Gang Loitering, the Court, and Some Realism About Police Patrol

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When the Supreme Court voted to review the decision of the Illinois Supreme Court holding Chicago’s “gang loitering” ordinance invalid on federal constitutional grounds, it seemed plausible that *City of Chicago v Morales* would be the occasion for a major statement from the Court on a set of complex issues—issues including not only the nature of the police officer’s authority to maintain order in public places, but also the relative roles of politics and judicial decision making in delineating both the limits on this authority and the latitude left to police to employ discretion in its exercise. After all, communities today are experimenting with a broad variety of new policing styles. Some of these experiments have emphasized the importance of a neighborhood’s public spaces to the health of its community and have involved police in efforts to improve the “quality of life” in such spaces. Police have seen to the removal of trash and abandoned cars along streets where children play. There has been a revival of interest in the enforcement of statutes and ordinances aimed at low-level public disorder. In some places, this local experimentation has produced a new con-

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1 119 S Ct 1849 (1999).

idence among community residents in the ability of police to contribute to the well-being of the neighborhoods they serve. Elsewhere, however, police initiatives directed at crime and disorder have generated concern, anxiety, and outright anger about police intrusiveness, particularly as directed at minority populations.

In Morales, a coalition that ultimately included prominent scholars, community activists, and the Solicitor General (not to mention various city attorneys, state attorneys general, and law enforcement groups) attacked the decision of the Illinois Supreme Court for being badly out of touch both with the legitimate aspiration of inner city residents to reclaim control over their neighborhoods and with the capacity of these residents, freed from the ineffective attempts of courts to restrain unreasonable police actions, themselves to impose meaningful political controls over the conduct of police. Others, meanwhile, fiercely contended that the Chicago ordinance was a frank invitation to arbitrary and discriminatory police enforcement; they called upon the Supreme Court to resist the siren song of “community” and “neighborhood empowerment” and to hold the line against a serious threatened erosion in constitutional liberties. Morales, then, seemed to advocates on

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1 This argument was presented most powerfully in several articles by Tracey Meares and Dan Kahan, as well as in an amicus brief before the Supreme Court that they helped to draft. See, e.g., Dan M. Kahan and Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 Geo L J 1153, 1171–80 (1998); Tracey L. Meares and Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales, 1998 U Chi Legal F 197, 209–14; Chicago v. Morales, No 97-1121, Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner, at 1–5. The United States and approximately thirty-one states, as well as various community groups, governmental associations, and law enforcement organizations, also submitted briefs arguing that the Chicago ordinance represented a constitutionally appropriate response to the plague of gang violence besetting some Chicago neighborhoods. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner, at 8–11 (“Brief for the United States Supporting Petitioner”); Brief Amicus Curiae of Ohio, et al, in Support of the Petitioner, at 1–6; Brief of the Center for the Community Interest as Amicus Curiae in Support of Petitioner, at 7–27; Brief of the U.S. Conference of Mayors, et al, as Amici Curiae in Support of Petitioner, at 2–7; Brief of Amici Curiae Natl Dist Attorneys Association and Intl Association of Chiefs of Police in Support of Petitioner, at 2–5.

both sides the proper occasion for a significant Supreme Court pronouncement—a pronouncement either reaffirming and clarifying the application of existing constitutional doctrines to the host of loitering ordinances, curfews, and other “order maintenance” laws recently adopted in many local communities or, instead, setting the nation’s courts on a new course with regard to the review of such laws.

Viewed from this perspective, Morales must be deemed disappointing to everyone. In Justice Stevens’s lead opinion, which was joined in full by only two Justices and in part by three others, six Justices agreed, narrowly, that Chicago’s gang loitering ordinance was impermissibly vague in its authorization to police to disperse gang members and those accompanying them whenever these people were found “loitering” (defined in the ordinance to mean “remain[ing] in any one place with no apparent purpose”) in public spaces.5 Despite arguments by supporters of the ordinance that such a holding would do little to realize the principal ambition the Court has articulated for its vagueness doctrine—namely, setting meaningful limits on the opportunity for arbitrary and discriminatory law enforcement—the Court failed to clarify the rationale for this doctrine or to explain how its application to the Chicago ordinance would promote the wise use of discretion by Chicago police.6 At the same time, the Court’s parsimonious holding did not offer opponents of the ordinance anything like a robust defense of vagueness doctrine nor of its application to public order laws.

It may be too hasty, though, simply to dismiss Morales as yet another case in which the Court has evaded—or at least failed to come to grips with—important issues concerning the relationship between local police and their communities. After all, the issue in the background of Morales—namely, the proper role for police patrol in a community—is extraordinarily complex, implicating, as it does, not only the law enforcement role of police, but also the role of police officers as peacekeepers and providers of a multitude of community services. Should patrol officers seek to deter crime and ameliorate disorder largely through their visible, uniformed

5 Morales, 119 S Ct at 1861–62.
6 For a statement by the Court that the facial vagueness doctrine is animated principally by a concern with limiting the potential for arbitrary enforcement, see Kolender v Lawson, 461 US 352, 357–58 (1983).
presence in public places, or should they adopt a more proactive posture? If they should be more proactive, what should they do? Enforce laws? Mediate conflicts? Serve as ombudsmen to address a broad variety of problems in the provision of governmental services? And if we are to authorize a significant category of coercive encounters between patrol officers and people found in public places, how do we guard against the abuse of this authority? How do we ensure that the grant of authority to police to serve as a useful support for the common use of public spaces does not become, instead, an instrument for the surveillance and harassment of disfavored individuals or groups? Even the Warren Court, which spoke with significant resolve in articulating the procedures to be followed in the investigation of serious crime, was remarkably tentative in Terry v Ohio, the principal case in which that Court confronted everyday aspects of police patrol: "[W]e approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street."  

It is increasingly apparent, moreover, that answers to the many questions posed today about the appropriate role of police in communities—questions not only about the proper scope of police patrol authority, but also about the best means for assuring police accountability—are likely to emanate not from national judicial pronouncements, but from the accumulated wisdom deriving from local experimentation. And in this regard, the Morales opinions as a whole are perhaps greater than the sum of their parts. These opinions, read together, do not foreclose, but in an important way expand the opportunity for further experimentation with laws regulating public disorder—even as the Court retains for itself a good deal of room to step in and limit this experimentation, if necessary, at some future point. In this sense, Morales is quite different from Papachristou v City of Jacksonville—that most dramatic of the facial vagueness cases that collectively remade the law applicable to public order in the 1960s and 1970s—even though in both cases the

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7 392 US 1 (1968).
8 Id at 12.
9 405 US 156 (1972).
Court invalidated a public order law.\textsuperscript{10} The unanimous Court in \textit{Papachristou} self-confidently, even eagerly, pronounced Jacksonville, Florida’s vagrancy ordinance an archaic law that threatened both fundamental rule-of-law values and central tenets of the American constitutional system.\textsuperscript{11} In contrast, the Court in \textit{Morales} groped anxiously for narrow grounds. Even the Justices in the majority felt constrained to empathize with the efforts of Chicago communities to deal with the serious gang problems afflicting them, to “characterize . . . clearly the narrow scope” of the Court’s holding, and most importantly, to suggest alternative means by which Chicago might constitutionally regulate the loitering of gang members.\textsuperscript{12}

Still, even acknowledging a special need for judicial humility in this fluid area, the \textit{Morales} Court could at least have begun to define a framework within which future experimentation with new forms of police patrol might be assessed. The Court made precious little progress on this more modest front. Indeed, there is a strong case to be made that the majority in \textit{Morales} did more harm than good to the project of placing reasonable constraints on police. The Court invalidated Chicago’s ordinance on the ground that the ordinance granted too much discretion to police, thus creating an undue risk that it would be arbitrarily employed;\textsuperscript{13} the Court’s de-

\textsuperscript{10} For a description of the application of facial vagueness doctrine to a broad variety of “street order” laws in the 1960s and 1970s, see Livingston, 97 Colum L Rev at 595–601 (cited in note 2).

\textsuperscript{11} \textit{Papachristou}, 405 US at 161–62, 168–71. The text of the Jacksonville ordinance provided in relevant part as follows:

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 as provided for Class D offenses.

\textsuperscript{12} See, e.g., \textit{Morales}, 119 S Ct at 1863 (opinion of Stevens, joined by Souter and Ginsburg); id at 1864–65 (O’Connor concurring in part and concurring in the judgment, joined by Breyer).

\textsuperscript{13} See \textit{Morales}, 119 S Ct at 1861–63.
cision, however, may well point localities in the direction of expanding the scope of police discretion in subsequent legislation. Similarly, the facial vagueness doctrine that was the basis for the decision addresses the concern that imprecise laws delegate basic policy matters to police officers on patrol, thus promoting ad hoc and capricious police enforcement. But Morales does not encourage localities and their police departments frankly to acknowledge police discretion and to develop means of using it in an accountable way for the positive good of communities. Instead, the decision is more likely to drive discretion underground and to suppress the open discussion of considerations regarding its appropriate exercise.

The result in Morales was arrived at through the highly technical parsing of nine words in Chicago's gang loitering ordinance. The majority opinion resulting from this exercise is not only unconvincing on its own terms; it is also disturbingly detached from serious consideration of both the nature of police patrol discretion and the efficacy of the Court's attempts to influence its character. Because no law can be entirely precise and because there is "no yardstick of impermissible indeterminacy" to be used in the review of challenged legislation, vagueess doctrine as employed by the Morales majority confers on courts considerable discretion to second-guess the efforts of localities to regulate public conduct in an effort to enhance the common use of public spaces. At the same time, however, the majority's methodology—its narrow focus on the language of Chicago's gang loitering ordinance—deprives judges employing the doctrine of any real ability to promote the positive use of police discretion for a community's good. Thus, the Morales majority may foster an illusion of judicial competence in this arena. But the realities of street-level policing remain unchanged and may even have been influenced for the worse.

This article offers an analysis of the Court's situation and a modest proposal for reform. I argue that the Court will make little

15 The majority in Morales concluded after parsing its language that the Chicago ordinance's loitering definition (which defined loitering to mean "remain[ing] in any one place with no apparent purpose") was impermissibly vague. See Morales, 119 S Ct at 1861–62.
progress on the project of constraining arbitrary police enforcement of newly enacted public order laws until it imports some realism into its doctrinal framework. Realism about police patrol discretion, moreover, points in the direction of a vagueness test that is not focused exclusively on the words of this new generation of public order laws. Rather, the Court should consider more broadly whether the exercise of police discretion contemplated in new legislation will take place under conditions that provide reasonable assurances of police accountability.

Part I briefly describes both the context in which the Morales ordinance was enacted and the Morales opinions themselves. Part II then delves into the confusion in the Court’s vagueness analysis. This part argues that the Morales Court’s approach to vagueness does not meaningfully constrain the opportunity for arbitrary police action because it has no application to many contexts in which this opportunity is present—in the enforcement of traffic laws, for instance, or in the area of stop and frisk. Moreover, the Morales majority’s narrow focus on the language of Chicago’s gang loitering ordinance may encourage legislators searching for precise terms to broaden the enforcement authorization given to police and thus to augment, rather than narrow, the scope of police discretion. The majority thus focused on factors of little importance to the restraint of police arbitrariness. It also ignored aspects of the Chicago law that might actually have promoted the judicious use of discretion by Chicago police. Indeed, the majority’s disregard of significant innovations in the Chicago ordinance is likely to retard efforts at promoting police accountability. Part III concludes with a sketch of a more realistic vagueness jurisprudence in the area of public order policing.

I. The Case and Its Context

A. The Chicago Ordinance

Chicago’s gang loitering ordinance was enacted in 1992, during a period when the number of Chicago homicides deemed to be gang related by the Chicago Police Department was in the midst of a fivefold increase—from approximately fifty-one such homicides in 1987 to around 132 in 1991, and then to a high of about
240 in 1994 (a number representing 26.2 percent of all Chicago homicides for that year).\(^{17}\) Street gang homicide tends to increase and decrease in spurts, but the huge spurt in the early 1990s broke all previous records in Chicago and dramatically increased the risk of being killed in a street gang-related homicide for, in particular, African-American males and Latinos aged fifteen to nineteen years.\(^{18}\) Of course, because Chicago gangs tend to concentrate in particular geographical areas, neither this risk nor any of the other risks associated with gang activity fell uniformly across Chicago’s neighborhoods. Indeed, one prominent study of Chicago gangs found that for the three-year period from 1987 to 1990, the rate of street-gang motivated crime in the two most dangerous parts of Chicago was seventy-six times that of the two safest areas.\(^{19}\) Moreover, even in high-crime neighborhoods (some of which echoed with gunfire almost nightly during this period), gang-related crime “[was] not monolithic, but rather diverse, affecting different neighborhoods in different ways.”\(^{20}\) In those neighborhoods where competition among rival street gangs for constricted turf was intense, for example, buildings of all sorts were often covered with multiple layers of graffiti; neighborhoods in other parts of Chicago, however, were remarkably free of graffiti even though inundated with gang members simply because a given gang “was so much in command that [it] did not need many physical markers to identify [its] turf.”\(^{21}\) The potentially most lethal street gang situations in Chicago at this time involved turf-related violence—violence that researchers found to be primarily “expressive” (meaning that it was undertaken principally for purposes like defense and glorification of the gang) rather than “instrumental” (motivated primarily by the desire to acquire money or property from, for

\(^{17}\) See Carolyn Rebecca Block, et al., Research Bulletin: Street Gangs and Crime 4 (Ill Criminal Justice Information Authority, Sept 1996) (“Street Gangs and Crime”). The Chicago Police Department designates an offense as street gang related when a preponderance of the evidence indicates “that the offense grew out of an street gang function.” Id at 2. The gang membership of a perpetrator or victim is not alone enough to establish gang relatedness. Id.

\(^{18}\) See id at 5, 8. See also Carolyn Rebecca Block and Richard Block, Street Gang Crime in Chicago 4 (Natl Institute of Justice, Dec 1993) (“Street Gang Crime in Chicago”).

\(^{19}\) See Street Gang Crime in Chicago at 1 (cited in note 18).

\(^{20}\) Street Gangs and Crime at 23 (cited in note 17).

\(^{21}\) Street Gang Crime in Chicago at 4 (cited in note 18).
instance, the possession or sale of drugs).22 The Chicago Police Department estimated in 1992 that more than forty major street gangs were active in Chicago.23 The most violent gangs tended to be those smaller gangs that controlled only a few fiercely defended blocks.24

The effort to enact a gang loitering law in Chicago can be traced to 1991, when a number of Chicago neighborhood groups concerned about the rising violence associated with street gangs began negotiating with city officials to develop anti-gang legislation.25 These negotiations led to hearings before the Chicago City Council in the spring of 1992 during which testimony was elicited concerning a proposal for enactment of an ordinance regulating loitering by gang members in public places. Many concerned citizens testified poignantly about the disruption that the latest wave of gang violence had worked in their lives. A mother of four, for instance, attested that in her neighborhood, children no longer played hopscotch or jacks in the street: "I wish you could see the rust that has accumulated because they cannot ride [their] bikes."26 Eighty-eight-year-old Susan Mary Jackson spoke forcefully of the fear she experienced in public spaces: "We used to have a nice neighborhood. We don't have it anymore. . . . I am scared to go out in the daytime . . . . you can't pass because they are standing. I am afraid to go to the store."27 City Council members, however, also heard warnings that loitering ordinances were both unconstitutional and prone to abuse: "[V]ague laws . . . based on the concept of loitering . . . have historically been subject to massive abuse by law enforcement, both in this city and other cities."28 They heard from a representative of the police department who affirmed

22 See id at 8. See also Street Gangs and Crime at 20 (cited in note 17).
26 Transcription of Proceedings before the Committee on Police and Fire of the Chicago City Council 168–69 (May 18, 1992) (statement of Desiree Davidson) ("May 18 Transcript").
27 Morales, 119 S Ct at 1880 (Thomas dissenting, joined by Rehnquist and Scalia) (quoting Transcription of Proceedings before the Committee on Police and Fire of the Chicago City Council 93–95 (May 15, 1992)).
28 May 18 Transcript at 99 (statement of Harvey Grossman, Legal Director of the American Civil Liberties Union of Illinois) (cited in note 26).
that a loitering ordinance would be a viable tool for use in dealing with gang problems, but who also cautioned that no ordinance, standing alone, could substitute for a more comprehensive approach to these problems.29

The proposed ordinance "drew both support and opposition from Chicago citizens of all backgrounds."30 The City Council debate on the ordinance reflected this division and was described by the Chicago Tribune as "one of the most heated and emotional council debates in recent memory."31 Much of the debate centered on the concern that the proposed ordinance would have a disparate impact on racial minorities—a concern that was most passionately expressed by several of the eight African-American aldermen who ultimately voted against the new law.32 These alderman charged that the ordinance was "'drafted to protect the downtown area and the white community' at the expense of innocent blacks."33 At the same time, however, the ordinance received critical support from aldermen representing over a dozen high-crime, predominantly African-American and Latino wards.34 Alderman Ed Smith, an African American representing a heavily minority district with severe crime problems, was particularly outspoken in his support: "This doesn't allow the police to go hog wild. But we're tired of seeing the rights of gangbangers get protected when . . . a mother can't send her children outside for fear of them getting shot to death in a drive-by shooting."35 On June 18, 1992, the City Council enacted the proposed ordinance by a wide margin of thirty-one

29 Id at 175, 185–86 (statement of Gerald Cooper, Assistant Deputy Superintendent, Chicago Police Department).
30 Chicago Alliance Brief in Support of Respondents at 4 (cited in note 4).
32 See id. See also Alschuler and Schulhofer, 1998 U Chi Legal F at 220 (cited in note 4) (noting that eight African-American aldermen voted against the ordinance).
34 See Tracey L. Meares and Dan M. Kahan, Black, White and Gray: A Reply to Alschuler and Schulhofer, 1998 U Chi L F 245, 249–50. See also Jan Crawford Greenburg, Top Court Ruling Shows Way to a Legal Anti-Loitering Law, Chi Tribune 1 (June 11, 1999) (noting that "ordinance had widespread support in many communities plagued by gang violence, putting some activists at odds with the ACLU—a traditional ally").
GANG LOITERING

36 At the end of the debate, six of the city’s eighteen African-American aldermen voted in favor of the ordinance; as noted previously, eight African-American aldermen voted against the new law.37

The City Council issued findings based on the evidence presented at the Council hearings that were included in the text of the ordinance to explain the reasons for its enactment. The council found that Chicago was experiencing an increasing murder rate, as well as an increase in violent and drug-related crime, and that both were largely attributable to criminal street gang activity.38

The members determined that in many parts of Chicago, street gangs had, in effect, “taken over” entire neighborhoods by intimidating residents into retreating from parks, sidewalks, and other public spaces that the gangs then occupied as their turf. “One of the methods by which criminal street gangs establish control over identifiable areas,” the council found, “is by loitering in those areas and intimidating others from entering...”39 The members determined that loitering in such places by gang members created “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.”40 Aggressive action was necessary, the council determined, “to preserve the City’s streets and other public places so that the public [might] use such places without fear.”41

The Chicago ordinance accordingly authorized police to order any group of two or more people found loitering in public places to move along on pain of arrest, so long as at least one of the group was reasonably believed to be a member of a criminal street gang. The law specifically provided as follows:

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

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36 See Davis, New Police Arrest Power Lights City Council Fuse, Chi Tribune at Al (cited in note 31).


38 See Chicago v Morales, 177 Ill 2d 440, 445, 687 NE2d 53 (1997) (quoting the ordinance’s findings in full).

39 Id.

40 Id.

41 Id.
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.42

Drafted in a manner analogous to that employed in the federal Racketeer Influenced Corrupt Organizations Act,43 the Chicago ordinance was replete with prolix definitions of each of its key terms. Thus the ordinance defined a "criminal street gang" to mean any ongoing organization, association in fact, or group of three or more persons having as one of its substantial activities the commission of certain specified crimes (like murder, drug dealing, and armed violence), and whose members individually or collectively were engaged in or had engaged in a pattern of criminal gang activity.44 "Criminal gang activity" was further defined to mean the commission, attempted commission, or solicitation of a lengthy list of offenses "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."45 A "pattern" of such activity simply denoted two or more acts of criminal gang activity, provided that at least two of these acts must have been committed within five years of each other and at least one such act must have occurred after the effective date of the ordinance.46

"Loitering" was also a defined term in the Chicago ordinance. It referred to "remain[ing] in any one place with no apparent purpose."47 Notably, the law was drafted so that gang members and those loitering with them did not violate the ordinance simply by loitering together, but only by thereafter defying a police order "to disperse and remove themselves from the area."48 The ordinance further provided as an affirmative defense "that no person who was observed loitering was in fact a member of a criminal street gang."49 Violations of the law were punishable by a fine of

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42 Municipal Code of Chicago, § 8-4-015(a).
41 18 USC §§ 1961–68.
44 Municipal Code of Chicago, § 8-4-015(c)(2) & (3).
47 Id at § 8-4-015(c)(3).
46 See id at § 8-4-015(c)(4).
48 Id at § 8-4-015(c)(a).
49 Id at § 8-4-015(b).
up to $500, imprisonment for not more than six months, and the requirement to perform up to 120 hours of community service.\textsuperscript{50}

Within two months of the ordinance’s enactment, the Chicago Police Department promulgated General Order 92-4, a police regulation which set forth specific guidelines to govern enforcement of the new law for the purpose of ensuring that the ordinance was not enforced in an arbitrary or discriminatory way.\textsuperscript{51} The order required each police district and each area unit of the department’s Gang Crime Section to maintain a file for the purpose of identifying those groups and individuals active in a given district who constituted “criminal street gangs” and “criminal street gang members” as defined in the ordinance.\textsuperscript{52} Identification of a gang as a criminal street gang was to be based on factors like the analysis of crime pattern data, interviews with gang members or witnesses, and information from reliable informants.\textsuperscript{53} The order specified that dispersal orders should issue only on probable cause to believe that criminal street gang members were loitering with each other or with other people in a given area. Probable cause of a person’s membership in a criminal street gang, the order stated, might be established by evidence such as the individual’s admission of membership, his use of signals distinctive of a specific gang, or the wearing of emblems, tattoos, or similar markings that could not reasonably be expected to be displayed by anyone except a member of a particular gang.\textsuperscript{54} The order specifically cautioned that gang membership could not be established solely on the basis of clothing worn by the individual but available for sale to the general public.\textsuperscript{55}

On its face, Chicago’s gang loitering ordinance applied city-wide. In practice, the Chicago Police Department limited its application in General Order 92-4 to public places designated by the department as areas in which the presence of gang members had resulted in “a demonstrable effect on the activities of law abiding persons in the surrounding community.”\textsuperscript{56} Examples of areas ap-

\textsuperscript{50} See id at § 8-4-015(e).
\textsuperscript{51} See Chicago Police Department, General Order No 92-4 at §§ I, II.
\textsuperscript{52} See id at § III.A.
\textsuperscript{53} See id at § IV.
\textsuperscript{54} See id at § V.
\textsuperscript{55} See id at § V.B.
\textsuperscript{56} Id at § VI.A.1.
propriate for such designation, according to police, included "locations near schools used for criminal street gang recruiting" or "locations near businesses where criminal street gang activity [has] adversely affect[ed] the patronage of those businesses." Designations were to be made by district commanders based on consultations with relevant police personnel, local officials, leaders of community organizations, and other citizens able to provide reliable information.

In addition, General Order 92-4 specified that only specially designated police personnel—like members of the Gang Crime section or the district tactical units—could arrest individuals for violating the gang loitering law. These police officers were required to familiarize themselves with the information maintained by the department concerning criminal street gangs active in the areas in which the officers worked. Officers making arrests pursuant to the gang loitering law were also required to prepare written reports which, among other things, fully described the circumstances giving rise to probable cause to arrest.

The Chicago Police Department began enforcing the new law in August 1992 and stopped enforcing it in December 1995, when it was held invalid by an Illinois appellate court. During that time, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. Enforcement was "overwhelmingly concentrated on the City's high-crime neighborhoods."

When the ordinance was first enacted, Chicago Mayor Richard Daley (one of the law's ardent supporters) had sarcastically offered that "the Police Department might not enforce the new law in the wards of those aldermen who voted against it. . . ." No City

57 Id.
58 See id.
59 See id at § III.C.
60 See id at § VI.C.1.
61 See id at § VI.C.3.c.
62 See Morales, 119 S Ct at 1855, n 6.
65 Robert Davis, Special Units to Police Loiterers: City Wants to Make New Anti-Gang Law Hold Up in Court, Chi Tribune 3 (June 19, 1992).
Council member attempted to take the mayor up on this proposal during the three years that the law was enforced. In fact, there is little evidence that support for the ordinance among City Council members in any way diminished once the ordinance had actually been employed. In May 1998, the City Council passed a resolution urging the U.S. Supreme Court to uphold the ordinance. The resolution passed by a vote of twenty-five to eight—and now, incidentally, with the support of a majority of those voting aldermen representing predominantly African-American wards.66

The gang loitering law fared considerably less well in the courts. At the trial level, three judges of the Circuit Court of Cook County upheld the ordinance (and one judge held it constitutional as applied to people whom the police reasonably believed to be gang members), but twelve judges, in separate cases, declared the ordinance invalid on its face.67 The Appellate Court of Illinois concluded that the ordinance impermissibly impaired the freedom of assembly of non-gang members in violation of the First Amendment, that it was unconstitutionally vague, that it infringed upon Fourth Amendment rights, and that it improperly criminalized status rather than conduct.68 The Supreme Court of Illinois held that the gang loitering law violated due process because it was "impermissibly vague on its face and an arbitrary restriction on personal liberties."69 The U.S. Supreme Court affirmed the Illinois Supreme Court’s judgment on the ground that Chicago’s gang loitering ordinance was void for vagueness in that the ordinance failed to set sufficiently specific limitations on the enforcement discretion of Chicago police.

B. THE MORALES OPINIONS

1. The holding. The void-for-vagueness doctrine is one of several devices by which judges may avoid making difficult constitutional

66 Alschuler and Schulhofer, 1998 U Chi Legal F at 220, n 35 (cited in note 4). Only thirteen of the nineteen African-American aldermen were present at this vote. The majority of those present, however, voted in favor of the resolution, and four of the six not present had voted in favor of the ordinance’s passage in 1992. Based on the assumption that each of the six missing aldermen would not have changed his vote if present, Professors Meares and Kahan suggest that by 1998, a majority of African-American aldermen supported the ordinance. See Meares and Kahan, 1998 U Chi Legal F at 250, n 24 (cited in note 34).


69 Morales, 177 Ill 2d at 447.
decisions while deciding the controversy before them—in the case of the vagueness doctrine, by invalidating a constitutionally suspect law as overly vague while leaving open the possibility that a clearer version of the law might be upheld. Professor Sunstein has shown that the current Supreme Court has a special fondness for such devices: that this Court not infrequently employs doctrines like void-for-vagueness to “avoid[ ] clear rules and final resolutions” and to “allow[ ] continued space for democratic reflection from Congress and the states.” He terms this style of decision making by courts “judicial minimalism.” “[K]now[ing] that there is much that it does not know” and “intensely aware of its own limitations,” a minimalist court seeks “to decide cases on narrow grounds.” And this Supreme Court, according to Professor Sunstein, “embraces minimalism.”

The Supreme Court’s holding in Morales could be termed an exercise in judicial minimalism. Indeed, even by minimalist standards, the majority’s holding would have to be characterized as unusually narrow. Traditionally, penal laws are said to be constitutionally vague when they fail to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited” and to establish guidelines for enforcement that are sufficiently concrete so as not to “encourage arbitrary and discriminatory [law] enforcement.” The Morales majority found that Chicago’s gang loitering ordinance failed to satisfy the second of these two requirements. Six Justices concluded that the ordinance’s definition of loitering (“to remain in any one place with no apparent purpose”) was so vague that it in effect entrusted police with lawmaking authority and thus created a grave risk of capricious enforcement decisions.

The majority’s vagueness holding was thus limited to one aspect of the vagueness doctrine—the role of that doctrine in demanding

70 See Cass R. Sunstein, One Case at a Time 110 (Harv U Press, 1999).
71 Id at ix–x.
72 Id at ix.
73 Id.
74 Id at xi.
75 Kolender, 461 US at 357–58.
76 See Morales, 119 S Ct at 1861–62.
77 See id.
that enforcement discretion be appropriately constrained—and to a single phrase in Chicago's lengthy and complex loitering law. Justice Stevens's analysis for the majority, moreover, was nothing if not succinct. In deciding that the ordinance's loitering definition was impermissibly vague, the majority proceeded on the assumption that every person loitering in a public place manifests some purpose—if only the purpose to loiter. Police charged with dispersing gang members and their associates loitering "with no apparent purpose," then, were in effect tasked with choosing among the purposes manifested by these individuals—purposes which police could legitimate by acquiescing in the behavior or condemn through orders to disperse. In the Court's words:

Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose [was] actually apparent.78

The majority professed to be bound by the Illinois Supreme Court's conclusion that the Chicago ordinance's loitering definition clothed officers with "'absolute discretion . . . to determine what activities constitute loitering.'"79 Even setting aside any deference to this statement as a construction of local law, however, the majority found "'[t]he 'no apparent purpose' standard' to be "'inherently subjective."80 And such a subjective standard, in the majority's view, impermissibly left lawmaking "'to the moment-to-moment judgment of the policeman on his beat.'"81

2. Other issues. The majority's holding, then, was decidedly limited. But Justice Stevens addressed several additional issues in those portions of his opinion joined only by Justices Souter and Ginsburg. First, he elaborated on the vagueness doctrine's "fair notice" requirement and its application to the Chicago ordinance. In the view of the plurality, the gang loitering law also violated the

78 Id at 1862.
79 Id at 1861 (quoting Morales, 177 Ill 2d at 457).
80 Id at 1862.
81 Id at 1861 (quoting Kolender, 461 US at 359).
vagueness prohibition by leaving the public uncertain as to the nature of the conduct the law prohibited:

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? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? The plurality rejected the argument that police dispersal orders could serve to inform citizens of the nature of the prohibited conduct for two reasons. First, the plurality concluded that Chicago’s citizens were entitled to advance notice regarding the loitering prohibited by the ordinance so that these citizens might avoid ever being ordered to disperse. Second, the Justices in the plurality agreed that the dispersal orders contemplated in the new law (requiring gang members and their associates “to disperse and remove themselves from the area”) had the effect of compounding the inadequacy of the notice afforded by the ordinance’s definition of loitering. In Justice Stevens’s words, “After such an order issues, how long must the loiterers remain apart? How 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 to being ordered to disperse again?”

The plurality also explicitly addressed the issue whether loitering is a constitutionally protected activity and determined that the freedom to loiter for innocent purposes is an attribute of personal liberty protected by the Due Process Clause: “Indeed, 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.’” Notably, how-

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82 Id at 1859 (opinion of Stevens, joined by Souter and Ginsburg).
83 See id at 1860.
84 See id.
85 Id.
86 Id at 1857–58 (quoting Kent v Dulles, 357 US 116, 126 (1958)). The plurality rejected the view that Chicago’s gang loitering ordinance violated First Amendment rights for two reasons. First, the ordinance’s prohibition on loitering “with no apparent purpose,” the plurality said, did not interfere with the First Amendment rights of those loitering for the apparent purpose of communicating ideas. Second, the ordinance, by not reaching associations for the purpose of engaging in core First Amendment activities or intimate human associations, failed to implicate any right protected by the right of association. See id at 1857.
ever, Justice Stevens did not analyze whether the impact of Chicago’s gang loitering ordinance on this liberty interest would itself support a facial challenge to the ordinance: “There is no need . . . to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. For it is clear that the vagueness of this enactment makes a facial challenge appropriate.”

Justices O’Connor, Breyer, and Kennedy—the other three Justices in the majority—did not join in those portions of the Stevens opinion dealing with the notice issue, nor did they address the issue whether loitering for innocent purposes is an activity protected by the Due Process Clause. Each wrote separately. In the most significant of these opinions concurring in part and concurring in the judgment, Justice O’Connor, joined by Justice Breyer, went to some lengths to explain that despite the invalidation of Chicago’s gang loitering law, “there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence.” She underscored the majority’s conclusion that an ordinance limited to loitering by gang members that had “an apparently harmful purpose” would no doubt satisfy the vagueness prohibition. So, too, she said, would a loitering ordinance that restricted its criminal penalties to gang members or that defined 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.” Laws incorporating limits on the area and manner in which they might be enforced, she suggested, should also be distinguished from Chicago’s gang loitering law.

3. The dissents. Justice Scalia dissented in a separate opinion, as

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87 Id at 1858 (citations omitted).
88 In a brief opinion concurring in part and concurring in the judgment, Justice Kennedy did note that he shared many of the plurality’s concerns about the sufficiency of the notice provided by the ordinance. See id at 1865 (Kennedy concurring in part and concurring in the judgment).
89 Id at 1864 (O’Connor concurring in part and concurring in the judgment, joined by Breyer).
90 See id.
91 Id at 1864–65.
92 See id at 1864.
did Justice Thomas, in an opinion joined by both Chief Justice Rehnquist and Justice Scalia. Justice Scalia’s dissent began by questioning whether federal courts even have the power to declare laws void in all their applications rather than as applied.93 Acknowledging that the Court has exercised such a power “for some of the present century,” he next argued that except in free-speech cases subject to the overbreadth doctrine, the Court should at least confine this power to those cases where a law is unconstitutional in all its applications.94 Justice Scalia relied heavily on United States v Salerno, in which the Court purported to disfavor facial challenges and noted that they are “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”95 Despite Justice Scalia’s impassioned treatment of this issue, however, the majority in Morales did not address the rationale for entertaining a facial challenge to Chicago’s ordinance, while the plurality expressly declined to “resolve the viability of [Salerno’s] dictum.”96 The plurality asserted simply that when vagueness permeates a law like Chicago’s gang loitering ordinance—a criminal law that the plurality characterized as containing no mens rea requirement and infringing on constitutionally protected rights—a facial attack should be entertained: “Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.”97

93 See id at 1867–72 (Scalia dissenting).
94 Id at 1869–71.
96 Morales, 119 S Ct at 1858, n 22 (opinion of Stevens, joined by Souter and Ginsburg).
97 Id. In his opinion concurring in part and concurring in the judgment, Justice Breyer similarly suggested that facial invalidation for vagueness is proper whenever a law delegates so much discretion to police that it can fairly be said that “every application of the ordinance represents an exercise of unlimited discretion.” Id at 1866 (Breyer concurring in part and concurring in the judgment) (emphasis added). He argued that in this sense, facial invalidation for vagueness is unlike those cases in which the Court has entertained a facial challenge for overbreadth in the First Amendment context. In the latter cases, “a defendant whose conduct clearly falls within the law and may be constitutionally prohibited can nonetheless have the law declared facially invalid to protect the rights of others (whose protected speech might otherwise be chilled).” A law permeated with vagueness, in contrast, confers so much unchecked discretion on enforcement authorities that it is “invalid in all its applications.” Accordingly, the right that defendants assert in facial vagueness cases—namely, “the right to be free from the officer’s exercise of unchecked discretion”—is, in Justice Breyer’s view, “more clearly their own.” Id.
Not surprisingly, both Justice Scalia and Justice Thomas strongly disagreed with the characterization of Chicago’s gang loitering ordinance as vague. Justice Scalia argued that even if the appropriate circumstances for a facial challenge extend more broadly than Salerno would suggest, Chicago’s gang loitering law would still pass muster because the law is not vague “in most or even a substantial number of applications.”98 He took issue with the notion that loiterers are always manifesting some apparent purpose for remaining in any one place and argued, instead, that loiterers often display no apparent purpose for their behavior for the simple reason that they have no actual purpose in so behaving: “Remaining at rest will be a person’s normal state, unless he has a purpose which causes him to move.”99 Justice Scalia concluded that in the bulk of cases, Chicago police could easily perceive the difference between those remaining in a place for an apparent reason and those remaining there without such a reason: “The criteria for issuance of a dispersal order under the Chicago Ordinance could hardly be clearer.”100 Justice Thomas’s dissent was (if possible) even more emphatic: “[T]he Court’s conclusion that the ordinance is impermissibly vague because it ‘necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,’ cannot be reconciled with common sense, longstanding police practice, or this Court’s Fourth Amendment jurisprudence.”101

Addressing the plurality, the dissenters similarly rejected the argument that a law hinging arrest on the refusal to obey a clear and explicit police order might nevertheless provide inadequate

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98 Id at 1875 (Scalia dissenting).
99 Id at 1877, n 11.
100 Id at 1876.
101 Id at 1885 (Thomas dissenting, joined by Rehnquist and Scalia) (quoting majority’s citation to Kolender, 461 US at 359). Both dissents similarly chastised the majority for purporting to be bound by the Illinois Supreme Court’s statement that the “apparent purpose” standard “provides absolute discretion to police officers” to decide what constitutes loitering. See id at 1876 (Scalia dissenting); id at 1887, n 11 (Thomas dissenting, joined by Rehnquist and Scalia). In the words of Justice Scalia, the Illinois Supreme Court’s statement was nothing more than a characterization of the ordinance’s language in light of that court’s refusal to read any limitations into it: “It [was] not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound).” Id at 1876 (Scalia dissenting).
notice to the citizen as to the nature of the prohibited conduct: in Justice Thomas's words, "[t]here is nothing 'vague' about an order to disperse." Justice Scalia chided the plurality for perceiving vagueness problems in police orders "to disperse and remove . . . from the area." He noted that this analysis, if adopted by the Court, "would render unconstitutional for vagueness many . . . Presidential proclamations," including President Eisenhower's command that all persons obstructing the court-ordered enrollment of black students in the Little Rock, Arkansas public schools "'cease and desist therefrom, and . . . disperse forthwith.'" The dissenters also cited a lengthy history in which loitering has been criminalized to argue that loitering is not a fundamental right "'deeply rooted in this Nation's history and tradition,'" and thus properly characterized as a liberty interest protected by the Fourteenth Amendment's Due Process Clause. Despite the plurality's insistence on a "Fundamental Freedom to Loiter," Justice Scalia noted, "there is not the slightest evidence for the existence of [such] a genuine constitutional right. . . .

Justice Thomas's dissent also detailed at some length the human costs exacted in many cities by the presence of criminal street gangs. "Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror [to which] the Court does not give sufficient consideration," he said. He noted that in 1998, "in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school"—children "too terrified of gang violence to leave their homes alone."

Justice Thomas quoted the testimony of one Chicago resident before the City Council to the effect that "'only about maybe one or two percent of the people in the city [are] causing these problems maybe, but it's keeping 98 percent of us in our houses and off the

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102 Id at 1886 (Thomas dissenting, joined by Rehnquist and Scalia). See also id at 1875–76 (Scalia dissenting).
103 Id at 1875 (Scalia dissenting).
104 Id at 1881–83 (Thomas dissenting, joined by Rehnquist and Scalia) (quoting Washington v Glucksberg, 521 US 702, 721 (1997) (citation omitted)). See also id at 1872–73 (Scalia dissenting).
105 Id at 1872 (Scalia dissenting).
106 Id at 1880 (Thomas dissenting, joined by Rehnquist and Scalia).
107 Id.
streets and afraid to shop.’’108 In a ringing conclusion to his dissent, Justice Thomas noted that “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.”109 He charged that the Court, by focusing exclusively on the 2 percent, had “denied our most vulnerable citizens the very thing that Justice Stevens elevates above all else—the ‘freedom of movement.’”110

II. Some Clarity about Vagueness

The Morales opinions explicitly raise numerous significant issues and implicitly touch upon even more. It is with the Court’s vagueness analysis, however, that one must begin in assessing the failure of the Morales majority to illuminate significant current issues regarding police patrol. The problems in this analysis are not apparent from a superficial reading of the Morales opinions. Such a reading discloses that the Court has reached no agreement as to those circumstances in which the facial vagueness doctrine should apply. This, however, is nothing new.111 Such a reading demonstrates, as well, that the Justices vehemently disagree among themselves as to whether the “apparent purpose” language in Chicago’s gang loitering ordinance is even vague. This fact alone does not constitute an indictment of their work. As Justice Frankfurter noted many years ago, unconstitutional indefiniteness “is itself an indefinite concept.”112 With the recent revival of statutes and ordinances aimed at improving the quality of life in public places, it is

108 Id at 1887.

109 Id.

110 Id.

111 See Richard H. Fallon, Jr., et al, The Federal Courts and the Federal System 212–13 (Foundation Press, 4th ed 1996) (noting mixed signals sent by Court to as to when facial invalidation for vagueness is appropriate). Compare Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., 455 US 489, 494–95 (1982) (“[A]ssuming the enactment implicates no constitutionally protected conduct,” a court should entertain a facial vagueness challenge “only if the enactment is impermissibly vague in all of its applications”), with Kolender, 461 US at 359, n 8 (permitting party to attack statute on ground that it would be impermissibly vague as applied to someone else and asserting that “[n]o authority cited by the dissent” supports argument that facial vagueness challenges are permitted only when statute is vague in all its applications).

not altogether surprising that the Justices might come to different conclusions about whether any one of these newly enacted laws is sufficiently precise so as to reasonably confine the opportunity for abusive enforcement by police.

Looking no further than the four corners of the void-for-vagueness doctrine as it has been traditionally understood, then, it is possible to cast the Morales opinions as instances of reasonable disagreement among the Justices within a framework of overall doctrinal coherence. On closer inspection, however, Morales evinces a deeper problem—a real inability on the part of the majority to offer even a facially plausible account of the role that the vagueness doctrine actually plays in constraining the opportunity for arbitrary and discriminatory law enforcement by local police. To bring this aspect of Morales to the surface, I first explore the degree to which the Morales holding is in tension with other aspects of the legal environment in which public order policing occurs—and in ways that deprive the majority of the ability credibly to maintain that this holding represents a significant constraint on the opportunity for abusive police enforcement. I then argue that the majority focused its attention on matters of little relevance to the constraint of police discretion and ignored aspects of the Chicago law that could have promoted the judicious use of discretion by officers on patrol. Overall, this part contends that the majority's inability to articulate a workable framework for its vagueness doctrine threatens to deprive communities of the ability to enact legitimate laws that might assist in the amelioration of pressing social problems—and in what amounts to an illusory effort to constrain police.

A. THE LEGAL ENVIRONMENT FOR PUBLIC ORDER POLICING

The judicial invalidation of local public order laws as facially vague transformed the legal regime governing public order that was in place in this country into the 1960s and 1970s—a legal regime characterized by loitering, disorderly conduct, and vagrancy laws that were so vague in terminology and so broad in scope that they had the effect, in practice, of "'legally' authoriz[ing] the police to arrest virtually anyone."113 The vagueness

cases from this period, though formally concerned that laws be sufficiently clear both to inform people what conduct is prohibited and to confine the discretion of enforcement authorities, were in fact animated most strongly by the latter concern—that laws should provide adequate guidelines for enforcement so as to limit the opportunity for the arbitrary and discriminatory application of legal prohibitions. By the time Kolender v Lawson was decided in 1982, it was explicitly settled that the most important aspect of the vagueness doctrine is its role in requiring that a legislature establish minimal guidelines to govern law enforcement. It was also settled (albeit implicitly) that the facial vagueness doctrine has a special application to local public order laws directed at various forms of public nuisance. During the period leading up to Kolender, the exercise of police discretion pursuant to such laws was increasingly seen to evade any meaningful review in the criminal courts. The decisions facially invalidating public order offenses as void for vagueness, then, were designed in large part to help secure a simple principle—that individuals should not walk public streets, as the Court said, “‘only at the whim of . . . police officer[s].’”

Morales, then, is but the latest in a line of Supreme Court cases in which the Court has employed the facial vagueness prohibition supposedly to constrain the potential for harsh and arbitrary law enforcement by local police. The assumption in all these cases—an assumption expressed quite clearly in Morales—is that courts

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3] GANG LOITERING 165

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significantly contribute to the reasonable restraint of capricious police enforcement when they facially invalidate those public order ordinances that afford "too much discretion to the police."119 This assumption regarding the street-level efficacy of the facial vagueness doctrine seemed eminently plausible in the 1960s and 1970s, given both the panoply of broad and ill-defined public order laws to be found in the legal codes of many municipalities and the relative lack of empirical knowledge about the nature of police discretion.120 Because police today are (and are understood to be) vested with a considerable degree of discretion that is beyond the scope of traditional vagueness doctrine, however, this assumption is significantly less plausible as applied to recently enacted laws like the one at stake in Morales.

This point can be most easily established by focusing on three characteristics of the current legal regime that, together, create substantial opportunities for police arbitrariness that do not raise traditional vagueness concerns. First is the significant potential for abusive enforcement that exists pursuant to broad but clear laws—such as the juvenile curfews that have become increasingly popular over the last ten years.121 The most aggressive employment of the facial vagueness doctrine does not constrain the opportunity for police misuse of such laws and, indeed, may even encourage municipalities to enact them. Next, the prevalence in certain domains of numerous narrow and specific, but commonly violated, low-level statutes and ordinances likewise creates opportunities for abusive police enforcement. These opportunities, too, lie beyond the scope of traditional vagueness doctrine and thus challenge the Morales majority's assumption that the void-for-vagueness doctrine represents a meaningful check on police. Finally, the Court's own Fourth Amendment jurisprudence—its endorsement of warrantless police actions premised on admittedly nebulous concepts like probable cause—vests police with a significant degree of street-level discretion that is hard to reconcile with the Morales

119 Morales, 119 S Ct at 1863 (opinion of Stevens, joined by Souter and Ginsburg).

120 For an account of how discretion in criminal justice administration was only "discovered" beginning in the late 1950s and how thereafter it became better understood, see Samuel Walker, Taming the System 6–12 (Oxford U Press, 1993).

majority’s condemnation of the discretion involved in applying Chicago’s gang loitering ordinance.

1. Broad, clear laws and the vagueness prohibition. A brief hypothetical can demonstrate not only that traditional vagueness doctrine fails to address the opportunity for abusive police enforcement created by broad but clear laws, but that vagueness doctrine may even encourage legislators to expand the reach of legal prohibitions. Consider the finding of the Chicago City Council that in many Chicago neighborhoods in 1992, criminal street gangs loitered in identifiable areas so as to establish control over these areas “and intimidat[e] others from entering” them.122 Based on this finding, a council member in 1992 might well have proposed an ordinance authorizing police to order any person reasonably believed to be a gang member to depart from any neighborhood in which he might be found loitering so as to intimidate others from using public spaces. This formulation was essentially endorsed in Justice Stevens’s opinion for the majority in Morales.123 Thus, even as the Court invalidated Chicago’s gang loitering ordinance on the ground that the “no apparent purpose” language in that law’s loitering definition was unconstitutionally vague, the Court reached out to opine that an ordinance limited to loitering by gang members that “had an apparently harmful . . . effect” would “no doubt be sufficient” to satisfy vagueness concerns.124

But could our council member in 1992 have been reasonably confident that such a law would survive facial vagueness review? In an opinion offering only the most summary analysis, the Supreme Court in 1971 facially invalidated a law prohibiting three or more people from assembling on any sidewalk and conducting themselves in a manner annoying to passersby, noting that a city may not enact and enforce an ordinance “whose violation may entirely depend upon whether or not a policeman is annoyed.”125 Our hypothetical legislator, then, would have needed to address the question whether an ordinance authorizing police to move

122 See Morales, 177 Ill 2d at 445 (quoting City Council’s findings).
123 It has also received some support in the academic literature. See, e.g., Peter W. Poulos, Comment, Chicago’s Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, 83 Cal L Rev 379, 340 (1995).
124 Morales, 119 S Ct at 1862.
along loiterers who are acting so as to intimidate others is any less vague than an ordinance directed at conduct that annoys. Even prior to the majority's dicta in Morales, a court might have answered this question in the affirmative. But this answer was certainly not clear-cut in 1992.

So what would our legislator have done next? He might have suggested a law prohibiting those reasonably believed to be criminal street gang members from loitering in public places with the specific intent of intimidating others from entering these places. He might have pointed out that the Court has on occasion suggested that a specific intent requirement ameliorates vagueness concerns. But on further consideration, he would probably have concluded that even this revision was inadequate to ensure the constitutionality of the legislation he intended to propose. The Supreme Court's observations about specific intent have not prevented several state supreme courts from invalidating public order laws reasonably read to include such an element as void for vagueness.

Such invalidations, moreover, may in fact make sense—at least to the extent that the vagueness doctrine's chief concern is the potential for arbitrary police enforcement. The specific intent element has traditionally been said to address the vagueness doctrine's mandate that penal laws provide adequate notice to the public about the nature of prohibited conduct—not its concern that police might misuse an overly ambiguous law. It is easy to understand, moreover, how including a specific intent element among those facts which must be shown at trial works (at least in theory) to cure notice difficulties. As the Court has said, to hold someone liable for violating a law containing a specific intent element, a fact finder must conclude that the defendant at the time of the alleged offense "[was] aware that what he [did was] precisely that which the statute forbids." Such a conclusion, of course, substantially

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126 See, e.g., Papachristou, 405 US at 163.
127 See, e.g., E.L. v State, 619 S2d 252, 253 (Fla 1993) (invalidating drug loitering ordinance as vague); Wyche v State, 619 S2d 231, 236 (Fla 1993) (invalidating prostitution loitering ordinance for vagueness); City of Akron v Rowland, 67 Ohio St 3d 374, 381–86, 618 NE2d 138 (Ohio 1993) (invalidating drug loitering ordinance as vague).
129 Id at 104.
ameliorates any concern that because of the vagueness in a legal prohibition, the defendant had no notice of what the law required.

It is less easy to perceive, however, how a specific intent requirement meaningfully constrains the potential for arbitrary police enforcement on the street. In this context, the vagueness doctrine's demand for adequate specificity in statutes and ordinances is designed to ensure that officers do not capriciously employ ambiguous laws to charge people in light of the officers' own "personal predilections." But our conscientious legislator in 1992 was already worried about the vagueness in a law authorizing police to disperse those gang members loitering in such a way as to intimidate others, objectively speaking. Could he honestly conclude that police receive significantly more guidance from a law directing them to move along those gang members loitering so as to intimidate others—but now from each gang member's subjective perspective? In reality, an officer would rely on the very same observable conduct to make judgments about the loiterer's internal mental state that he would have used to determine whether this loiterer was acting in a manner reasonably likely to have harmful effects on others.

Our legislator could not be blamed at this juncture for taking yet another tack to minimize any vagueness in his proposed ordinance. He might have noticed that most street gang offenses in Chicago have historically been committed by young people between the ages of fifteen and nineteen. Why not enact a law prohibiting at least the juveniles in this group from loitering in public places? Or better yet, from being in public places, except for carefully specified purposes? By removing from police the necessity of distinguishing intimidating or purposefully harmful loitering from harmless loitering, this approach does substantially ameliorate vagueness concerns. But it does so only by broadening the category of people subject to the law to a group defined by age—an attribute offering the advantage that it can be specified (at least comparatively) with a substantial measure of rulelike precision.

This is not what happened in Chicago in 1992. There is evidence, however, that something very much like this hypothetical

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130 Goguen, 415 US at 575.
131 See Street Gangs and Crime at 7 (cited in note 17).
happened in many other municipalities in the 1990s. In cities across the country, many legislators concerned with public order issues proposed and then enacted laws very similar to the one just discussed—namely, juvenile curfews. These legislators, moreover, were not out of the mainstream in any sense. In the 1990s, curfews became “the norm in major American cities.” As of 1995, they existed in 77 percent of those cities with 1992 populations of 200,000 or more; half of all such cities either enacted new curfews or revised existing ones between the years 1990 and 1994.

Curfews have also been upheld by several appellate courts. Indeed, within one week of the Court’s decision in Morales invalidating Chicago’s gang loitering law, the U.S. Court of Appeals for the District of Columbia Circuit, in an en banc decision, upheld the constitutionality of the District of Columbia’s juvenile curfew—a law “which bars juveniles 16 and under from being in a public place unaccompanied by a parent or without equivalent adult supervision from 11:00 p.m. on Sunday through Thursday to 6:00 a.m. the following day” and from midnight on Friday and Saturday night to 6:00 a.m. the following morning. The law was enacted “to protect the welfare of minors by reducing the likelihood that minors will perpetrat e or become victims of

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132 See Livingston, 97 Colum L Rev at 556, n 15 (cited in note 2) (juvenile curfews now in effect in nearly three-quarters of the nation’s largest cities).

133 Ruefle and Reynolds, 41 Crime & Delinquency at 353 (cited in note 121).

134 See id.

135 Hutchins v District of Columbia, 188 F3d 531, 534 (DC Cir 1999). As the D.C. Circuit Court noted, by its terms, the curfew is not violated if the minor is:

(1) accompanied by the minor’s parent or guardian or any other person 21 years or older authorized by a parent to be a caretaker for the minor; (2) on an errand at the direction of the minor’s parent, guardian, or caretaker, without any detour or stop; (3) in a vehicle involved in interstate travel; (4) engaged in certain employment activity, or going to or from employment, without any detour or stop; (5) involved in an emergency; (6) on the sidewalk that abuts the minor’s or the next-door neighbor’s residence, if the neighbor has not complained to the police; (7) in attendance at an official school, religious, or other recreational activity sponsored by the District of Columbia, a civic organization, or another similar entity that takes responsibility for the minor, or going to or from, without any detour or stop, such an activity supervised by adults; or (8) exercising First Amendment rights, including free exercise of religion, freedom of speech, and the right of assembly.

Id at 535.
crime. . . .”136 Similarly, the Fourth Circuit easily rejected a
vagueness challenge to Charlottesville, Virginia’s juvenile curfew, noting that the search for clarity in a criminal code “can be a re-
ceding mirage” which cannot be permitted to “‘convert into a
constitutional dilemma the practical difficulties in drawing [ap-
propriate] criminal statutes. . . .”137

Juvenile curfews have both supporters and detractors.138 But
whatever their merits, it is perverse that vagueness decisions sup-
pposedly emanating from a concern with the potential for arbitrary
police enforcement may well have tilted localities in the direction
of enacting curfews as opposed to gang loitering, disorderly con-
duct, or other similar public order laws. Curfews may or may not be
a better way of reducing crime and improving the quality of
life in public spaces, but there is little to suggest that curfews are
preferable from the standpoint of limiting the opportunity for ar-
bitrary and discriminatory police enforcement.

At least within the hours of their operation, curfews have the
practical effect of authorizing police to approach and detain any
person who appears young enough to trigger their prohibitions.
This is an extremely broad category of people—and incidentally,
the very category of people who are already among the most likely
to be approached by police in a public place.139 Curfews, moreover,
are often enacted as “quick-fix” solutions to concerns about com-
community violence—and without any consideration of the police re-
sources needed to enforce them evenhandedly.140 Such laws may
not be vague, but the manner in which they are (or are not) em-

136 Id at 541.

137 See Schleifer v City of Charlottesville, 159 F3d 843, 853 (4th Cir 1998) (quoting Colten
v Kentucky, 407 US 104, 110 (1972)). See also Quib v Strauss, 11 F3d 488, 492 (5th Cir
1993) (rejecting equal protection challenge to a juvenile curfew). But see Nunez v City of
San Diego, 114 F3d 935, 940–52 (9th Cir 1997) (holding that juvenile curfew was unconsti-
tutionally vague and overbroad, and that curfew violated equal protection and parents’ funda-
mental right to rear children without undue governmental interference).

138 See Robert Hanley, Authorities Turn to Curfews to Clear the Streets of Teen-Agers, NY
Times B1 (Nov 8, 1993) (citing critics of curfews). See also Todd S. Purdum, Clinton Backs
Plan to Deter Youthful Violence, NY Times A20 (May 31, 1996) (noting President Clinton’s
endorsement of juvenile curfews).

“young people in general” are “preferred targets of special police concern”).

140 See Hanley, Authorities Turn to Curfews to Clear the Streets of Teen-Agers, NY Times
at B1 (cited in note 138).
ployed can in practice still subject a large number of people to spotty, erratic—and even arbitrary—enforcement efforts.

All this escapes traditional vagueness analysis. In evaluating whether a given law is impermissibly vague, courts do not routinely consider the alternatives to this law. They never consider that the overall effect of a body of decisions invalidating laws in a given subject area as overly vague may be paradoxical: that in future efforts to avoid vagueness and imprecision in defining a law’s core concepts (like any ordinance addressed to “gang members” who adopt “turf” and “annoy,” “harass,” or “intimidate” others), legislators searching for precise terms may end up broadening the enforcement authorization given to police and thus adding to, rather than narrowing, the scope of enforcement discretion. The potential correlation between breadth and clarity in public order legislation, however, creates serious analytic difficulties for the Morales majority’s assumption that traditional vagueness doctrine can be meaningfully employed to limit the potential for arbitrary exercises of police patrol discretion.

2. Vagueness and the prevalence of frequently violated rules. Vagueness doctrine is concerned with the potential for arbitrary enforcement posed by a given law. No one in the least familiar with current controversies involving police, however, can be unaware of the principal arena in which police today have been charged with actual arbitrariness and discrimination in enforcement—namely, traffic stops. The Justice Department and New Jersey officials, for instance, are even now in the process of implementing a consent decree that mandates changes in the operation of the New Jersey State Police to address long-standing charges of racial discrimination against minority motorists by personnel within this law enforcement agency—charges, parenthetically, that the governor of New Jersey has conceded to be true.\(^{141}\) The admittedly small number of empirical studies on this subject, moreover, together with a much more substantial body of anecdotal evidence, strongly indicate that the problem of racial discrimination in traffic enforcement extends well beyond New Jersey. It is clear that mi-

tority motorists around the country "are pulled over far more frequently than whites."\textsuperscript{142} African Americans, in particular, "almost universally describe[ ] . . . as an everyday reality . . . the familiar roadside detention for 'Driving While Black.' \textsuperscript{143}

The grievances of minority motorists stopped by police represent an important challenge for law enforcement officials dedicated to overcoming the estrangement that has not infrequently characterized the relationship between police and minority communities. For our purposes here, however, the immediate significance of these grievances lies in the light they shed on the limited ability of the Court materially to influence the opportunity for arbitrariness in police enforcement through the invalidation of vague laws. Traffic rules regulating speed, lane changing, and the like are among the most precise regulations to be found in state and local legal codes. These laws, by traditional standards, are simply not vague. Despite the specificity of such laws, however, no one could deny that the opportunity for their arbitrary and discriminatory enforcement is huge—whatever one believes about the frequency with which police actually engage in the capricious exercise of enforcement authority. Low-level traffic offenses (like most laws regulating minor misconduct) are not invariably enforced, even when the evidence of their violation is clear. Because almost everyone violates traffic rules sometimes, moreover, the police, "if they are patient, can eventually pull over anyone they are interested in questioning . . . ."\textsuperscript{144} In effect, clear and precise traffic laws empower police to pursue their own predilections in targeting people for enforcement \textit{in precisely the manner condemned by the vagueness prohibition.}

But this point is obscured in traditional vagueness analysis. Lower courts do not routinely consider the claim that in fields of human endeavor that are heavily and minutely regulated with rules that are invariably broken at least part of the time, the judiciary's demand for specificity does not significantly reduce the opportunity for arbitrary law enforcement. Nor has the Supreme Court

\textsuperscript{142} David A. Sklansky, \textit{Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment}, 1997 Supreme Court Review 271, 313.

\textsuperscript{143} Id at 312. See also Henry L. Gates, Jr., \textit{Thirteen Ways of Looking at a Black Man}, New Yorker 59 (Oct 23, 1995) (noting that "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black").

\textsuperscript{144} Sklansky, 1997 Supreme Court Review at 298–99 (cited in note 142).
ever accepted the argument that the Due Process Clause's demand for reasonable specificity in statutes and ordinances might also require that enforcement policies be adequately precise. The Court's continued skepticism with regard to such an argument, moreover, can probably be safely inferred from its recent unanimous decision in *Whren v United States*. There, the Court outright rejected the claim that the Fourth Amendment might impose obligations on police to adhere to reasonably well-specified enforcement policies (above and beyond that Amendment's mandate that probable cause exist to support arrest) merely because of the abundance of commonly violated regulations within a given sphere.

*Whren* was, in fact, a "traffic" case. The incident giving rise to the suppression motion in that case began when plainclothes vice-squad officers in the District of Columbia who were patrolling a "high drug area" in an unmarked vehicle observed a dark Pathfinder truck stopped at an intersection. Their suspicions somewhat aroused by the behavior of the truck's youthful occupants, the officers observed the Pathfinder turn without signaling and then proceed at an "unreasonable" speed. They stopped the truck—apparently in violation of local police regulations permitting plainclothes officers in unmarked cars to enforce traffic laws only in the case of violations so grave as to pose an immediate threat to the safety of others. An officer testified that he approached the Pathfinder to give the driver a warning about traffic violations. Drawing up to the driver's window, however, he observed plastic bags of crack cocaine in the hands of the passenger, Whren. Both Whren and Brown, the driver of the Pathfinder, were arrested, and quantities of several types of illegal drugs were retrieved from the truck.

The petitioners in *Whren* had a simple argument. They contended that probable cause that a driver has violated a civil traffic

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145 This is despite the urging of Kenneth Culp Davis, who argued that "the vagueness of the enforcement policy is at least as important as the vagueness of a statute or ordinance, for it just as much permits and encourages arbitrary and discriminatory enforcement of the law." Kenneth Culp Davis, *Police Discretion* 137 (West, 1975).


147 Id at 808.

148 See id at 808, 815.

149 See id at 809.

150 See id at 808–09.
regulation should not without more be adequate to justify a traffic stop for the very reason that "... a police officer will almost invariably be able to catch any given motorist in [some] technical violation."\footnote{Id at 810.} To guard against racially discriminatory traffic stops, as well as the pretextual use of traffic regulations as a tool for investigating other law violations, the petitioners contended that courts judging the reasonableness of a traffic stop for Fourth Amendment purposes should ask "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given . . . ."\footnote{Id at 814.} The Court emphatically—and unanimously—rejected this argument:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, what particular provisions are sufficiently important to merit enforcement.\footnote{Id at 818–19.}

Consider the ramifications of this result. There is no question that police employ the maze of traffic regulations proactively to investigate or to prevent other law violations. Indeed, in many cities plagued by things like "gang activity, illegal guns . . . and drive-by shootings," police officials have observed that "saturating an area with traffic patrol shuts down these illegal operations."\footnote{Earl M. Sweeney, Traffic Enforcement: New Uses for an Old Tool, Police Chief 45 (July 1996).} The phenomenon of enforcing commonly violated, low-level regulations to pursue broader law enforcement goals, moreover, is not limited to traffic enforcement. In New York City, for example, police enforcing precise but often violated laws regulating public drinking, littering, and the like have admitted that one purpose in stepping up enforcement in such areas is to remove weapons from the street.\footnote{See, e.g., Eric Pooley, One Good Apple, Time 54, 56 (Jan 15, 1996) (noting observation by one New York City police official that enforcement of public drinking law often permits officers to locate weapons on the people stopped).} Police managers there have even claimed that such
enforcement serves generally to deter weapons possession in public places. In the words of one New York City police administrator, the vigorous enforcement of low-level offenses is important precisely because it makes people leave their guns at home, "know[ing] they might get stopped."\(^{156}\)

The aggressive enforcement of low-level offenses to serve broader law enforcement goals may be broadly supported in a community. It may, in fact, help to address more serious crime. The experiences of many minority motorists, however, attest that police do not always exercise discretion in this area with wisdom—or sometimes with any sensitivity to the communities they serve. Even more important for our purposes, moreover, is the undeniable fact that it is police who make these important discretionary judgments concerning the resources to be put into the enforcement of low-level offenses and the broader goals to which this enforcement should be directed. The vagueness prohibition has never been interpreted to constrain the exercise of such discretion—despite the fact that the opportunity for police arbitrariness in this context is at least as significant as the opportunity created by ordinances like Chicago's gang loitering law.\(^{157}\)

3. The Fourth Amendment and the vagueness principle. Finally, the Court has repeatedly held that it is consistent with the Fourth Amendment for officers on the street, without prior judicial authorization, to apply concepts like "probable cause" and "reasonable suspicion" even as the Court has acknowledged that it is impossible to articulate "precisely what [these concepts] mean."\(^{158}\) The tolerance shown in Whren to affording police even extremely


\(^{157}\) This is not to say that police may exercise their discretion in a manner that discriminates on the basis of factors like race. As the Court has said, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause..." Whren, 517 US at 813. It is impossible to view the Court's selective enforcement doctrine, however, as a robust control over the arbitrary exercise of police discretion. First, this doctrine addresses actual and intentional discrimination, rather than the potential for arbitrary and discriminatory enforcement that a given legal regime may create. Second, defendants bear an "extremely heavy burden of proof" to overcome the presumption of regularity that attaches to criminal law enforcement. Wayne R. LaFave, Arrest 163 (Little, Brown, 1965). See also United States v Armstrong, 517 US 456, 465 (1996) (to dispel presumption that law enforcement authorities have not violated equal protection, "a criminal defendant must present 'clear evidence to the contrary'") (quoting United States v Chemical Foundation, Inc., 272 US 1, 14–15 (1926)).

broad street-level discretion, then, is not limited to the exceptional Fourth Amendment case. Indeed, the Court has broadly endorsed the notion in its Fourth Amendment jurisprudence that officers can fairly employ "commonsense, nontechnical conceptions" to deal with the practical realities of street patrol.159 This idea exists in considerable tension, however, with the Morales majority's assumption that a substantial degree of technical clarity in the language to be applied by patrol officers is necessary to the effective constraint of police discretion.

A few examples can illustrate this point. First, the bulk of felony arrests in this country take place pursuant to the conclusion of an officer that probable cause exists to believe that a crime has been committed by the person being arrested. Such arrests generally do not require prior judicial authorization, nor is such authorization sought in most circumstances.160 Similarly, officers may in most cases search automobiles and containers within automobiles based on a street-level assessment that probable cause supports the search.161 They may enter homes to pursue fleeing suspects or to seize evidence in the process of being destroyed—again without a warrant, and based on their on-the-scene determinations regarding the existence of probable cause.162 All these activities have been held to be reasonable for Fourth Amendment purposes despite the Court's acknowledgment that probable cause itself—the central concept that police must accurately employ to act within Fourth Amendment constraints—is a "fluid" legal construct "not readily . . . reduced to a neat set of legal rules."163

Terry v Ohio, however, may be the Court's single most important Fourth Amendment case in terms of its role in constituting a legal environment broadly supportive of the street-level discretion of

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159 Id.

160 See United States v Watson, 423 US 411, 414–24 (1976) (holding that warrantless felony arrests in public places are consistent with the Fourth Amendment).

161 See California v Acevedo, 500 US 565, 580 (1991) (holding police with probable cause to believe evidence will be found in an automobile may search any container in automobile in which said evidence might be located); California v Carney, 471 US 386, 30 (1985) (holding that a motor home falls within "automobile exception" and may be searched without a warrant upon a finding of probable cause).


officers on patrol. Police acting under the authority of the Court’s decision in *Terry* and subsequent cases may generally detain people based on reasonable suspicion to believe that these people may be committing or about to commit a crime. Individuals may be frisked when there is reasonable suspicion to believe they may be armed and dangerous. Once again, these detentions and frisks take place without prior judicial authorization. In the great majority of cases, moreover, there is no subsequent judicial review of the officer’s judgment about the propriety of his actions.

No one could deny that patrol officers employ significant street-level discretion in this context, nor that the proper exercise of this discretion is of tremendous importance both to communities and to police. Indiscriminate street stops and searches, after all, were blamed by the Kerner Commission for helping to foster the “deep hostility between police and ghetto communities” that contributed to numerous tragic riots between 1964 and 1968. And even when properly employed, aggressive use of stop and frisk can alienate and estrange communities in ways that ultimately detract from, rather than contribute to, the maintenance of a vibrant civil order.

But these considerations have not led the Court to attempt more stringently to regulate the area of stop and frisk. The Court has found both street detentions and frisks based on reasonable suspicion to be consistent with Fourth Amendment principles despite its recognition that such encounters are not trivial, but are often “annoying,” “frightening,” and even “humiliating” to the persons involved. The Court has upheld the stop-and-frisk authority even though police departments vary widely in the degree to which they train and oversee officers so as to minimize its abuse. It has done so, moreover, irrespective of its recognition that the standard by which officers have to judge the propriety of their actions in detaining and frisking an individual cannot be stated in clear and readily understandable language:

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164 392 US at 1.

165 Reasonable suspicion that a person has committed a crime in the past will also legitimate a *Terry* detention, at least in some circumstances. See *United States v Hensley*, 469 US 221, 227–29 (1985). For a general description of *Terry* and its progeny, see Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 3.8 at 202–14 (West, 2d ed 1992).

166 See *Terry*, 392 US at 12.


Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like “articulable reasons” and “founded suspicion” are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.169

Compare the holding in Morales. There, the majority concluded that the loitering definition in Chicago's gang loitering ordinance afforded police an intolerable amount of discretion—so much discretion that the ordinance in effect entrusted police with lawmaking authority.170 The Chicago law and its implementing regulations, however, at least facially limited the authority granted to officers and carefully defined the circumstances in which this authority might be employed—authorizing only designated officers, for example, in the first instance not to arrest or even to detain, but only to issue “move along” orders to those gang members and their associates remaining in specified public places with no apparent reason. The Morales majority made no effort to answer the dissenters’ charge that its condemnation of the Chicago ordinance was simply inconsistent with the Court’s Fourth Amendment case law and the trust placed in police there to detain, to search, and even to arrest based upon “spur-of-the-moment determinations about amorphous legal standards such as ‘probable cause’ and ‘reasonable suspicion’. . .”171 The Court’s Fourth Amendment jurisprudence, however, substantially undercuts the persuasiveness of the majority’s position that the “no apparent purpose” language in Chicago’s ordinance conferred on police a “vast discretion” too extravagant to be endured.172

B. SHORTCOMINGS IN THE COURT’S VAGUENESS ANALYSIS

One response to all this could well be, “So what?” Perhaps the Court has been too willing to tolerate the expansive street-level

169 United States v Cortez, 449 US 411, 417 (1981). See also Terry, 392 US at 12 (noting “limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street”).
170 Morales, 119 S Ct 1861 (characterizing ordinance).
171 Id at 1885 (Thomas dissenting, joined by Rehnquist and Scalia).
172 Id at 1861 (majority opinion).
discretion conferred on police by broad, clear laws regulating minor misconduct, by the plethora of narrow (and commonly violated) regulations that characterize the legal environment in some spheres of human activity, and even by the Court’s own Fourth Amendment case law. This is no reason to abandon whatever limited judicial control over arbitrary and capricious police enforcement that the facial vagueness doctrine represents.

Indeed, this doctrine may play an important role in disciplining police discretion even if there are contexts in which it has little or no application. The threat of facial invalidation may help prevent outright delegations to police to preserve order in public places in any way they choose. It may condition police and the lawyers who assist them to take administrative steps to monitor or restrain the exercise of discretion—thereby ameliorating the problems posed by laws embodying some degree of vagueness in their terms.\footnote{This point draws upon and profits from Peter Strauss’s more extended discussion of the role of the delegation and void-for-vagueness doctrines in the context of administrative law. See Peter L. Strauss, Legislative Theory and the Rule of Law: Some Comments on Rubin, 89 Colum L Rev 427, 441–45 (1989).} Finally, even if traditional vagueness doctrine can play at best a limited role in addressing arbitrary police enforcement, this in no way deprives the doctrine of its symbolic or expressive dimensions. It may be important, and very simply so, that the Supreme Court retains the authority to denounce the constitutional vice in laws that say that a person’s use of public spaces is subject to the whim of police officers on patrol.\footnote{See Shuttlesworth, 382 US at 90 (quoting Cox v Louisiana, 379 US 536, 579 (1965)).}

Nevertheless, these observations speak generally to the existence of the facial vagueness doctrine and not to the question of how frequently it should be invoked—or whether its invocation in \textit{Morales} was appropriate. Despite the claims of some advocates opposing Chicago’s gang loitering law, the questions it presented to the Supreme Court were neither easy nor clear-cut. Granted, it is an open question whether laws like the one at stake in \textit{Morales} will prove to be effective in addressing gang violence and the neighborhood disintegration it can effect.\footnote{For an argument that law enforcement efforts directed specifically at gangs are often counterproductive because they have the unintended effect of transforming loosely associated groups of young people into more solidly bonded (and threatening) criminal organizations, see Malcolm W. Klein, \textit{Street Gang Cycles}, in James Q. Wilson and Joan Petersilia, eds, \textit{Crime} 217, 235 (ICS Press, 1995).} Many cities like Chicago, how-
ever, are seriously experimenting with new methods of addressing violence in their communities while at the same time attempting appropriately to limit the power of police. The *Morales* majority's approach to vagueness may frustrate at least some of this experimentation while doing little, in reality, to restrain the discretion of patrol officers. Indeed, this approach may even contribute to police abuse—both by fostering an illusion of judicial competence in this arena that saps energy from other efforts at police reform and by depriving police of lawful authority to deal with community problems they are expected to handle.

It is important, then, that the Court begin to articulate a framework within which the real issues at stake might be addressed. This framework cannot limit courts assessing the vagueness of new public order laws to consideration of the text of such laws alone; it must be based upon a realistic assessment of the nature of police patrol discretion and the efficacy of the Court's efforts to influence its character. Caught up in the abstract parsing of the Chicago law's text, the *Morales* majority failed to grapple realistically with the issue of police discretion in many different ways. Four principal shortcomings in the *Morales* majority's opinion, in particular, point in the direction of a new framework for facial vagueness review.

1. *Hypertextualism.* First is the Court's hypertextualism. The majority's parsing of the Chicago ordinance's loitering definition at best provides a less than persuasive rationale for the Court's holding. More problematically, this hypertextual approach to vagueness may result in replacing one strategy for addressing gang loitering with others that present greater risks of police abuse. The majority claimed to have no choice in its interpretation of the Chicago ordinance, saying that it was bound by the Illinois Supreme Court's statement that the ordinance's loitering definition "'provides absolute discretion to police officers to determine what activities constitute loitering.'"176 Fairly read, however, this single sentence in the Illinois Supreme Court's decision was not a construction of the Chicago ordinance to which the Court was bound. Rather, it was a characterization of what the ordinance's language achieved in light of the Illinois court's refusal to read any limitations into it.177 As both Justice Scalia and Justice Thomas argued in their

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176 *Morales*, 119 S Ct at 1861 (quoting *Morales*, 177 Ill 2d at 457).

177 See *Wisconsin v Mitchell*, 508 US 476, 484 (1993) (noting that Court is not bound by such characterizations).
dissents, such characterizations are not binding on the Court: "[This was] not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound)."178

The majority's analysis in fact hinged on its own characterization of how the "apparent purpose" language in the Chicago ordinance (as construed by the Illinois court) would be applied by officers on patrol. The majority reached its conclusion that the Chicago ordinance's loitering definition conferred a "vast discretion" on police only by assuming that virtually all loiterers have an apparent purpose for "remain[ing] in any one place"—so that officers applying the law were required in effect to come up with their own definition of prohibited loitering. This assumption, however, is unpersuasive for the simple reason that it renders Chicago's prohibition on remaining in one place with no apparent purpose utterly meaningless. In the Solicitor General's words, such a law "would prohibit nothing at all."179 But once this assumption is set aside, the judgment whether the Chicago ordinance's language is sufficiently definite becomes considerably more difficult—and precisely because the law would seem to have many clear applications. Two women with neither umbrellas nor raincoats who stand in a doorway anxiously observing a downpour do manifest an apparent purpose for remaining in that doorway—namely, the purpose to stay out of the weather. Just as clearly, "a group that is talking or smoking while remaining in one place would not ordinarily have an apparent purpose, since it would rarely be apparent to an observer that the group's purpose for remaining in that place—rather than walking or moving elsewhere—was to talk or smoke."180

The conclusion that the Chicago law has a substantial number of clear applications, moreover, is at least implicitly supported by the record in Morales. There is little in that record to suggest that during the period the Chicago law was enforced, police had any trouble distinguishing between those gang members and their associates who remained in one place with an apparent purpose and those loitering without any discernible reason for doing so. As the

178 Morales, 119 S Ct at 1876 (Scalia dissenting). See also id at 1887 n 11 (Thomas dissenting, joined by Rehnquist and Scalia).
179 Brief for the United States Supporting Petitioner at 13 (cited in note 3).
180 Id at 12.
petitioner in *Morales* pointed out, "after the many thousands of arrests under the ordinance, [the] record reflects not a single instance in which anyone . . . was arrested, or even ordered to move on, while engaged in political canvassing, planning a demonstration, . . . or doing anything else protected by the First Amendment." The respondents could not even identify a single case in which clearly harmless loitering (admittedly falling within the statutory language) had been constrained—as, for instance, might have occurred if a social worker, minister, or other responsible adult found talking to gang members for the purpose of advising them to change their ways had been ordered to move along.182

The very difficulty of the judgment demanded in *Morales* suggests the importance in cases like this of considering not only the text of the law under review, but also alternative ways in which police might deal with the problem to which a given public order law is addressed. Thus, the *Morales* Court should have considered whether Chicago's gang loitering law might be preferable to alternatives like juvenile curfews precisely because police discretion in the gang loitering law is more clearly restrained. It should not have overlooked the possibility that Chicago's ordinance might pose fewer problems of arbitrary enforcement than another alternative that police have used to address the problems presented by a gang's turf occupation—namely, the employment of a menu of commonly violated (but admittedly clear) rules specifically to target gang members hanging out in public places.

The Court's neglect of these alternatives is troubling because the choice between Chicago's ordinance and these other approaches to gang loitering has serious implications for the core ambition the Court has articulated for its own jurisprudence—namely, limiting the opportunity for arbitrary law enforcement. In the absence of a gang loitering law, patrol officers in a neighborhood afflicted by gang violence might turn to jaywalking, public littering, and juvenile curfew ordinances to suppress gang activity. An enforcement effort employing laws formally applicable to many people but directed narrowly at gang members, however, could well result in complaints about harassment—complaints to which police management would likely respond by citing the po-

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181 *Chicago v Morales*, No 97-1121, Brief for the Petitioner, at 22.
lice department’s responsibility for enforcing the law. Such exchanges between police managers and community residents are not uncommon, but they have baleful effects on the project of reasonably restraining the potential for arbitrary enforcement. This is because such exchanges obscure rather than illuminate the issues surrounding the discretionary use of police authority—and in ways simply not possible when, as in the case of Chicago’s gang loitering ordinance, a law is the subject of intense public scrutiny and is employed more precisely to deal with the problem for which it was enacted.

This is not to suggest that the vagueness question in Morales was simple, nor that Chicago’s gang loitering ordinance was clearly preferable to other available approaches for dealing with a gang’s occupation of turf. If the Court’s vagueness jurisprudence is to have an effect on the realities of street-level policing, however, it is important that the Court move beyond its narrow focus on the text of the public order laws it reviews. The Court must recognize that the facial invalidation of public order laws that are imprecise to some degree can itself promote arbitrary law enforcement—by pushing police to employ admittedly clear laws for purposes other than those for which they were enacted, and in contexts where the exercise of police discretion is concealed. The vagueness doctrine’s traditional concern is to avoid the potential for arbitrariness that arises when imprecise laws delegate basic policy matters to police officers on patrol. Realism demands an acknowledgment, however, that such delegation can occur even when laws are very precise—and in ways that can make the political control of discretion more difficult than when an admittedly imprecise law is employed.

2. The “move along” provision. The Morales majority next erred by neglecting to consider that the risk that Chicago’s gang loitering law would be misused was mitigated by the law’s limited reach—to gang loitering only when accompanied by the refusal to comply with a police order to move along, and not to gang loitering alone. The majority treated this aspect of the Chicago law dismissively, and as if it was wholly irrelevant to the ordinance’s po-

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183 See Herman Goldstein, Policing a Free Society 105 (Ballinger, 1977).
184 See id at 72.
tential to be used in an arbitrary and capricious way: "[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed," the majority concluded, "does not provide any guidance to the officer deciding whether such an order should issue." In reality, however, this feature of the ordinance was of substantial importance to the question whether Chicago’s law reasonably restrained police.

This is partly because the arrest power threatens individuals with serious consequences—like an arrest record—that are simply not presented by an order to "move along." Indeed, by not at least commenting favorably on this aspect of the Chicago ordinance, the Morales majority missed an opportunity to point municipalities in the direction of less punitive approaches to public order problems. This is unfortunate because such approaches are clearly preferable in many contexts: when the primary interest in enacting a new ordinance is not so much to prohibit an activity entirely, as to aid police in regulating it; when behaviors (like loitering) pose serious problems in communities but do not bear the traditional hallmarks of blameworthiness associated with criminal violations; and when it is difficult for legislators to define in the abstract precisely what behaviors they wish to proscribe. The Court recognized in Village of Hoffman Estates v The Flipside that the need for clarity in a law depends in part on the severity of the penalties that flow from its violation. In Morales, however, the majority overlooked an analogous point—that the potentially harmful effects of legislative imprecision are ameliorated when public order laws limit the arrest authority to cases involving defiance of a police command.

The significance of the Chicago ordinance’s "move along" feature to the reasonable restraint of police discretion, moreover, is not limited to its role in softening the consequences that flow from the law’s enforcement. By hinging the arrest authority on defiance of a police command rather than on simple loitering by gang mem-

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186 Morales, 119 S Ct at 1861–62.
187 For a general theoretical discussion of factors influencing the choice between more or less punitive sanctions, see John C. Coffee, Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It, 11 Yale L J 1875, 1886 (1992).
188 Village of Hoffman Estates, 455 US at 498–99 (expressing more tolerance for vagueness in laws with civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe").
bers and their associates, the Chicago ordinance also severed, to some degree, the connection between the "order maintenance" and "law enforcement" activities of police. This severance lessened the potential for arbitrary enforcement of the gang loitering law in a manner that should also have been considered by the *Morales* Court.

As is now well understood, police serve an order maintenance role that is distinct from their law enforcement role in two important ways. First, police invoking a public order law in service of order maintenance ends are often less interested in "enforcing the law" than in "maintaining a pattern of public order"—in putting an end to conditions or behaviors that threaten the public peace. As a result, many order maintenance problems are handled on the street and informally, without any need for citation or arrest. Second, order maintenance, properly performed, is generally less adversarial than the ferreting out of serious crime. This is partly because the maintenance of public order is often negotiated and thus does not place officers in frankly confrontational relations with people on the street. In addition, order maintenance does not feed the competitive, "crime fighting" self-image of many patrol officers.

The potential interaction between the order maintenance and law enforcement roles of police, however, complicates any analysis of the ways in which patrol officers commonly employ discretion in the performance of order maintenance tasks. Police usually request that citizens desist from behaviors threatening the public order against the backdrop of a law criminalizing the underlying conduct that is the subject of the request. Patrol officers invoking such laws, then, are often tempted to employ them in the same way that traffic regulations are frequently employed—not to encourage people to desist from problematic conduct, but to pursue broader law enforcement goals. An officer may elect to make a "public order" arrest, for instance, without attempting to negotiate an end to troublesome conduct. This is because his real motivation is not

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190 See *Johnson*, 333 US at 14 (discussing "competitive" nature of law enforcement).

order maintenance at all. Instead, the officer wants to arrest so that he can conduct a search incident to arrest in the hope that this search will reveal evidence of more serious crime.

Because police at least generally expect their commands to be followed, however, limiting police authority in the first instance to the issuance of a “move along” order lessens the temptation on the part of police to employ a low-level public order law simply to gain the authority to search.\textsuperscript{192} This is a significant advantage. The ferreting out of serious crime is an intensely competitive enterprise that poses a substantial risk of excessive police zeal.\textsuperscript{193} Order maintenance, properly performed, is altogether different. By partially disentangling police measures that are principally directed at promoting and maintaining public order from the more adversarial business of investigating serious crime, then, the Chicago ordinance’s “move along” feature at least reduced the risk of arbitrary and capricious enforcement.

3. **Administrative measures.** The next area in which the *Morales* majority failed to grapple realistically with the subject of police discretion concerns the Court’s treatment of the Chicago Police Department’s efforts to regulate and to monitor enforcement of the gang loitering law. The Court dismissed the Chicago Police Department’s attempt to impose administrative controls on the use of Chicago’s gang loitering ordinance, noting simply that the provision in General Order 92-4 limiting enforcement of the ordinance to designated areas in Chicago “would not provide a defense to a loiterer who might be arrested elsewhere.”\textsuperscript{194} This and other provisions in General Order 92-4, however, if implemented carefully, had the capacity substantially to ameliorate potential problems with the discretionary enforcement of Chicago’s gang loiter-

\textsuperscript{192} It is impossible entirely to separate order maintenance from law enforcement motives in policing as it is presently constituted. By approaching gang members in public places to issue “move along” orders, for example, police may thereby gain the ability to conduct legitimate *Terry* frisks for safety purposes—frisks that may uncover evidence to be used in the prosecution of serious crime. See, e.g., Pooley, *One Good Apple*, Time at 56 (cited in note 155) (noting observation of New York City police official that enforcement of public drinking law in New York has permitted officers to locate weapons carried by people stopped on the street). The formulation of Chicago’s gang loitering law, however, ameliorates the problem posed by the interaction of order maintenance and law enforcement responsibilities in ways that should have been considered by the Court.

\textsuperscript{193} See *Johnson*, 333 US at 14.

\textsuperscript{194} *Morales*, 119 S Ct at 1862.
ing law—and regardless whether disregard of these provisions constituted a defense at trial.

Thus, it is important that police managers in Chicago at least limit the group of officers authorized to enforce Chicago's gang loitering ordinance to specially trained police knowledgeable about the gangs and gang members operating in their neighborhoods.\(^{195}\)

Indeed, to the extent that a police department structures its work to ensure that officers develop significant community-specific knowledge about the problems they are addressing, the exercise of police discretion is likely to be both better informed and more judicious. This reduces the potential for capricious exercises of police discretion to a significant degree.

Consider, for example, the position of the roving, citywide tactical team that last year confronted Amadou Diallo in his New York City foyer. Those officers approached Diallo, a local street peddler, based on their suspicion that he had committed a serious crime. But the officers had little connection to the neighborhood they were patrolling and little community-specific knowledge to draw upon in making the street-level judgment that Diallo was a likely suspect.\(^{196}\) The results in that case were tragic: Diallo, an immigrant with no connection to the crime the officers were investigating, ended up "dead from a hail of bullets" and perhaps simply because "he acted furtively when confronted . . . by a band of plain-clothed armed men."\(^{197}\)

Incidents involving officers confronting strange neighborhoods and people they do not know rarely end as tragically as in the Diallo case. Surely it makes a difference, however, that General Order 92-4 did not contemplate sending officers into unfamiliar neighborhoods for the purpose of "rounding up" gang members and their associates. The order limited enforcement of the ordinance to designated police personnel who were required to familiarize themselves with information regarding the criminal street gangs active in the neighborhoods in which these officers worked.\(^{198}\) Further, enforcement of Chicago's gang loitering ordi-

\(^{195}\)See Chicago Police Department, General Order No 92-4 at §§ III.C, VI.C.1 (cited in note 51).

\(^{196}\)See Wesley G. Skogan, Everybody's Business, Boston Rev 15, 16 (Apr/May 1999).

\(^{197}\)Id at 15.

\(^{198}\)See Chicago Police Department, General Order No 92-4 at §§ III.C, VI.C.1 (cited in note 51).
nance was limited to areas designated in advance as places where gang loitering had significantly affected the surrounding community. Such designations were to derive at least in part from some measure of community consultation.\textsuperscript{199} The overall thrust of these provisions, then, was to encourage police to analyze a neighborhood’s problems and to determine in advance the need to employ the gang loitering law in that neighborhood. Properly implemented, these provisions in General Order 92-4 had the capacity to influence the exercise of police discretion in profound and beneficial ways.

Other provisions of Chicago’s police regulations were likewise relevant to the question whether police discretion was reasonably restrained. The requirement that officers making arrests pursuant to the gang loitering law prepare written reports describing the circumstances giving rise to probable cause to arrest, for instance, represented a potentially significant constraint on the opportunity for arbitrary enforcement.\textsuperscript{200} Records of this type facilitate public review of exercises of police discretion and also provide police managers with helpful information about the behavior of their officers.\textsuperscript{201} General Order 92-4 also contemplated that the department’s records regarding gang members would be regularly updated in ways designed to help ensure that officers exercising discretion in the enforcement of the gang loitering law would be acting on the basis of accurate information. Thus, these records were to contain “only the names of individuals the Department ha[d] concluded that it ha[d] probable cause to believe [were] members of criminal street gangs.”\textsuperscript{202} The order provided for reg-

\textsuperscript{199} See id at § VI.A.1. In oral argument, at least one Justice seemed to discount this administrative requirement because the police regulations did not provide for public designation of those parts of the city determined to be places where the public presence of gang members had resulted in “a demonstrable effect on the activities of law abiding persons in the surrounding community.” See US S Ct Official Tr, \textit{Morales} at 22–23 (cited in note 182). Even internal administrative requirements, however, can help constrain the potential for arbitrary police enforcement—and in this case without imposing the costs on borderline neighborhoods that would likely flow from any formal public designation of their gang-infested status.

\textsuperscript{200} See Chicago Police Department, General Order No 92-4 at § VI.3.3 (cited in note 51).


\textsuperscript{202} Chicago Police Department, General Order No 92-4 at § VI.A.5 (cited in note 51).
ular deletion of the names of individuals apparently no longer actively involved in gang activity.203

Perhaps Chicago’s police regulations were implemented badly. Perhaps as implemented these regulations were even inadequate to the task of restraining the discretion of Chicago police. For the purpose of the majority’s analysis in Morales, however, it was a matter of no significance whatsoever that Chicago’s police managers did much more than simply encourage widespread enforcement of the gang loitering law. This approach to vagueness is simply wrong. As the Court said in Ward v Rock Against Racism, the administrative interpretation and implementation of a law are “highly relevant” to facial vagueness analysis.204 By not focusing on this aspect of the case, the Court missed an opportunity to provide both legislators and police managers with the incentive to experiment with innovative administrative approaches to the reasonable restraint of police.

4. Proposed changes to Chicago’s gang loitering law. Perhaps the shortcomings in the Morales majority’s approach to vagueness, however, are most evident not upon consideration of what the majority opinion omits, but upon consideration of what the Justices in the majority chose to say. Both Justice Stevens, writing for the majority, and Justice O’Connor, in her concurring opinion, empathized with the efforts of Chicago communities to address the serious gang problems afflicting them. Unusually, they even suggested ways in which Chicago might constitutionally regulate the loitering of gang members. But the very changes to Chicago’s gang loitering ordinance that these Justices proposed attest to the failure of the Court to grapple realistically with the issue of police discretion. Indeed, they demonstrate that the majority has failed to fash-ion a framework for its vagueness analysis that represents an effective response to the potential for arbitrary and capricious police enforcement.

Consider first the majority’s conclusion that a law prohibiting only loitering having an “apparently harmful purpose or effect” would “no doubt” satisfy vagueness review.205 It is impossible to conclude, as the majority blithely does, that officers charged with dispersing loiterers remaining in a place for an “apparently harm-
ful purpose” are significantly more constrained in the exercise of their discretion than officers acting to disperse those loiterers remaining for “no apparent purpose” whatsoever. Indeed, as the dissenters urged, an ordinance requiring officers to ascertain whether a group of loiterers has “an apparently harmful purpose” would seem to require these officers to exercise more discretion—more judgment in the law’s application—than a law directing them to disperse loiterers hanging out for no apparent purpose at all.206 Similarly, a mandate to officers to identify those loiterers remaining in any one place with “apparently harmful effects” would seem to require a substantial amount of judgment in its application. At least in the absence of some legislative specification of what these effects might be, such a law seems no better than the law enacted in Chicago.

Indeed, the Court ignores significant sociological research showing that patrol officers invoking public order laws in the service of order-maintenance ends do not consider these laws and then apply them to the facts in the manner of a law student taking an exam. Rather, police officers blend legal knowledge, “common sense,” and various behavioral norms in using such laws to deal with problems they are called upon to handle.207 In the words of one scholar:

I am not aware of any descriptions of police work on the streets that support the view that patrolmen walk around, respond to service demands, or intervene in situations, with the provisions of the penal code in mind, matching what they see with some title or another, and deciding whether a particular infraction is serious enough to warrant being referred to further process.208

If police do not invoke the law in the manner of a law student taking an exam, however, the subtle differences in language discussed by the majority in Morales are unlikely to make any difference to the behavior of officers on patrol. Such subtle differences are also unlikely to affect the potential for police arbitrariness. The majority’s approach to the reform of Chicago’s gang loitering law is thus unpersuasive when viewed in light of the available empirical evidence about the behavior of police.

206 See id at 1885 (Thomas dissenting, joined by Rehnquist and Scalia).
207 See David Dixon, Law in Policing 278 (Clarendon, 1997).
208 Bittner, Aspects of Police Work at 245 (cited in note 139).
This approach, moreover, is also unpersuasive when examined entirely on its own terms. Consider yet another modification to Chicago’s gang loitering law discussed by the Court. The *Morales* majority suggested (without explicitly affirming) that limiting the criminal penalties in Chicago’s gang loitering law to gang members alone might well cure the vagueness problem identified in the ordinance. Justice O’Connor, in her concurrence, was definite on this point: “[L]imitations that restricted the ordinance’s criminal penalties to gang members,” she said, “would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court.”

This position, however, undercuts entirely the stated rationale for the Court’s holding. If the problem with the Chicago ordinance is really the one identified by the majority (namely, that the vagueness permeating the law creates too great an opportunity for its arbitrary enforcement), it makes little sense to argue that limiting the criminal penalties in Chicago’s gang loitering law to gang members alone “solves” the problem. In Justice Scalia’s words:

> [I]f “remain[ing] in one place with no apparent purpose” is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members alone. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.

To a significant degree, then, it is fair to conclude that the majority in *Morales* both failed to consider factors truly relevant to a realistic approach to police discretion and focused on factors of little account. The result is a majority opinion that does not persuade and cannot assist localities in developing meaningful restraints on arbitrary and capricious law enforcement. This is not to say that a more realistic jurisprudence can render judgments like the one called for in *Morales* simple and clear-cut. Such a jurisprudence, however, could encourage localities to experiment with

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209 See *Morales*, 119 S Ct at 1862.

210 Id at 1865 (O’Connor concurring in part and concurring in the judgment, joined by Breyer).

211 Id at 1879 (Scalia dissenting).
approaches to the policing of public order that might more meaningfully constrain the opportunity for police arbitrariness.

III. A Realistic Vagueness Jurisprudence

So how might a more realistic vagueness jurisprudence look? At the start, such a jurisprudence would be rooted in a recognition of both the breadth of police enforcement discretion and the necessity for such discretion if police are adequately to perform their jobs. Police discretion, especially in the enforcement of low-level offenses, is a necessary consequence of limited resources and the need to prioritize. Beyond these factors, moreover, it is also a natural outgrowth of other variables: the recognition that not all problems faced by police are best addressed through law enforcement, and that not all communities can or will tolerate full enforcement of laws specified by the legislature. This may seem obvious to informed observers today. As Justice O'Connor stated in her concurrence, "some degree of police discretion is necessary to allow the police ‘to perform their peacekeeping responsibilities satisfactorily.'"212 As recently as forty years ago, however, "the prevalent assumption of both the police and the public was that the police had no discretion—that their job was to function in strict accordance with the law."213 And this notion that police are ministerial officers—an idea that police have sometimes encouraged—still pervades much of the public discourse about law enforcement in ways detrimental to the reasonable restraint of arbitrary and capricious police behavior.

That said, it is equally important to affirm that police can be held reasonably accountable for the exercise of enforcement discretion. Much of the discussion here has emphasized the degree to which the void-for-vagueness doctrine creates an illusory sense of formal accountability in its command that laws be sufficiently precise so as to reasonably constrain enforcement discretion. Indeed, the doctrine has been cast in the worst of all possible lights: as an ineffective constraint on abusive police conduct that may even contribute to such abuse by casting officers left without lawful author-

212 Id at 1863 (O'Connor concurring in part and concurring in the judgment, joined by Breyer) (quoting id at 1885 (Thomas dissenting, joined by Rehnquist and Scalia)).
213 Goldstein, Policing a Free Society at 93 (cited in note 183).
ity to address real community problems in the role of “dirty workers” who furtively bend rules or employ inappropriate laws to deal effectively with the situations they are called upon to handle.\(^{214}\)

The vagueness doctrine, however, is but one small part of the legal and sociopolitical context in which police operate. Granted, there are police departments in which enforcement discretion, if not explicitly denied by police managers, is still exercised in a sub rosa and ad hoc fashion. There are also police departments, however, in which effective constraints on the opportunity for arbitrary and discriminatory enforcement have already emerged—in which a substantial effort is made to acknowledge enforcement discretion, to seek input from communities about its exercise, and to learn from experimentation within the department with different methods or styles of law enforcement. The differences between these two types of police department, moreover, translate into significantly different potentials for the arbitrary and capricious exercise of enforcement authority—and regardless of any differences in the clarity of the laws that they enforce.

A realistic vagueness jurisprudence, then, should work to stimulate local police departments to experiment with new and promising methods of promoting accountability in the exercise of police discretion. Admittedly, this is no easy task. The objectives behind the rules and procedures set by courts are always at least partially transformed by their interaction with the subcultural rules of police, the police organization’s internal structure, and the practical exigencies of policing.\(^{215}\) My colleague Michael Dorf’s model of “provisional adjudication,” however, outlines a way in which courts might focus more attention on the likely consequences of their decisions in order to find workable solutions to the problems they must address.\(^{216}\) This form of adjudication is premised on the recognition that courts sometimes need to learn from experimentation with varied approaches to such problems. Professor Dorf’s work suggests how courts might import some measure of realism

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\(^{214}\) For a discussion of how police not provided with “explicit authority to deal effectively with the problems they encounter” often become “dirty workers” who furtively “‘[do] what has to be done’ through the exercise of their discretion,” see George L. Kelling and Catherine M. Coles, *Fixing Broken Windows* 167 (Free Press, 1996).


into their facial vagueness assessments without thereby assuming the impossible burden of providing one-shot, definitive answers to empirical and policy questions concerning the best way in which to restrain police.

Simply stated, courts addressing difficult vagueness questions should consider whether the exercise of police discretion contemplated in challenged public order legislation will take place under conditions that provide reasonable assurances that the relevant police department will be accountable for the way in which it employs this discretion. Such assurances will not derive solely from the clarity of the statutory text, however, but from a more realistic assessment of the ways in which a public order law will be used. This approach to facial vagueness would both permit and stimulate experimentation with different methods of promoting police accountability. By tolerating some measure of disagreement among state and lower federal courts regarding the reasonableness of such methods, the Supreme Court might further encourage this experimentation. The Court might also maximize its own ability over time to make at least some judgments about the relative efficacy of these various methods of ensuring that the exercise of police discretion is reasonably constrained.

This approach to vagueness thus differs sharply from that endorsed by Kenneth Culp Davis, one of the early writers on the void-for-vagueness doctrine and its role in restraining police. Professor Davis recognized the limited effects of the vagueness doctrine on the scope of police enforcement discretion and proposed that the Court should extend the vagueness principle beyond the face of legislation to address vagueness in police enforcement policies:

The Court [in Papachristou v City of Jacksonville] quite properly responded to the problem before it in asserting that lack of standards in the ordinance is unconstitutional. But I think the fundamental [point] may be broader—that vagueness of law or of enforcement policy is unconstitutional because it permits or encourages arbitrary and discriminatory enforcement of the law. . . . I do predict that the time will come when courts will generally hold that unnecessary or undue vagueness in an enforcement policy is unconstitutional, because of the reasons the unanimous Supreme Court stated in the Papachristou opinion. 217

The Court never adopted this proposal, for what seem in retrospect to be good and sufficient reasons. As Professor Davis himself admitted, the task for the Court of working out the limits and applications of his idea was truly "enormous."\textsuperscript{218} It would have required courts across the country to determine for thousands of far-flung police agencies whether "unnecessary or undue vagueness" in their enforcement policies rendered these policies unconstitutional—a difficult job for generalist courts lacking knowledge about both internal law enforcement practices and the public order problems faced by police.\textsuperscript{219} Even more fundamentally, Davis's work on police discretion did not grapple fully with the difficulties of drafting enforcement rules both sufficiently precise to establish accountability in the terms he contemplated and still flexible enough to achieve tolerably adequate results in terms of the problems with which police must deal.\textsuperscript{220} Nor did Davis fully explore the question whether the mere elaboration of enforcement policies could even meaningfully constrain police in their routine encounters with citizens on the street.

Davis's insight was important: that courts concerned about reducing the potential for arbitrary and discriminatory police enforcement needed to focus more attention on the ways in which police actually employ laws regulating low-level misconduct. But his proposal demanded too much and too little at the very same time. The inadequacies of Davis's proposal, however, contain lessons that point in the direction of the alternative approach outlined here. This approach does not require courts to take on the task of passing on all enforcement policies. It does not lock police departments into overly rigid administrative rules that frustrate accomplishment of the substantive ends of policing while at the same time failing in their objective to constrain police.

This is not the place to specify all the features in a given law or its implementing plan that a more realistic approach to vagueness might take into account. Like all tests premised on reasonableness, the one articulated here will permit many factors to be

\textsuperscript{218} Id at 137–38.

\textsuperscript{219} See id at 138.

\textsuperscript{220} For a provocative theoretical account of the general conflict between accountability and the flexibility required for effectiveness in bureaucratic administration—as well as a proposal for transcending this conflict—see Michael C. Dorf and Charles F. Sabel, Drug Treatment Courts and Emergent Experimentalist Government, Vand L Rev (forthcoming 2000).
considered. We can articulate some principles, however, that might guide the overall analysis of the question whether police enforcement discretion has been reasonably constrained.\textsuperscript{221} The articulation of these principles, moreover, can serve as prelude to some final consideration of a more realistic approach to vagueness in the area of public order policing.

A. THREE PRINCIPLES OF A REALISTIC VAGUENESS JURISPRUDENCE

1. Openness. First is the principle of openness. As I have suggested, the healthy evolution of police organizations has long been stymied by the failure of police departments frankly to acknowledge the broad scope of police discretion and to explain the rationale for its exercise in different ways. Accountability is simply not possible when discretion is exercised furtively and with an air of illegitimacy. There are few reasons, moreover, for the secrecy that has often surrounded the formulation and implementation of enforcement policies involving public order problems. The goal of enforcement in this context is not the detection and punishment of offenders (a goal that may require that enforcement rationales remain unexplained), but compliance with legislated behavioral norms. Indeed, the public discussion of a public order problem and the police department’s proposed response may help ameliorate the problem before enforcement ever takes place. And there is much to be gained from openness about enforcement discretion in terms of limiting the opportunity for its abuse.

Courts evaluating whether the admitted vagueness in a given public order law is tolerable, then, should consider whether the police department implementing this law is participating in a process in which it explains its reasons for employing the law in a given way and also reports on its results in a manner that permits evaluation of the efficacy and propriety of the strategy it has chosen.\textsuperscript{222} In the case of Chicago’s gang loitering law, for instance, it is certainly relevant that General Order 92-4, even without public designation of the specific places in which the law would be enforced, did specify the criteria for designating a given area in Chi-

\textsuperscript{221} This analysis builds upon, but also partly departs from, my earlier work on this subject in Livingston, 97 Colum L Rev at 667–70 (cited in note 2).

\textsuperscript{222} For a general discussion of this approach to accountability, see Dorf and Sabel, Vand L Rev (cited in note 220).
cago for gang loitering enforcement. It is likewise relevant that the law required the preparation of written reports each time an arrest was made. Standing alone, these measures might not be enough to render a given public order law constitutional. Such measures point in the right direction, however—toward the open acknowledgment of enforcement discretion and the provision of adequate information to ensure that exercises of discretion can be appropriately reviewed within a community.

2. Monitoring. As a second principle of accountability, courts examining a public order law that might be vulnerable to facial vagueness invalidation should also consider whether this law is being employed in such a way as to provide for effective monitoring of its enforcement. Monitoring mechanisms can take a variety of forms. Monitoring might be performed by a legislative oversight committee armed with the rich information about enforcement that a reasonably constrained police department could be required to provide. Courts might participate in this role through their consideration of “as applied” challenges and their review of the sufficiency of the evidence in individual cases.

Perhaps most promisingly, the monitoring function might also arise from the premises of community policing. In a police department that has implemented the principles of this substantive policing theory, neighborhood residents are involved in identifying local public order problems and prioritizing among them “in a constructive dialogue with one another and with police officers who work in their immediate area.”223 In Chicago, this effort at police-community partnership occurs at monthly public meetings held in each of the city’s 279 small police beats.224 In theory, when police and citizens meet together “to report on what they have accomplished since the last meeting, and what they will work on next,” this form of cooperation can itself play an important role in monitoring police order maintenance activities.225 Certainly when the implementation of a challenged public order law is built into such an organizational framework—a framework dedicated to “securing month-in, month-out accountability to residents for

224 See id.
225 Id.
what beat officers are doing”—this is a relevant factor to consider in assessing the likelihood that this law will be employed in an arbitrary and capricious way.226

3. Limited police authority. Third and finally, courts evaluating whether the measure of indeterminacy in a given public order law is acceptable should consider whether reasonable efforts have been made to limit police authority. This is simply an extension of traditional vagueness review. In employing the facial vagueness doctrine, courts already purport to limit police authority by forcing legislatures to define prohibited conduct more carefully so that patrol officers cannot arbitrarily employ overly ambiguous laws. The principle at work here is precisely the same—that reasonable constraints on enforcement authority are beneficial because they reduce the opportunity for police abuse. In a more realistic approach to vagueness, however, such constraints need not derive solely from clarity in an ordinance’s text.

Thus, courts might consider whether a police department, in ways analogous to an administrative agency, has given a law’s restrictions “more precise shape” in advance of “subject[ing] citizens to penalties for unwanted behavior.”227 They might take into account both provisions for warnings before arrest and regulations like the one in General Order 92-4 limiting enforcement authority to specially designated officers. Even things like sunset provisions, surprisingly, might count in this fuller analysis—as imposing a time limitation within which a given degree of police enforcement authority will be tolerated and also at least potentially attesting to a good faith effort on the part of the legislative body to ensure a periodic reassessment whether police are implementing a public order law in a fair and equitable way.

B. A REALISTIC VAGUENESS JURISPRUDENCE REASSESSED

The constitutional test outlined here does not constitute a radical departure for the vagueness doctrine, even if the adjudication of facial vagueness challenges pursuant to this test might require hearings and the amassing of an evidentiary record in ways not

226 Id at 16.

often deemed necessary in the traditional approach. This is because the test does not reject the central premise of the Court’s vagueness jurisprudence—namely, that courts bear some constitutional responsibility for limiting the opportunity for the arbitrary application of legal prohibitions. Instead, the test seeks to transcend the limitations of the doctrine as employed in Morales, and in ways that offer the reasonable prospect that courts might actually—as opposed to symbolically—promote the accountability of police.

The test has two concrete advantages. First, this test avoids the false choice evident in the Morales opinions. These opinions seem to proffer only two options for courts employing the facial vagueness doctrine. First is the majority’s approach: an approach to facial vagueness that authorizes courts to second-guess community preferences about the regulation of public order in what is at best an illusory response to the problems posed by unconstrained police. Second is the dissenters’ approach. Admittedly, this approach avoids even the appearance that courts are engaged in the ad hoc review of public order legislation. It avoids this appearance, however, only by so limiting the facial vagueness doctrine as to essentially repudiate any role for this doctrine in contributing to the reasonable constraint of police. The present test, in contrast, focuses courts on a realistic assessment of the ways in which public order laws will be used. This focus guides judicial decision making so that opinions in this area can be both persuasive and effective in the terms in which they are written.

Second, the constitutional test outlined here stimulates those actors best able to devise and then to experiment with new and effective approaches to the reasonable constraint of police—namely, legislatures and police departments. The incentives set by current vagueness doctrine send these actors off on a chimerical quest for ever greater standards of clarity in the public order laws they propose. A realistic approach to vagueness doctrine, in contrast, enlists them in experiments that will have real-world consequences for the ways in which police employ public order laws on the street. This approach thus promotes police accountability. But it does not impose on generalist courts the impossible task of fully defining the conditions pursuant to which accountability can be achieved.

One objection to this analysis might be that it proposes what
amounts to a one-way ratchet. Thus, some public order laws now vulnerable to facial vagueness review might be upheld pursuant to this approach. Relatively clear laws could not be challenged for vagueness, however, despite the opportunity for arbitrary enforcement they present. This "realistic" approach to the void-for-vagueness doctrine, then, in effect expands police power. This objection, however, ignores both the benefits that would accrue from the realistic approach and the detriments that now flow from sometimes denying police legitimate authority to deal with problems they are expected to handle.

The benefits of the realistic approach could be considerable. By encouraging police departments to adopt measures that open up police enforcement discretion to monitoring and that reasonably constrain the scope of police authority, courts may generate changes not only in the area of order maintenance, but in other areas of police work as well. Police may come to recognize that they have much to gain from the favorable review of monitoring authorities. They may begin to appreciate the value of openness as a way in which more generally to enlist community support for enforcement efforts.

Even if the realistic approach to vagueness has no ripple effects on other contexts in which police exercise discretion, however, this approach is still preferable to the Morales majority's approach. Courts do no service to the project of police reform when they enunciate tests that create an illusion of constraint that does not in fact exist. Nor do they promote police accountability by denying police legitimate authority to address community problems. The realistic approach offers a better way in which to assess whether the vagueness in a public order law truly threatens to promote arbitrariness on the street. Moreover, it brings courts closer to realizing the aspiration that courts themselves have articulated for the facial vagueness doctrine.

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The majority in Morales made little progress in illuminating pressing issues concerning the relationship between police and communities. I should acknowledge in conclusion, however, that the Court's failure to shed light on these issues may be only partly attributable to the way in which the Morales majority approached the subject of police discretion. Indeed, the majority's suggestion that Chicago's gang loitering ordinance might be valid if applied
to gang members alone raises the possibility that it was Chicago’s regulation of “innocent conduct,” rather than concerns about police discretion, that really drove the result in this case. It is not my purpose in this conclusion to address the substantive dimensions of vagueness review. But a brief observation on the substantive undercurrents to Morales is in order.

The facial vagueness doctrine is sometimes employed by courts embracing Professor Sunstein’s “judicial minimalism” to avoid difficult substantive issues—as when a potentially suspect law is invalidated for vagueness, leaving open the question whether this law was unconstitutional on other, substantive grounds. Admittedly, there are often good reasons for the judicial reticence that this substantive use of vagueness permits. Such reticence, however, is not always to be applauded. And perhaps it should not be applauded here.

If the problem whether Chicago’s gang loitering ordinance infringed fundamental rights is complex, so too is the problem faced by communities seeking both to restrain their police and to confer on them those reasonable powers that might be of help in dealing with pressing problems of crime and disorder. Granted, realism about police patrol cannot illuminate the question whether activities like public loitering are protected by the Due Process Clause. Such realism, however, can help communities to better regulate their police. This article has suggested that the police need to deal forthrightly with communities in acknowledging their exercise of discretion and in seeking terms of accountability. If this is true for police, however, it may also be true for the Court. To the extent that substantive considerations are important to the outcome of cases like Morales, the Court may help communities by at least focusing them on the issues truly at stake in the regulation of public order. Perhaps it is time for the Justices, like police, to speak clearly.

228 See Morales, 119 S Ct at 1862.