in fact treasured, but traded away by the City Council. In contrast, Justice Scalia reasoned that the Ordinance was a reasonable exercise of the City Council’s power, and provided the police with a sufficient basis to maintain order in the neighborhoods.

If the police force is going to return to the community, the proper basis of police authority should come from the community itself. A trade off should be analyzed from the perspective of the community, not from the perspective of the City Council. A neighborhood’s willingness to support stricter community policing, which carries with it the greater risk of police harassment, reflects a community’s judgment that the continued victimization of residents at the hands of criminals poses a much more significant threat to the well being of residents, than does the risk of arbitrary mistreatment at the hands of the police. The individual community’s willingness to be subject to the

267. See supra notes 31-42 and accompanying text.  
268. See supra notes 58-61 and accompanying text.  
269. See supra notes 58-61 and accompanying text.  
270. See supra notes 62-67 and accompanying text.  
271. See supra notes 255-258 and accompanying text.  
272. See discussion supra notes 259-264 and accompanying text.  

The principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. Whereas mistreatment of suspects, defendants, and criminals has often been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African-Americans are private, violent criminals who attack those most vulnerable without regard to racial identity. Id. See Regina Austin, “The Black Community,” Its Lawbreakers, and a Politics of Identification, 65 S. CAL. L. REV. 1769, 1772 (1992)  

[|Led|] little enough attention is being paid to law-abiding people who are the lawbreakers’ victims. Drive-by shootings and random street crime have replaced lynchings as a source of intimidation, and the “culture of terror” practiced by armed crack dealers and warring adolescents has turned them into the urban equivalents of the Ku Klux Klan. Id. But see Stewart, supra note 52, at 2254 (noting that expansion of police officers’ already significant discretionary powers should only occur after it has been proven that their racial biases do not affect their work).
law should be the basis for the police officer's authority to spontaneously enforce the law in the community.

The drafting and passage of the Chicago Gang Loitering Ordinance was the product of community efforts throughout Chicago.\textsuperscript{274} Aldermen from high-crime wards worked with civic groups from their neighborhoods to draft a stricture that met the communities' concerns.\textsuperscript{275} Additionally, the Ordinance passed because the Aldermen from the high-crime sections of the City enthusiastically supported the Ordinance.\textsuperscript{276}

The Order tailored the community support for the Ordinance to the particular communities that wanted the Ordinance.\textsuperscript{277} For instance, the Order mandated that the Ordinance could only be enforced in parts of the City where loitering by street gangs had posed a demonstrable problem.\textsuperscript{278} Additionally, the Order required district commanders to consult with community groups in making the determination of whether gang loitering posed a demonstrable problem in the community.\textsuperscript{279} Consequently, the Order incorporated the community's will into the Ordinance. If the community failed to nominate loitering as a demonstrable problem, the district commander would not subject that portion of the City to the Ordinance.\textsuperscript{280}

However, had Justice Stevens and Justice Scalia analyzed the Ordinance from the community perspective, that is, with the Order, both of their concerns would have been placated. The Order appeased Justice Stevens' concern that the community's freedoms were inadvertently traded away, as well as addressing Justice Scalia's concern that the community was being prevented from exercising its free will.

\textsuperscript{274} See Meares & Kahan, \textit{supra} note 111, at 248; see also Editorial, \textit{Anti-gang law isn't the answer}, \textit{Chi. Trib.}, May 20, 1992, §1 at 16 (reporting that "[f]or the last year neighborhood groups have worked with Chicago aldermen to draft a legal battle plan against the city's fearsome, intimidating street gangs"); Fran Spielman, \textit{Daley endorses anti-gang law: Rodriguez wary}, \textit{Chi. Sun-Times}, May 20, 1992, at 14 ("It's basically a response from block organizations, churches and community groups.") (quoting Mayor Daley); John Kass, \textit{Old tactic sought in crime war}, \textit{Chi. Trib.}, May 15, 1992, §2 at 1 (reporting that the gang loitering bill "is welcomed by many residents of crime-ravaged neighborhoods"). \textit{But see} Alschuler and Schulhofer, \textit{supra} note 113, at 217 (stating that the ordinance derived from efforts of a community group based in a predominately white section of Chicago that was concerned about the increasing presence of gangs in its community).

\textsuperscript{275} Meares & Kahan, \textit{supra} note 111, at 248 ("[T]he sponsoring Alderman worked closely with leaders of various civic organizations from minority neighborhoods.").

\textsuperscript{276} Meares & Kahan, \textit{supra} note 111, at 250 (relating that six aldermen representing districts within the top ten most violent precincts voted in favor of the Ordinance).

\textsuperscript{277} \textit{See} Chicago Police Dep't. General Order 92-4 at 2-3.

\textsuperscript{278} \textit{Id.} at 3.

\textsuperscript{279} \textit{Id.}

\textsuperscript{280} \textit{Id.}
To strike a recurrent theme, the Court failed to address the issue. However, the issue is not an abstraction. Communities in jurisdictions all over the country are assuming a novel role in crime control. As more city councils respond to constituents' new relationship with the police, jurists must respond by reinventing their perspectives on review.

V. IMPACT

Immediately after news of the Morales decision, Chicago Mayor Richard M. Daley vowed to rework the Ordinance so that it would pass constitutional muster. On January 11, 2000, Mayor Daley unveiled a new anti-gang loitering ordinance that he claimed would satisfy every Supreme Court objection. The talk of a new Ordinance

281. See supra note 28.
282. Adrienne Drell & Fran Spielman, Loitering law nixed by court; Daley pledges to redraft, CHI. SUN-TIMES, June 10, 1999, at 1 (“Mayor Daley and supportive aldermen immediately pledged to draft a constitutionally valid law . . . .”).

(a) Whenever a police officer observes a member of a criminal street gang engaged in gang loitering with one or more other persons in any public place designated for the enforcement of this Section under subsection (b), the police officer shall, subject to all applicable procedures promulgated by the Superintendent of Police: (i) inform all such persons that they are engaged in gang loitering within an area in which loitering by groups containing criminal street gang members is prohibited; (ii) order all such persons to disperse and remove themselves from within sight and hearing of the place at which the order was issued; and (iii) inform those persons that they will be subject to arrest if they fail to obey the order promptly or engage in further gang loitering within sight or hearing of the place at which the order was issued during the next three hours.

(b) The Superintendent of Police shall by written directive designate areas of the City in which the Superintendent has determined that enforcement of this Section is necessary because gang loitering has enabled criminal street gangs to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities. Prior to making a determination under this subsection, the Superintendent shall consult as he or she deems appropriate with persons who are knowledgeable about the effects of gang activity in areas in which the ordinance may be enforced. Such persons may include, but need not be limited to, members of the Department of Police with special training or experience related to criminal street gangs; other personnel of that Department with particular knowledge of gang activities in the proposed designated area; elected and appointed officials of the area; community-based organizations; and participants in the Chicago Alternative Policing Strategy who are familiar with the area. The Superintendent shall develop and implement procedures for the periodic review and update of designations made under this subsection.

(c) The Superintendent shall by written directive promulgate procedures to prevent the enforcement of this Section against persons who are engaged in collective advocacy activities that are protected by the Constitution of the United States or the State of Illinois.
was accompanied by talk of a new battle in the courts.284 If the Ordi-

(d) As used in this Section:
(1) “Gang loitering” means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.
(2) “Criminal street gang” [See supra note 113, the definition is identical to the old Ordinance’s definition.]
(3) “Criminal gang activity” [See supra note 113, the definition is identical to the old Ordinance’s definition.]
(4) “Pattern of criminal gang activity” [See supra note 113, the definition is identical to the old Ordinance’s definition.]
(5) “Public place” [See supra note 113, the definition is identical to the old Ordinance’s definition.]

(e) Any person who fails to obey promptly an order issued under subsection (a), or who engages in further gang loitering within sight or hearing of the place at which such an order was issued during the three hour period following the time the order was issued, is subject to a fine not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months for each offense, or both. A second or subsequent offense shall be punishable by a mandatory minimum sentence of not less than 5 days imprisonment.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to Section 1-4-120 of this Code.

8-4-017 Narcotics-related loitering
(a) Whenever a police officer observes one or more persons engaged in narcotics-related loitering in any public place designated for the enforcement of this Section under subsection (b), the police officer shall: (i) inform all such persons that they are engaged in loitering within an area in which such loitering is prohibited; (ii) order all such persons to disperse and remove themselves from within sight and hearing of the place at which the order was issued; and (iii) inform those persons that they will be subject to arrest if they fail to obey the order promptly or engage in further narcotics-related loitering within sight or hearing of the place at which the order was issued during the next three hours.

(b) The Superintendent of Police shall . . . . [See subsection (b) above, duties of the Superintendent in that Section are identical to the duties in this Section.]

(c) As used in this Section:
(1) “Narcotics-related loitering” means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to facilitate the distribution of substances in violation of the Cannabis Control Act or the Illinois Controlled Substances Act.
(2) “Public place” [See supra note 113, the definition is identical to the old Ordinance’s definition.]

(d) Any person who fails to obey promptly an order . . . . [See subsection (e) above, the penalties in that Section are identical to the penalties under this Section.]


284. See Fran Spielman, Daley faces heat on gang proposal, CHI. SUN-TIMES, Jan. 12, 2000, at 12 (reporting that the Ordinance’s chance of success in the courts is debatable, and that Mayor Daley is willing to rewrite the Ordinance again and again until it survives legal challenge); General News, New Chicago anti-gang law unveiled, UNITED PRESS INT’L, Jan. 11, 2000, at 1 (reporting that Mayor Daley expects the Ordinance to face a court challenge). Mayor Daley had the following riposte to his would-be challengers: “The lawyers and civil libertarians who will challenge this ordinance do not live in neighborhoods where they have to thread their way through
nance is attacked in the courts, the Morales opinion will undoubtedly be the focal point of the litigation. Thus, it will be helpful to analyze and predict whether the City's second effort will be enough to appease the Justices' concerns about the old Ordinance.

A. Proscribed Activity Under the New Ordinance

Most importantly, the new Ordinance abandons the "no apparent purpose" definition of loitering in favor of tighter language that specifically defines the criminal conduct proscribed. The new law defines two types of prohibited loitering: gang and narcotics loitering. Gang loitering is defined as "remaining in any one place under circumstances that warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas or to conceal illegal activities." Narcotics related loitering is defined as "remaining in one place under circumstances that warrant a reasonable person to believe that the purpose or effect of that behavior is to facilitate the distribution of substances in violation of Illinois drug laws."

Like the old Ordinance, the new Ordinance requires the police to give the loiterers a dispersal order. However, unlike the old Ordinance, the new Ordinance requires the police to tell the group that they must remove themselves from within sight and hearing distance of the location for at least three hours. Furthermore, the police must notify the group that they are engaged in gang loitering in an area where gang loitering is prohibited, and then must give them time to disperse.

In addition, the new Ordinance creates specific duties for the Superintendent of Police, such as designating areas of the City that are in groups of gang-bangers luring kids to buy drugs a few feet from the school playground. . . ."

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285. See Chicago, Ill., Mun. Code § 8-4-015 (2000). The Court made plain its disapproval of the "no apparent purpose" standard. Morales, 527 U.S. at 57 ("If [a citizen of Chicago] were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?").


291. Id.

292. Id.

293. Id.
need of the Ordinance's protection.\textsuperscript{294} The new Ordinance requires the Superintendent of Police to promulgate regulations that will ensure that the Ordinance is not applied in a way that would infringe upon citizens' constitutional rights.\textsuperscript{295}

\section*{B. The Direct Response of the New Ordinance}

Undoubtedly, the Morales opinion will be the focal point of a court battle over the new Ordinance. Consequently, it was in the City's interest to respond to the concerns raised by the Justices because attention to those concerns will cut off the challengers' potential lines of attack. The City's new Ordinance clears up the problems that were specifically identified in Morales. Thus, challengers of the new Ordinance will not have the benefit of old arguments because the City's conscientious effort has rendered them moot.

\subsection*{1. Controlling Police Discretion}

The six Justice Morales majority held that the Ordinance was unconstitutionally vague because it afforded too much discretion to the police.\textsuperscript{296} The Court identified the "no apparent purpose" standard as the principal source of the vast discretion conferred on police,\textsuperscript{297} agreeing with the lower court that the standard provided an officer with absolute discretion to decide whose purpose was apparent.\textsuperscript{298} In the majority's view, the arresting officer had free reign to decide when to enforce the Ordinance because it did not provide the officer with a clear standard to guide his arrest.\textsuperscript{299}

While the majority was critical of the amount of discretion afforded police under the Ordinance, it advised the City of Chicago that the Ordinance was not fatally flawed.\textsuperscript{300} For instance, Justice Stevens, writing for the majority, recognized the Ordinance's requirement that an officer reasonably believe a group contains a gang member placed a limit on the officer's authority.\textsuperscript{301} Justice Stevens continued, "[t]hat limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect . . . ."\textsuperscript{302} However, Justice O'Connor clarified the majority's advice when she

\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} 527 U.S. at 64.
\textsuperscript{297} Id. at 61-62.
\textsuperscript{298} Id. at 62.
\textsuperscript{299} Id.
\textsuperscript{300} Id. at 62-63.
\textsuperscript{301} Id. at 62.
\textsuperscript{302} 527 U.S. at 62.
wrote, "the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a 'harmful purpose'. . . ."303 Justice O'Connor went further, defining a harmful purpose for the City: "The term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.'"304 In short, the Court made the remedies to its objections abundantly clear.

With an eye towards a future court battle, the City responded directly to the advice given by the *Morales* majority. For example, the City heeded the majority's objection to the "no apparent purpose" standard by abandoning it for a more definite objective standard that would give guidance to the police and limit their discretion.305 However, the new standard was far from innovative because the City carefully followed the Court's direction. First, the City responded to the Court's direction regarding the inclusion of a harmful purpose standard, defining gang loitering as "remaining in any one place under circumstances that warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas . . . ."306 Additionally, the harmful purpose that the City incorporated into the new Ordinance has a familiar ring since it was, quite literally, taken from Justice O'Connor's concurrence.307 Simply put, the City did not leave anything to chance. The City responded directly to the majority's concern that the old Ordinance lent the police too much discretion by incorporating the more objective standard that was outlined in Justice O'Connor's opinion. Thus, if the new Ordinance is attacked as affording too much discretion to the police, the City's first line of defense will be the *Morales* majority's advice that was dutifully heeded.

2. *Providing Citizens With Greater Notice*

A three Justice plurality held that the Ordinance was unconstitutionally vague because it left the public uncertain as to what conduct was prohibited.308 Writing for the plurality, Justice Stevens reasoned

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303. Id. at 67.
304. Id. at 68.
305. See supra notes 289-290 and accompanying text.
306. See CHICAGO, ILL., MUN. CODE § 8-4-015 (2000).
308. 527 U.S. at 56.
that the public could not possibly grasp what the Ordinance prohibited because the proscribed activity, standing on the street corner without an apparent purpose, was up to the judgment of the arresting officer. Further, he reasoned that the dispersal order was an insufficient form of notice because if the loitering was in fact harmless, the alleged loiterer would not know whether he was justifiably ordered to disperse. Finally, Justice Stevens noted that the form of the dispersal order compounded the inadequacy of the Ordinance’s notice. He maintained that the dispersal order raised a host of questions. How long must the loiterers remain apart? “[H]ow far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely being ordered to disperse again?”

The City has responded to the plurality’s concern that the Ordinance did not provide notice by abandoning the “no apparent purpose” standard. In place of the old standard, the City has provided an ascertainable standard to which the public will be able to conform its conduct. The new Ordinance informs every Chicagoan that if he intends to stand on the street corner, he should not do so in a manner that would lead a reasonable person to believe he was either attempting to establish control over the corner, or facilitating a drug trade.

One may argue that these standards are vague because “establishing control” or “facilitating a drug trade” are loose concepts that the arresting officer will ultimately determine. However, this sort of argument is always available. The real issue is whether the trier of fact will have a legal standard with which to work. Looking at a set of facts from Morales, it is apparent that these standards would put an alleged loiterer on notice.

For instance, Daniel Washington, an admitted member of the Vice Lords gang, was observed standing in the street, “yelling at passing vehicles, stopping traffic, and preventing pedestrians from using the sidewalks.” With those facts, we can safely assume that Washington would know that his conduct was proscribed by the Ordinance, and that the rational trier of fact could determine that Washington was “establishing control.” However, the effectiveness of the standards becomes more apparent with a set of facts that fails to put an alleged

309. Id. at 56-7.
310. Id. at 58.
311. Id. at 59.
312. Id.
313. See supra notes 290-292 and accompanying text.
314. See supra notes 290-292 and accompanying text.
315. 527 U.S. at 82-83.
loiterer on notice. For example, Jose Renteria, an admitted member of the Satan Disciples, was observed standing on the street corner with other gang members. Without more, the officer made an arrest. Obviously, the arrest may have represented gross negligence on the officer's part because the trier of fact would not have had anything to work with. Additionally, we could hypothesize that Renteria was conforming his conduct to the Ordinance by limiting his conduct to idle conversation with his friends. Thus, by plugging facts into the standards of the new Ordinance, it is evident that Chicagoans will be put on notice of what is proscribed.

The City has also been responsive to the plurality's concern over the terms of the dispersal order. Justice Stevens maintained that the dispersal order raised a host of questions, and the City has answered all of them directly in the new Ordinance. For instance, Justice Stevens asked, "how long must the loiterers remain apart?" The City answered by requiring the loiterers to leave the area and stay away for at least three hours. Justice Stevens asked, "[h]ow far must they move?" The City answered by requiring the loiterers to remove themselves from within sight and hearing distance of the targeted location. Finally, Justice Stevens asked, "[i]f each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely being ordered to disperse again?" The City answered by requiring the arresting officer to tell the loiterers the consequences of disobeying the dispersal order.

The above demonstrates the City's conscientious effort to be responsive to the plurality's concerns over notice. The City abandoned the plurality's chief aggravation, the "no apparent purpose" standard. In doing so, the City was able to more clearly define the proscribed activity, and in turn, put the citizenry on notice of what conduct the Ordinance seeks to prohibit. The City also provided direct responses to the questions posed by Justice Stevens, evidencing an effort to address even the plurality's secondary concerns. In sum, the City's conspicuous effort to appease the plurality would have to be recognized in the next round of litigation.

316. Id. at 82.
317. Id.
318. Id. at 59.
319. Id.
320. See CHICAGO, ILL., MUN. CODE § 8-4-015 (2000).
322. See CHICAGO, ILL., MUN. CODE § 8-4-015 (2000).
323. Morales, 527 U.S. at 59.
324. See CHICAGO, ILL., MUN. CODE § 8-4-015 (2000).
3. The Plurality’s Right to Loiter

Writing for the plurality, Justice Stevens reasoned that one’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.” He concluded that the United States recognizes that the freedom to loiter for innocent purposes is part of the liberty protected by the Due Process Clause of the Fourteenth Amendment.

At first blush, this section of the plurality seems fatally juxtaposed to any City effort to ban gang loitering because it holds loitering as an American ideal that deserves constitutional protection. However, the plurality limited the substantive right to loiter “for innocent purposes.” As argued above, the plurality introduced a constitutional right to loiter in Morales because it feared the “no apparent purpose” standard was vague enough to include a good deal of innocent conduct. In abandoning the loose “no apparent purpose” standard for a more objective “harmful purpose” standard, the City limited the scope of the new Ordinance to loiterers with a harmful purpose. Therefore, the City’s attention to the plurality will work to cut off challenges that the new Ordinance implicates an individual’s constitutional right to loiter because the new law does not prohibit loitering for an innocent purpose.

Mayor Daley and the City of Chicago expect that the new Ordinance will come under attack. However, if a new round of litigation begins, it will be short-lived because the Morales Court took pains to outline remedies for the vague Ordinance. In turn, the City has conscientiously heeded the Court’s advice. Thus, would-be challengers of the new Ordinance will enter the court battle with a distinct disadvantage because their court of last resort played a pivotal role in legislating the new Ordinance.

VI. Conclusion

The year 2000 was ominous for Chicago. Unfortunately, every year is ominous for some communities in Chicago. Bad years do not give way to good years because there exists a perennial blight on the structure of the community. Without a structure, residents and non-

325. Morales, 527 U.S. at 54.
326. Id. at 52-53.
327. Id. at 53.
328. See supra notes 259-263 and accompanying text.
329. See supra note 285 and accompanying text.
residents treat the community and its environment with callous disregard; problems perpetuate further problems because no one cares. Perennial problems call for novel solutions, and many communities around Chicago have become advocates of community policing.331 Communities have taken a new look at their relationship to the police, and have decided that cooperation may be the key to turning back the tide.332

Yet, old ways die hard, and Morales serves as a bold reminder that any new relationship between the community and police will be questionably adopted. The Court made it clear that police officer’s discretion was to be checked, and the return to the neighborhood must be pursuant to some definite legal basis.333 While plain in its uneasiness, the Court was unfortunately reticent regarding the constitutionality of a new community/police dynamic.334

Continued regret over Morales’ insufficiencies is uncalled for because the Chicago City Council heeded the Court’s advice, and reworked the Ordinance. Now the City of Chicago can only wait to see if this community-policing legislation is novel enough to turn the tide.

Matt Wawrzyn

331. See supra notes 273-276 and accompanying text.
332. See supra notes 273-276 and accompanying text.
333. See supra notes 153-164 and accompanying text.
334. See supra Part IV.