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### Vagueness-Chicago's Anti-Gang Loitering Ordinance

Thomas H. Lee

*Fordham University School of Law*, [thlee@law.fordham.edu](mailto:thlee@law.fordham.edu)

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short-term invitees in the home of a virtual stranger can have no reasonable expectation of privacy therein.

### C. Due Process

*Vagueness — Chicago's Anti-Gang Loitering Ordinance.* — Vagueness doctrine effectuates the norm that a criminal law “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” offends due process.<sup>1</sup> The Court and commentators have recently stressed that indefiniteness as to the standards for police enforcement of a statute, as opposed to the notice it provides to citizens of the conduct proscribed, constitutes “the more important aspect” of the doctrine.<sup>2</sup> In *City of Chicago v. Morales*,<sup>3</sup> the Court followed this trend to its logical conclusion by holding that an anti-gang loitering ordinance enacted by the Chicago City Council was unconstitutionally vague solely because it gave police too much discretion.<sup>4</sup> In so doing, 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 interconnected — not independent — aspects of a single vagueness test.

On June 17, 1992, the Chicago City Council enacted an anti-gang loitering ordinance pursuant to findings memorialized in the ordinance’s preamble.<sup>5</sup> The ordinance, which defined “loitering” as “remain[ing] in any one place with no apparent purpose,”<sup>6</sup> provided that:

[w]henever 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

<sup>1</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925).

<sup>2</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); see also John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 218 (1985) (“[T]he susceptibility of the law in question to arbitrary and discriminatory enforcement . . . is the most persuasive justification for vagueness review generally.”).

<sup>3</sup> 119 S. Ct. 1849 (1999).

<sup>4</sup> See *id.* at 1861–62; *id.* at 1863–64 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 1865–67 (Breyer, J., concurring in part and concurring in the judgment). Only Justices Souter and Ginsburg joined the sections of Justice Stevens’s opinion for the Court holding that the ordinance provided citizens insufficient notice of the conduct proscribed and interfered with a substantive due process right to loiter for innocent purposes. See *id.* at 1857–61 (plurality opinion). Accordingly, the majority affirmed the Illinois Supreme Court’s vagueness holding solely on the basis of the ordinance’s discretionary vagueness.

<sup>5</sup> See CHICAGO, ILL., MUN. CODE § 8-4-015 (1992). These findings, based on the testimony of residents and aldermen of high-crime neighborhoods, indicated that street gangs were largely responsible for a recent rise in violent and drug-related crimes, and that gang members intimidated citizens and established control over territory by loitering without committing crimes punishable under existing laws. See *id.*

<sup>6</sup> *Id.*

such an order is in violation of this section.<sup>7</sup>

As it had promised the City Council in the pre-enactment hearings,<sup>8</sup> the Chicago Police Department promulgated an administrative regulation (General Order 92-4) to govern enforcement of the ordinance.<sup>9</sup> Police began enforcing the ordinance as of the August 1992 effective date of the implementing regulation.<sup>10</sup> During the three years of its enforcement, the ordinance resulted in approximately 89,000 dispersal orders and more than 42,000 arrests.<sup>11</sup>

The ordinance fared poorly in the Illinois courts. Eleven trial judges found the ordinance unconstitutional; only two upheld it.<sup>12</sup> The state appellate court, in the test case of *City of Chicago v. Youkhana*,<sup>13</sup> affirmed the lower court's holding that the ordinance was unconstitutionally vague.<sup>14</sup> In *City of Chicago v. Morales*,<sup>15</sup> the Illinois Supreme Court consolidated all appeals and affirmed on vagueness grounds, holding that the ordinance's broad definition of "loitering" provided insufficient notice to citizens and excessive discretion to police.<sup>16</sup> The court considered General Order 92-4 as a limiting construction but concluded that it failed to cure the potential for arbitrary enforcement.<sup>17</sup> The state court also found that the ordinance interfered with substantive due process rights to travel, associate with others, and move about freely.<sup>18</sup>

The Supreme Court affirmed in an opinion by Justice Stevens.<sup>19</sup> Although the majority agreed with the Illinois courts that the ordinance was impermissibly vague, the Justices' reasoning diverged. Writing for three Justices,<sup>20</sup> Justice Stevens concluded that the ordi-

<sup>7</sup> *Id.* "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." *Id.* § 8-4-015(b). Each violation of the ordinance was punishable by a fine of up to \$500, not more than six months imprisonment, or up to 120 hours of community service. *See id.*

<sup>8</sup> *See Morales*, 119 S. Ct. at 1855 n.3.

<sup>9</sup> *See* Chicago, Ill., Police Dep't Gen. Order No. 92-4 (Aug. 8, 1992).

<sup>10</sup> *See Morales*, 119 S. Ct. at 1855 n.6.

<sup>11</sup> *See id.* at 1855.

<sup>12</sup> *See id.*

<sup>13</sup> 660 N.E.2d 34 (Ill. App. Ct. 1995).

<sup>14</sup> *See id.* at 43. The appellate court also ruled that the ordinance interfered with First Amendment rights of "assembly, association, and expression," *id.* at 38; criminalized a person's status in violation of the Eighth Amendment, *see id.* at 41-42; and offended the Fourth Amendment by authorizing arrests without probable cause, *see id.* at 42.

<sup>15</sup> 687 N.E.2d 53 (Ill. 1997).

<sup>16</sup> *See id.* at 57-65.

<sup>17</sup> *See id.* at 64.

<sup>18</sup> *See id.* at 64-65. The court did not reach the claims that the ordinance was overbroad, criminalized status, and authorized arrests without probable cause. *See id.* at 59, 65.

<sup>19</sup> Justice Stevens's opinion was joined in full by Justices Souter and Ginsburg and joined in part by Justices O'Connor, Kennedy, and Breyer.

<sup>20</sup> Justices Souter and Ginsburg joined this section of Justice Stevens's opinion.

nance did not infringe upon First Amendment rights but that it did implicate a substantive due process liberty interest.<sup>21</sup> He articulated a two-pronged vagueness test: "First, [a criminal law] 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."<sup>22</sup>

Only Justices Souter and Ginsburg agreed with Justice Stevens that the ordinance failed the notice prong of the test.<sup>23</sup> In response to the city's contention that a dispersal order resolved any ambiguity by providing "actual notice" of what citizens were expected to do,<sup>24</sup> Justice Stevens noted that an order given *after* an officer has identified impermissible loitering could not possibly afford *advance* notice as to what loitering was impermissible.<sup>25</sup> He also reasoned that the dispersal order was itself vague because it gave no guidance as to how far and for how long a group of loiterers should disperse.<sup>26</sup>

Five Justices agreed with Justice Stevens that the ordinance was impermissibly vague because it gave too much discretion to the police.<sup>27</sup> Because "loitering" was defined expansively as "remain[ing] in any one place with no apparent purpose,"<sup>28</sup> police officers possessed broad discretion to determine what activities constituted loitering.<sup>29</sup> Nor did the majority, in endorsing the state court's refusal to accept General Order 92-4 as a limiting construction, find that the police regulation corrected this undue breadth of discretion.<sup>30</sup>

Concurring in part and concurring in the judgment, Justice

<sup>21</sup> See *Morales*, 119 S. Ct. at 1857-58 (plurality opinion) ("[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause . . .").

<sup>22</sup> *Id.* at 1859 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The reasoning of the concurring and dissenting Justices indicated that they accepted Justice Stevens's formulation of the controlling test. See, e.g., *id.* at 1875 (Scalia, J., dissenting).

<sup>23</sup> See *id.* at 1859-61 (plurality opinion). Justice Kennedy did not join the plurality on this point, but he dedicated his brief concurrence to discussing his concerns about insufficiency of notice. See *id.* at 1865 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>24</sup> Brief for Petitioner at \*31, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121), available in 1998 WL 328342.

<sup>25</sup> See *Morales*, 119 S. Ct. at 1860 (plurality opinion).

<sup>26</sup> See *id.*

<sup>27</sup> See *Morales*, 119 S. Ct. at 1861-62. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined this section of Justice Stevens's opinion.

<sup>28</sup> CHICAGO, ILL., MUN. CODE § 8-4-015 (1992).

<sup>29</sup> See *Morales*, 119 S. Ct. at 1861-62. Justice Stevens speculated that the requirement that police reasonably believe that a group includes a gang member might have saved the ordinance, had it covered "loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Id.* at 1862.

<sup>30</sup> See *id.* Justice Stevens observed that the order's restriction of enforcement to designated areas could not serve as an affirmative defense for anyone arrested under the ordinance in undesignated areas, and that "a person who knowingly loitered with a well-known gang member anywhere in the city [could not] safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be." *Id.*

O'Connor emphasized that curbing arbitrary enforcement was "the more important aspect of vagueness doctrine."<sup>31</sup> Like Justice Stevens, she found the "no apparent purpose" standard unpalatably subjective.<sup>32</sup> The Illinois court, Justice O'Connor continued, could have construed "loitering" to mean "remain[ing] 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."<sup>33</sup> But the Court could not itself impose a definition of loitering that would comport with the City's findings and due process.<sup>34</sup>

Justice Breyer, like Justices O'Connor and Kennedy, concurred with respect to the discretion aspect of the vagueness test and concurred in the judgment.<sup>35</sup> He explained that "the ordinance [was] unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoy[ed] too much discretion in *every* case."<sup>36</sup> Even defendants who had sufficient notice of what was prohibited, he reasoned, had suffered from undue police discretion; thus, every defendant had standing to mount a facial attack on the ordinance.<sup>37</sup>

In dissent, Justice Scalia interpreted *United States v. Salerno*<sup>38</sup> as requiring that a successful facial vagueness challenge establish that a law is "unconstitutional in every conceivable application" — a burden that the plaintiffs had failed to carry.<sup>39</sup> He contended that the plurality had manufactured an exception to the *Salerno* rule for cases in which a vague criminal law contained no *mens rea* requirement and implicated constitutional rights.<sup>40</sup> Putting aside his skepticism about the existence of such an exception, Justice Scalia insisted that there was no "constitutionally protected right to loiter"<sup>41</sup> and that the "willful failure to obey a police order [was] wrongful intent enough."<sup>42</sup>

Justice Scalia then concluded that the ordinance survived both as-

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<sup>31</sup> *Id.* at 1863 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Justice Breyer joined Justice O'Connor's opinion.

<sup>32</sup> *See id.*

<sup>33</sup> *Id.* at 1864–65.

<sup>34</sup> *See id.* at 1865.

<sup>35</sup> *See id.* at 1865–67 (Breyer, J., concurring in part and concurring in the judgment).

<sup>36</sup> *Id.* at 1866.

<sup>37</sup> *See id.* Justice Breyer thus distinguished the present facial attack from a First Amendment overbreadth challenge in which a defendant whose conduct is not constitutionally protected may nonetheless invalidate a law that chills the protected conduct of others. *See id.*

<sup>38</sup> 481 U.S. 739 (1987).

<sup>39</sup> *Morales*, 119 S. Ct. at 1871 (Scalia, J., dissenting). The plurality rejoined that the viability of the *Salerno* rule was "doubtful," and that, in any case, it was a third-party standing rule that did not apply to review of a state court decision. *See id.* at 1858–59 n.22 (plurality opinion).

<sup>40</sup> *See id.* at 1872 (Scalia, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1875.

pects of the Court's vagueness test.<sup>43</sup> Police discretion in the issuance of a dispersal order was sufficiently limited by the requirement of reasonable belief and by the order's narrow applicability to the objectively discernible and constitutionally unprotected act of "remaining" in a place "with no apparent purpose."<sup>44</sup> He dismissed the Illinois Supreme Court's pronouncement that the ordinance vested "absolute discretion" in the police as a "legal conclusion," not a binding construction of the ordinance's text.<sup>45</sup> Justice Scalia punctuated his dissent by pointing out the logical inconsistency of Justice Breyer's position (implicitly shared by Justices O'Connor and Kennedy) that the ordinance was clear enough to provide sufficient notice to citizens of what conduct was prohibited, but not clear enough to provide the enforcement agency with sufficient notice of the same conduct.<sup>46</sup>

Justice Thomas also dissented.<sup>47</sup> Noting the documented danger posed by street gangs, he posited that the "ordinance does nothing more than confirm the well-established principle that the police have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it."<sup>48</sup> The rich history of vagrancy and loitering laws in America, Justice Thomas argued, disproved the plurality's claim of a substantive due process right to "loiter for innocent purposes."<sup>49</sup> With respect to vagueness, surely, he reasoned, the discretion granted was no more than what had long been permitted.<sup>50</sup> Protestations of inadequate notice, too, were unconvincing, as "[t]here is nothing 'vague' about an order to disperse."<sup>51</sup>

Troubled by the subjectivity of the "no apparent purpose" standard, the *Morales* Court inadvertently<sup>52</sup> elevated the discretion prong of the vagueness inquiry to the unprecedented status of an independently dispositive test.<sup>53</sup> Although excessive discretion alone may indeed jus-

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<sup>43</sup> See *id.*

<sup>44</sup> *Id.* at 1876-77.

<sup>45</sup> *Id.* at 1876.

<sup>46</sup> See *id.* at 1878.

<sup>47</sup> See *id.* at 1879-87 (Thomas, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's dissent.

<sup>48</sup> *Id.* at 1881.

<sup>49</sup> *Id.* at 1883.

<sup>50</sup> See *id.* at 1884-85.

<sup>51</sup> *Id.* at 1886. Like Justice Scalia, Justice Thomas opined that the Court was bound only by the state court's construction of a statute's language, not by "mere[] characteriz[ation] [of] its practical effect." *Id.* at 1887 n.11.

<sup>52</sup> The holdings of six Justices — the plurality and the dissenters — are consistent with the proposition that notice and discretion moved as one in vagueness doctrine, but because the concurring Justices agreed with the plurality only as to discretionary vagueness, the unintended result was an invalidation based on discretion alone.

<sup>53</sup> Justice Stevens's statement that notice and discretion are "independent" grounds for a vagueness holding, see *id.* at 1859 (plurality opinion), was certainly a reasonable reading of the Court's opinion in *Kolender v. Lawson*, 461 U.S. 352 (1983), but it was not the actual holding in

tify the invalidation of a penal statute that presumably neither prohibits constitutionally protected activity nor affords inadequate notice, the Court should have more carefully considered its prior jurisprudence and the logic and consequences of an exclusively discretion-based vagueness holding. Had the Court done so, it would have realized that a discretion-only invalidation should be a rare result — perhaps inappropriate in the present case in light of an administrative regulation that significantly narrowed police discretion.

An exclusively discretion-based vagueness holding can be reconciled with the Court's precedents. This may be done by recognizing, first, that due notice is calibrated to the constitutional protection that a prohibited activity enjoys.<sup>54</sup> Accordingly, the issue of discretion becomes the "more important aspect" of vagueness doctrine in cases in which there is no clearly implicated constitutional right. For example, in *Kolender v. Lawson*,<sup>55</sup> the Court found that a California ordinance requiring loiterers to provide "credible and reliable identification" to requesting police officers was impermissibly vague.<sup>56</sup> Although the Court mentioned "concern" for First Amendment rights and the "implicat[ion of] the constitutional right to freedom of movement"<sup>57</sup> and stated that "actual notice" was a consideration,<sup>58</sup> the Court's express conclusion was that the statute was "unconstitutionally vague on its face because it encourage[d] arbitrary enforcement."<sup>59</sup> The result in *Morales* extends *Kolender's* reasoning to a case in which a majority of Justices did not find a constitutional right to be implicated at all.

The Court, however, has stated that a "law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague [if it] is impermissibly vague in all of its applications."<sup>60</sup> Not-

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that case, *see id.* at 357–62 (noting the greater significance of arbitrary enforcement but generally affirming the lower court's vagueness holding on both notice and discretion grounds). Because Justice Stevens found that the ordinance failed both the notice and discretion prongs in this case, however, it remains unclear whether he meant either prong to be independently dispositive.

<sup>54</sup> *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614, 616 (1971) (holding an anti-loitering ordinance unconstitutionally vague primarily because it "subject[ed] the exercise of the right of assembly to an unascertainable standard," and secondarily because it "contain[ed] an obvious invitation to discriminatory enforcement").

<sup>55</sup> 461 U.S. 352 (1983).

<sup>56</sup> *Id.* at 353–54.

<sup>57</sup> *Id.* at 358.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 361.

<sup>60</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

withstanding spirited dissensus within the Court about the requirements for a facial challenge,<sup>61</sup> this doctrinal formulation is consistent with the result in *Morales* if, as Justice Breyer sensibly articulated, "the ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case."<sup>62</sup> The problem with this position, as Justice Scalia noted,<sup>63</sup> is the apparent inconsistency of holding that a law may be simultaneously too vague to enforce meaningful constraints on a police officer's discretion yet clear enough to place a citizen on notice of the conduct proscribed.

This inconsistency may be mitigated by a recognition that even when constitutional rights are not implicated and the requirement of notice is correspondingly relaxed, discretionary vagueness alone may still violate due process in a more general sense to the extent that it subjects citizens to a pervasive police state.<sup>64</sup> Just as *Coates v. City of Cincinnati*<sup>65</sup> represented the paradigmatic notice-cum-discretionary-vagueness holding in which a vague ordinance unambiguously implicated constitutional rights,<sup>66</sup> *Papachristou v. City of Jacksonville*<sup>67</sup> exemplified the quintessential discretionary-vagueness holding in which an invalidated ordinance appeared to have provided clear notice and to have prohibited constitutionally unprotected conduct. Although the *Papachristou* Court justified its holding in terms of notice and discretion, the language of the opinion and the clarity of the ordinance's enumeration of the conduct proscribed<sup>68</sup> indicated that the result was compelled neither by insufficient notice nor by encroachment on constitutional liberties,<sup>69</sup> but by "the effect of the unfettered discretion [the

<sup>61</sup> Compare *Morales*, 119 S. Ct. at 1858 n.22 (plurality opinion), with *id.* at 1867-72 (Scalia, J., dissenting). See also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236-38 (1994) (describing intra-Court division concerning the applicability of the *Salerno* "no set of circumstances" test to facial challenges).

<sup>62</sup> *Morales*, 119 S. Ct. at 1866 (Breyer, J., concurring in part and concurring in the judgment).

<sup>63</sup> See *id.* at 1878 (Scalia, J., dissenting).

<sup>64</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972) (noting that "unfettered discretion" in the administration of open-ended vagrancy laws, "though long common in Russia, [is] not compatible with our constitutional system").

<sup>65</sup> 402 U.S. 611 (1971).

<sup>66</sup> By making it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by," the challenged ordinance implicated the First Amendment right of assembly. *Id.* at 611.

<sup>67</sup> 405 U.S. 156 (1972).

<sup>68</sup> The ordinance targeted, among others, "persons who use juggling or unlawful games or plays, common drunkards, common night walkers, . . . persons wandering or strolling around from place to place without any lawful purpose or object, . . . [and] persons able to work but habitually living upon the earnings of their wives or minor children." *Id.* at 156 n.1.

<sup>69</sup> See *id.* at 164 (noting that the prohibited activities "are not mentioned in the Constitution or in the Bill of Rights").



ordinance] place[d] in the hands of the Jacksonville police.”<sup>70</sup>

The threshold showing for this type of unconstitutional discretion, however, should be high. “[I]n every case” must mean, as Justice Stevens’s Sammy Sosa example assumes,<sup>71</sup> that the threat of arbitrary or discriminatory enforcement of Chicago’s anti-gang loitering ordinance may come to be experienced by every citizen under circumstances in which no rational basis for enforcement exists.<sup>72</sup> In other words, the discretion at issue must be both qualitatively subjective in the sense of the “no apparent purpose” standard and quantitatively excessive insofar as it may be exercised by police officers throughout the city.<sup>73</sup> Such is the nature of an arbitrary police state. Because General Order 92-4 narrowed the quantitative and qualitative dimensions of police discretion by limiting enforcement of the anti-gang loitering ordinance to emergency areas where gang crime posed a documented problem and to officers specially qualified to deal with street gangs,<sup>74</sup> the Court should have more closely examined the regulation as a potential corrective to discretionary vagueness.

The Court has established that “[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.”<sup>75</sup> In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,<sup>76</sup> the Court upheld the validity of a drug paraphernalia ordinance by relying

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<sup>70</sup> *Id.* at 168.

<sup>71</sup> See *Morales*, 119 S. Ct. at 1861 (assuming that the police could apply the ordinance to Chicago Cubs fans hoping to glimpse slugger Sammy Sosa exiting Wrigley Field).

<sup>72</sup> The Jacksonville ordinance, for example, cast a discretionary “net” large enough to allow police to arrest two interracial couples driving to a night club, two black men waiting for a ride to work, two men backing out of a residential driveway, a man driving home early in the morning, and another walking out of a hotel. See *Papachristou*, 405 U.S. at 159–60, 165.

<sup>73</sup> Police discretion may be excessive in a quantitative or a qualitative sense. If  $X$  police officers each possesses  $Y$  units of discretion, discretion is quantitatively excessive when the product of  $X$  and  $Y$  exceeds an acceptable level. Qualitatively excessive discretion, by contrast, implies that the discretion exercised by an individual officer is impermissibly high, without regard either to the number  $X$  of police officers who each exercises  $Y$  units of discretion or to the product of  $X$  and  $Y$ . Unconstitutional discretionary vagueness in the absence of a constitutional right should logically require a high level of both qualitative and quantitative discretion; when an unclear law criminalizes constitutionally protected activity, however, the threat of arbitrary enforcement posed by a lesser quantum of qualitatively excessive discretion may offend due process.

<sup>74</sup> See Chicago, Ill., Police Dep’t Gen. Order No. 92-4 (Aug. 8, 1992).

<sup>75</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)) (emphasis added); see *id.* at 504 (“The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance . . . [S]uch administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope.”); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (“Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis.”).

<sup>76</sup> 455 U.S. 489 (1982).

on police guidelines that narrowed its enforceability.<sup>77</sup> Even in *Kolender v. Lawson*,<sup>78</sup> which Justice O'Connor cited for the proposition that the Court "must take the statute as though it read precisely as the highest court of the State has interpreted it,"<sup>79</sup> the Court acknowledged the need to consider executive agency constructions.<sup>80</sup>

What prevented the Court from considering the regulation was the Illinois Supreme Court's rejection of the general order as a limiting construction.<sup>81</sup> If the state court had declined this construction as a matter of state law, the Court's deference would have been justified.<sup>82</sup> However, not only did the Illinois court reject the general order as a matter of federal vagueness doctrine,<sup>83</sup> it also misinterpreted the Court's precedents as requiring that any redemptive checks on enforcement discretion be imposed by the legislature.<sup>84</sup> Nothing in the Court's vagueness case law indicates that checks on discretion must be provided by the legislature and not by the agency charged with enforcement. In fact, such a holding contradicts the Court's unwillingness to impose a separation-of-powers scheme upon the states<sup>85</sup> and its treatment of agency discretion to enforce federal criminal laws.<sup>86</sup>

Had the Court in fact reviewed independently the question whether General Order 92-4 reduced police discretion to a constitutionally permissible level, the Court would have found that the regulation narrowed the aspects of the ordinance that encouraged "arbitrary or discriminatory enforcement."<sup>87</sup> First, the regulation circumscribed police discretion in the identification of loitering gang members by requiring

<sup>77</sup> See *id.* at 500-04.

<sup>78</sup> 461 U.S. 352 (1983).

<sup>79</sup> *Morales*, 119 S. Ct. at 1865 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Kolender*, 461 U.S. at 355-56 n.4) (internal quotation marks omitted).

<sup>80</sup> See *Kolender*, 461 U.S. at 355 (citing *Hoffman Estates*, 455 U.S. at 494 n.5).

<sup>81</sup> See *Morales*, 119 S. Ct. at 1861 ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."). It is also possible that the Court was too concerned with excessive qualitative discretion to have considered the possibility that the general order's predominantly quantitative restrictions would cure the undue discretionary vagueness.

<sup>82</sup> See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

<sup>83</sup> As support for its vagueness holding, the court cited U.S. Supreme Court precedents and one state court case, *People v. Haywood*, 515 N.E.2d 45 (1987), which, in turn, relied primarily on federal precedents, see *id.* at 48. See *City of Chicago v. Morales*, 687 N.E.2d 53, 63-64 (Ill. 1997).

<sup>84</sup> See *Morales*, 119 S. Ct. at 1865 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor wrote:

To the extent it relied on our precedents . . . as requiring it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. This Court has never held that the intent of the drafters determines whether a law is vague.

*Id.* (citations omitted).

<sup>85</sup> See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937).

<sup>86</sup> See *Touby v. United States*, 500 U.S. 160, 167-69 (1991).

<sup>87</sup> *Morales*, 687 N.E.2d at 63.

probable cause that a loiterer was a gang member,<sup>88</sup> rather than the reasonable belief prescribed by the ordinance.

Second, the general order diminished enforcement discretion with respect to which activities counted as loitering. Police officers could not issue a dispersal order, even if they saw loitering, unless they were specially trained and operating in areas designated by district commanders based on documented proof of gang-related activity.<sup>89</sup> Thus, what might count as loitering if observed by a Gang Crimes Section detective in a designated area would not be loitering within the meaning of the ordinance if observed by a traffic cop in that same area, or by that same detective in an undesignated area. Moreover, the trigger for the issuance of a dispersal order was the observation of loitering by someone who police had probable cause to believe was a gang member.<sup>90</sup> A police officer could therefore not issue a dispersal order to a group of loiterers absent probable cause that one was a gang member.<sup>91</sup>

Finally, the regulation imposed a *qualitative* constraint on arbitrary enforcement insofar as the specially designated officers entrusted with enforcement discretion were particularly knowledgeable and experienced in the task of identifying gang loitering for the purposes described in the ordinance's findings.<sup>92</sup> The reasonable conclusion is that notwithstanding the breadth of the "no apparent purpose" standard, these officers would be more likely to exercise their discretion in a nonarbitrary manner. And because a constitutional right was not burdened and notice to citizens was already sufficient, the nonpublic means by which the regulation effected a diminution in the probability of arbitrary enforcement should not have mattered.

The Court's narrow holding will probably be short-lived; the effects of a lost opportunity to rationalize the confusing evolution of the Court's vagueness jurisprudence will undoubtedly prove more lasting. The Chicago City Council could take its cue from the Court's opinions and draft a permissible ordinance by changing the words "no apparent purpose" to "apparently harmful purpose"<sup>93</sup> or to "no apparent purpose other than to establish control over identifiable areas, to intimidate

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<sup>88</sup> See Chicago, Ill., Police Dep't Gen. Order No. 92-4 (Aug. 8, 1992).

<sup>89</sup> See *id.* Justice Stevens limited his brief analysis of the general order's checks on discretion solely to the provision for enforcement in designated areas. See *Morales*, 119 S. Ct. at 1862.

<sup>90</sup> See *Morales*, 119 S. Ct. at 1885 (Thomas, J., dissenting).

<sup>91</sup> Accordingly, the absence of a gang member constitutes an affirmative defense to a violation of the ordinance. See CHICAGO, ILL., MUN. CODE § 8-4-015(b) (1992).

<sup>92</sup> See Chicago, Ill., Police Dep't Gen. Order No. 92-4 (Aug. 8, 1992). In addition to having received specialized training, these officers were responsible for compiling gang crime reports and maintaining databases of gang-related information. See *id.*

<sup>93</sup> *Morales*, 119 S. Ct. at 1862.

others from entering those areas, or to conceal illegal activities."<sup>94</sup> But courts seeking guidance on the roles and interplay of notice, discretion, and constitutional rights in vagueness doctrine will find no similar succor. Regardless whether the Court would have decided that the police guidelines cured the ordinance's fatal vagueness had it considered the regulation more carefully, the Court should have analyzed the precedential support for, and the logical consequences of, an invalidation due to discretionary vagueness alone. Had the Court done so, it might have identified a coherent internal logic to the doctrine that could explain the past and guide the future.

#### D. Freedom of Speech

*Political Speech — Restrictions on Ballot-Initiative Petitions.* — The Supreme Court has repeatedly noted that ballot and election regulations raise difficult questions about the interplay between the First Amendment's heightened protection for political speech, and states' need to regulate ballots and elections to ensure fair and orderly democracy.<sup>1</sup> When making the delicate judgments between protecting political speech and allowing states to regulate elections, the Court has traditionally stated precisely which test it was employing to evaluate individual restrictions.<sup>2</sup> Last Term, in *Buckley v. American Constitutional Law Foundation*,<sup>3</sup> the Court invalidated several of Colorado's restrictions on the signature-gathering process for ballot initiative petitions. In so doing, the Court failed to identify which level of scrutiny it was applying for each of the restrictions in question and relied instead on certain unreviewed restrictions to render unconstitutional the specific regulations before it. The lack of clarity in the resulting opinion will make it difficult for lawmakers, lower courts, and the Court to create and evaluate election regulations.

In 1993, the American Constitutional Law Foundation (ACLF) brought suit in the United States District Court for the District of Colorado to challenge Colorado's ballot initiative regulations.<sup>4</sup> The

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<sup>94</sup> *Id.* at 1864-65 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>1</sup> See, e.g., *Storer v. Brown*, 415 U.S. 724, 729-30 (1974) ("[There is] no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree' . . ." (citing *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972))); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting that a decision about the constitutionality of an election regulation involves careful consideration of "the fact and circumstances behind the law").

<sup>2</sup> See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

<sup>3</sup> 119 S. Ct. 636 (1999).

<sup>4</sup> See *id.* at 641; *American Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995 (D.