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Constitutional Law - The Vagueness Doctrine: Two-Part Test, or Two Conflicting Tests - City of Chicago v. Morales

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CONSTITUTIONAL LAW—The Vagueness Doctrine: Two-Part Test, or Two Conflicting Tests? *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999).

INTRODUCTION

For approximately two decades, criminal street gangs have plagued American cities with violence, drug dealing, and intimidating conduct. Cities have responded with a wide variety of law enforcement strategies,[1] many of which operate on the fringes of the Constitution. In *City of Chicago v. Morales*,[2] the United States Supreme Court utilized the often confused vagueness doctrine to strike down a broadly sweeping loitering law aimed directly at criminal street gangs.

In 1992, the Chicago City Council held hearings to explore the problems criminal street gangs present for the city's residents.[3] Witnesses testified that gang members assemble in public places as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary citizens.[4] In reaction to its findings, the Chicago City Council enacted § 8-4-015 of the Chicago Municipal Code (Ordinance).[5] The Ordinance

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1. 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, 198-99 (1998). These strategies are often referred to as "order maintenance policing" and include the enforcement of loitering laws, curfews, and civil injunctions.
2. City of Chicago v. Morales, 119 S. Ct. 1849 (1999).
3. *Morales*, 119 S. Ct. at 1854.
4. *Id.*
5. The city council incorporated its findings in the preamble to the Ordinance, as follows:

> WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and
> WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
> WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
> WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

instructs police officers to order groups of loiterers to disperse or face arrest if the officer reasonably believes one of the loiterers is a criminal street gang member.[6] Refusal to promptly obey the dispersal order creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service.[7]

Two months after the Ordinance was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern enforcement of the Ordinance.[8] The order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way."[9] The city of Chicago enforced the Ordinance for three years.[10] During this time, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the Ordinance.[11]

WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear[.]

Chicago, Ill., Municipal Code 8-4-015 (1992).

6. *Id.* Section 8-4-015 provides in pertinent part:

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

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

(c) As used in this section:

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

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

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

(d) Any person who violates this section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months or both. In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to 1-4-120 of this Code.

7. *Id.* at (d).

8. *Morales*, 119 S. Ct. at 1855. During the hearings preceding the adoption of the Ordinance, "representatives of the Chicago law and police departments informed the city counsel that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordinance itself." Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997).

9. *Morales*, 119 S. Ct. at 1855 (quoting Chicago Police Department, General Order 92-4, reprinted in App. to Pet. for Cert. 65a.). General Order 92-4 confines enforcement of the Ordinance to designated police officers working in designated areas and outlines criteria for defining street gangs and membership therein. *Id.* at 1855.

10. *Id.* at 1855, n. 6.

11. *Morales*, 119 S. Ct. at 1855.

In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the Ordinance, but eleven others held that it was invalid.[12] The Illinois Appellate Court, in *Chicago v. Youkhana*, consolidated the pending appeals and invalidated the Ordinance on four counts: The Ordinance (1) impairs the freedom of assembly of non-gang members; (2) is impermissibly vague; (3) improperly criminalizes status rather than conduct; and (4) allows arrest without probable cause.[13] The Illinois Supreme Court affirmed, holding the Ordinance violates the Due Process Clause because it is impermissibly vague and an arbitrary restriction on personal liberties.[14] The United States Supreme Court granted certiorari to decide whether the Illinois Supreme Court correctly held that the Ordinance violates the Due Process Clause because it is impermissibly vague.[15] In a six to three decision, the Court affirmed, holding the Ordinance impermissibly vague because it fails the requirement that legislatures establish minimal guidelines to govern law enforcement.[16]

Focusing on the *Morales* decision, this case note argues that the vagueness doctrine is not the two-part test it is claimed to be, but is rather two separate tests that conflict with each other. This note explains these two tests and outlines their development through vagueness doctrine precedent. This note then addresses which of these tests best represents the purposes of the vagueness doctrine. Finally, it concludes by addressing the potential consequences of the *Morales* Court's advisory commentary.

BACKGROUND

The Vagueness Doctrine—Two Conflicting Tests

In mounting a void-for-vagueness facial challenge the challenging party asserts that the language of the challenged law fails constitutional standards.[17] Courts apply the vagueness doctrine to determine whether a void-for-vagueness facial challenge will succeed.[18] As commonly

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12. Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 384, n. 26 (1995).

13. Chicago v. Youkhana, 660 N.E.2d 34, 36 (Ill. 1995).

14. Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997). The Illinois Supreme Court did not address whether the Ordinance creates a status offense, permits arrests without probable cause, or is overbroad. *Id.*

15. *Morales*, 119 S. Ct. at 1854.

16. *Id.* at 1861-62.

17. For commentators' perspectives on void-for-vagueness facial challenges, *see generally* John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Anthony G. Amsterdam, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Mark A. Richard, Comment, *The Void-for-Vagueness Doctrine in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.: Revision or Misapplication?*, 34 HASTINGS L.J. 1273 (1983).

18. The doctrine's rationale stems from the Due Process Clause of the Fifth and Fourteenth Amendments – neither the federal government or state governments shall deprive any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V, cl. 4; U.S. CONST. amend. XIV, § 1,

(mis)understood, the vagueness doctrine is a single test composed of two independent elements—the minimal guidelines requirement and the fair notice requirement.[19] Failure to meet either element renders a law void for vagueness.[20] The minimal guidelines requirement mandates that "laws must provide explicit standards for those who apply them," so that arbitrary and discriminatory enforcement is prevented.[21] The fair notice requirement mandates that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[22]

Through Supreme Court precedent, the minimal guidelines requirement and the fair notice requirement have developed into two separate tests. The minimal guidelines requirement seems to have developed into the "overly broad" test, while the fair notice requirement has developed into the "hard-core violator" test.[23] The two tests impose conflicting thresholds upon the challenging party.

The "Overly Broad" Test

The "overly broad" test follows the premise that ill-defined laws necessarily proscribe an overly broad amount of conduct.[24] Its analysis employs two steps. First, the challenger must prove, with the benefit of third-party standing, that the law reaches a significant amount of innocent conduct.[25] If the challenger meets this burden, she then must prove that the enforcing officer has discretion to apply the law in an arbitrary or discriminatory manner. In sum, the "overly broad" test requires the challenger to prove that the law's language reaches a significant amount of innocent conduct and allows for arbitrary and discriminatory enforcement. The following void-for-vagueness decisions illustrate how the "overly broad" test developed through the United States Supreme Court's reliance on the minimal guidelines requirement.

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cl. 3.

19. *Morales*, 119 S. Ct. at 1859.

20. *Id.*

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

22. *Grayned*, 408 U.S. at 108.

23. "Overly broad" and "hard-core violator" are names created by the author to describe the conflicting tests that the Court has utilized in void-for-vagueness facial challenges.

24. The "overly broad" test is very similar to the First Amendment overbreadth doctrine. Like overbreadth analysis, the "overly broad" test defines the scope of conduct proscribed by the challenged law through an assertion of third-party rights. The distinction between the "overly broad" test and the overbreadth doctrine is found in their respective rationales. The rationale behind the "overly broad" test is to prevent arbitrary and discriminatory enforcement of laws that proscribe a significant amount of innocent conduct. The rationale behind the overbreadth doctrine is to eliminate laws that have a chilling effect on the public's willingness to exercise First Amendment rights.

25. This step generally occurs in the name of the fair notice requirement. A court will create hypothetical applications to determine if the challenged law distinguishes between innocent and threatening conduct. The "overly broad" test does not question whether the challenged law gives fair warning as applied to the challenger's conduct.

Coates v. City of Cincinnati [26] and *Smith v. Goguen* [27] are decisions in which the Court believed that the challenged law, given a literal reading, was capable of reaching First Amendment rights.[28] In *Coates*, a five-member majority struck down an ordinance that made it a criminal offense for three or more people to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by."[29] Although conceding that "annoying" has a common meaning, the majority concluded that the statute was unconstitutionally vague because it did not say who must be annoyed to justify a conviction.[30] Demonstrating its reliance on the minimal guidelines requirement, the majority concluded its analysis by stating:

> The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. *It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.*[31]

Four Justices argued that the challenged law was not unconstitutionally vague on its face and that the record was too incomplete to determine whether it was vague as applied to the challenging party.[32] In response, the majority stated, "[t]he details of the offense could no more serve to validate

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26. Coates v. Cincinnati, 402 U.S. 611 (1971).

27. Smith v. Goguen, 415 U.S. 566 (1974).

28. The Court has noted on several occasions that it will demand a greater standard of specificity when First Amendment rights are at issue. *Smith*, 415 U.S. at 573. However, this note argues, in cases where the Court relies on the minimal guidelines requirement, the "overly broad" test is applied identically regardless of whether a First Amendment right is at issue. A comparison of the Court's analysis in *Coates* and *Smith* (First Amendment cases) versus its analysis in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), *Kolender v. Lawson*, 461 U.S. 352 (1983), and *Morales* (non-First Amendment cases) illustrates that the "overly broad" test applies to both First Amendment cases and non-First Amendment cases. Furthermore, employing the "hard-core violator" test, Justices filed identically reasoned dissents in both First Amendment cases and non-First Amendment cases. It is not the First Amendment that divides the vagueness doctrine, it is the conflict between the two tests.

29. *Coates*, 402 U.S. 611.

30. *Id.* at 613-14.

31. *Id.* at 614 (emphasis added).

32. *Id.* at 617 (separate opinion by Justice Black); *Id* at 618-21 (White, J., dissenting). Justice White's dissent, joined by Chief Justice Burger and Justice Blackmun followed the "hard-core violator" test, concluding:

> Any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the 'annoying conduct' standard of the ordinance. . . . It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged. *Id.* at 618 (White, J., dissenting).

this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech."[33]

In *Smith*, a five-member majority held a statute imposing a criminal penalty on anyone who "publicly . . . treats contemptuously the flag of the United States" void for vagueness.[34] Demonstrating its reliance on the minimal guidelines requirement, the majority stated:

> We recognized that in the noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. *It is in this regard that the statutory language under scrutiny has its most notable deficiencies.*[35]

The "treats contemptuously" phrase, argued the majority, "allows policemen, prosecutors, and juries to pursue their personal predilections . . . [w]here inherently vague statutory language permits such selective law enforcement, there is a denial of due process."[36] Four Justices employed the "hard-core violator" test,[37] concluding that the majority incorrectly held the statute void for vagueness.[38]

In *Papachristou v. City of Jacksonville*,[39] the Court relied on the minimal guidelines requirement to unanimously strike down an archaic vagrancy statute.[40] The Court held the statute void for vagueness because it encouraged arbitrary and erratic arrests and convictions.[41] Consistent with the first step of the "overly broad" test, the Court determined that the statute prohibited a large amount of innocent conduct.[42] It stated, "[t]he Jacksonville or-

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33. *Id.* at 616.

34. Smith v. Goguen, 415 U.S. 566, 572-73 (1974). The majority held that the statute fails the fair notice requirement because it does not specify what qualifies as "contemptuous treatment." *Id.* at 574. To do so, the majority employed the first step of the "overly broad" test, noting that "contemptuous treatment" encompasses a significant amount of innocent conduct. *Id.*

35. *Id.* at 574 (emphasis added).

36. *Id.* at 575.

37. *See infra* notes 51-54 and accompanying text.

38. Justice White concluded, "I cannot, therefore, agree that the Massachusetts statute is vague as to Goguen; and if not vague as to his conduct, it is irrelevant that it may be vague in other contexts with respect to other conduct." *Id.* at 585-86. (White, J., concurring in judgment). Chief Justice Burger, Justice Blackmun, and Justice Rehnquist agreed with White's conclusion. *Id.* at 590 (Blackmun, J., dissenting); *Id.* at 591 (Rehnquist, J., dissenting).

39. Papachristou v. City of Jacksonville, 405 U.S. 156 (1971).

40. *Papachristou*, 405 U.S. at 162. The unanimity of the Court's decision deserves a footnote in that Justices Powell and Rehnquist did not participate. Justice Thomas' dissenting opinion in *Morales*, joined by Rehnquist, openly criticizes the *Papachristou* decision. *Morales*, 119 S. Ct. 1849, 1883 (1999) (Thomas, J., dissenting).

41. *Papachristou*, 405 U.S. at 162.

42. The challenged statute deemed persons "neglecting all lawful business and habitually spending

dinance makes criminal activities which by modern standards are normally innocent."[43] The Court then criticized the legislative intent behind the statute, stating, "[d]efiniteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[44]

In *Kolender v. Lawson*, the Court relied on the minimal guidelines requirement, holding a California "stop and identify" statute void for vagueness.[45] The statute required persons who loiter or wander the streets to provide "credible and reliable" identification at the request of a stopping officer.[46] The defendant's actual notice was indisputable because he was arrested or detained under the challenged statute on approximately fifteen occasions.[47] Writing for a seven to two majority,[48] Justice O'Connor stated:

> [The statute] as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide 'credible and reliable' identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute.[49]

Thus, concluded O'Connor, "[a]n individual, whom the police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets only at the whim of any police officer who happens to stop the individual. . . ."[50]

The "Hard-Core Violator" Test

The "hard-core violator" test asserts that a law is not required to give fair notice in every application, as long as it clearly proscribes a "core" of conduct.[51] Its analysis employs two steps. First, the challenging party is

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their time frequenting . . . places where alcoholic beverages are sold or served . . ." as criminal vagrants. *Id.* at 158, n. 1. This, the Court concluded, "would literally embrace many members of golf clubs and city clubs." *Id.* at 164.

43. *Id.* at 163.

44. *Id.* at 166.

45. Kolender v. Lawson, 461 U.S. 352, 353 (1983).

46. *Id.*

47. *Id.* at 354

48. Justices White and Rehnquist dissented. White spoke directly of the "hard-core violator" test stating, "[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face. . . ." *Id.* at 370-71 (White, J., dissenting). As an interesting historical note, Chief Justice Burger and Justice Blackmun, both of whom endorsed the "hard-core violator" test in *Coates* and *Smith*, switched sides in *Kolender* and voted with the majority.

49. *Id.* at 358.

50. *Id.* (citing Shuttlesworth v. City of Birmingham, 86 S. Ct. 211, 213 (1965)).

51. *Id.* at 370-71 (White, J., dissenting).

required to prove that the law does not give fair warning as applied to her specific conduct.[52] If the challenger passes the first step, the second step shifts the "burden" to the state. The state must prove, with the benefit of third-party standing, that there is at least one conceivable application where the law would give fair warning.[53] Combining the two steps, the threshold for a successful void-for-vagueness facial challenge under the "hard-core violator" test requires proving that the law fails to give fair warning in every conceivable application.[54] The following void-for-vagueness decisions illustrate how the "hard-core violator" test developed through the Court's reliance on the fair notice requirement.

In *Parker v. Levy*,[55] a five-member majority relied on the fair notice requirement to reverse the Third Circuit's holding that two articles of the Uniform Code of Military Justice were void for vagueness. In that case, Howard Levy was charged and convicted of "conduct unbecoming an officer or gentleman" and "disorders and neglects to the prejudice of good order and discipline in the armed forces."[56] The majority held, "Levy had fair notice from the language of each article that the particular conduct which he engaged in was punishable."[57] The majority acknowledged that "differentiations" existed within its vagueness doctrine precedent, yet mysteriously concluded:

> None of [the differentiations] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and liberal ambit.[58]

In *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*,[59] the Court relied on the fair notice requirement to unanimously reverse the Seventh Circuit's holding that an economic regulation was void for vagueness. Consistent with step one of the "hard-core violator" test, the Court stated, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of

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52. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).

53. *Morales*, 119 S. Ct. 1849, 1871 (1999) (Scalia, J., dissenting). The state gains the benefit of third-party standing because it is simply required to show that one conceivable (i.e., hypothetical) valid application exists.

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

55. Parker v. Levy, 417 U.S. 733 (1974).

56. *Id.* at 737-38.

57. *Id.* at 755.

58. *Id.* at 756.

59. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). The challenged ordinance required a business to obtain a $150.00 license if it sold any items that are "designed or marketed for use with illegal cannabis or drugs." Failure to obtain such license resulted in a fine of not less ten dollars and not more than $500.00. *Id.* at 492.

others."[60] Consistent with step two, the Court concluded that the challenger must prove that the law is impermissibly vague in *all* of its applications.[61] This conclusion cannot be reconciled with the *Papachristou* (pre-*Hoffman Estates*) or *Kolender* (post-*Hoffman Estates*) decisions. Nonetheless, *Hoffman Estates* is frequently cited by lower courts as defining the threshold for void-for-vagueness facial challenges outside the context of the First Amendment.[62]

In *United States v. Salerno*, decided in 1987, the Court expressed a facial challenge threshold nearly identical to that put forth in *Hoffman Estates*.[63] Justice Rehnquist, writing for a six to three majority, stated:

> A facial challenge to a legislative Act is, of course, 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.* The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[64]

Salerno is not a vagueness doctrine case as the terms of the Bail Reform Act were not challenged as impermissibly vague.[65] Nonetheless, a minority of the Court cites *Salerno's* "no set of circumstances" test as the rule governing all facial challenges to laws that have no substantial impact on rights guaranteed by the First Amendment.[66]

PRINCIPAL CASE

In *Morales*, the Supreme Court held Chicago's gang-loitering ordinance void for vagueness because it fails the minimal guidelines requirement.[67] The plurality applied the "overly broad" test and concluded that the

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60. *Id.* at 495.

61. *Id.* at 497.

62. The Supreme Court of California recently relied on *Hoffman Estates* to uphold an injunction forbidding gang members from entering a designated neighborhood. People ex rel. Gallo v. Acuna, 929 P.2d 596, 612 (1997). It held that the challenged terms of the injunction were not impermissibly vague when read in the context of the gang members' behavior. *Id.* at 614. The United States Supreme Court denied certiorari. Gonzalez v. Gallo, 521 U.S. 1121 (1997).

63. United States v. Salerno, 481 U.S. 739, 745 (1987).

64. *Salerno*, 481 U.S. at 745 (emphasis added).

65. The challenged statute was the Bail Reform Act of 1984, which permits a federal court to detain an arrestee without bail, pending trial, on the ground of such arrestee's dangerousness to any other person and to the community. 18 U.S.C.S. §§ 3141 – 3151 (Law. Co-op. 1993 & Supp. 1999).

66. *Morales*, 119 S. Ct. 1849, 1870-71 (1999) (Scalia, J., dissenting). *Id.* at 1886 (Thomas, J., dissenting). Chief Justice Rehnquist and Justices Scalia and Thomas have consistently endorsed *Salerno's* "no set of circumstances" test. The *Salerno* test has created much controversy within and between courts and among scholars. *See infra* notes 126-28.

67. *Morales*, 119 S. Ct. at 1856. Six opinions were filed in the case. Justice Stevens authored a six-

Ordinance fails the minimal guidelines and fair notice requirements.[68] The concurring Justices reluctantly deferred to the state court's construction and concluded that the Ordinance fails the minimal guidelines requirement.[69] The dissenting Justices applied the "hard-core violator" test and concluded that the Ordinance fails neither requirement.[70]

The Plurality

The plurality addressed the Ordinance's purpose, to curb intimidating and illegal conduct by criminal street gangs, and concluded:

> We have no doubt that a law directly prohibiting such intimidating conduct would be constitutional, but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.[71]

The plurality refused to apply the First Amendment overbreadth doctrine, concluding that the Ordinance does not have a "sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional."[72] However, the plurality asserted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[73] Thus, concluded the plurality, a void-for-vagueness facial challenge is justified.

The plurality concluded that the Ordinance fails the fair notice requirement because its definition of "loitering"—"to remain in any one place with no apparent purpose"—does not distinguish between innocent and

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part opinion. He announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V. Justice Stevens delivered an opinion with respect to Parts III, IV, and VI, in which Justices Souter and Ginsberg joined. Justices O'Connor filed an opinion concurring in part and concurring in judgment, in which Justice Breyer joined. Justice Breyer and Justice Kennedy filed opinions concurring in part and concurring in judgment. Justice Scalia filed a dissenting opinion. Justice Thomas filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Scalia joined.

68. *Id.* at 1854-63 (plurality opinion).

69. *Id.* at 1863-65 (O'Connor, J., concurring in part and concurring in judgment); *Id.* at 1865 (Kennedy, J., concurring in part and concurring in judgment); *Id.* at 1865-67 (Breyer, J., concurring in part and concurring in judgment).

70. *Id.* at 1867-79 (Scalia, J., dissenting); *Id.* at 1879-87 (Thomas, J., dissenting).

71. *Id.* at 1856-57 (plurality opinion).

72. *Id.* at 1857 (plurality opinion). The plurality stated:

> The Ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular view. Its impact on the social contact between gang members and others does not impair the First Amendment 'right of association' that our cases have recognized.

Id. (plurality opinion).

73. *Id.* (plurality opinion).

threatening conduct.[74] This, the plurality asserted, distinguishes the Ordinance from state-validated laws that attach "loitering" to some overt act or criminal intent (i.e., loitering with intent to distribute drugs).[75] Also, the plurality refuted the city's argument that a dispersal order itself gives fair notice:

> Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between permissible and impermissible applications of the law.[76]

With respect to the minimal guidelines requirement,[77] the plurality began its analysis by stating:

> The broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement . . . [r]ecognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.[78]

In analyzing the statute's language, the plurality confirmed the Illinois Supreme Court's non-limiting construction of the Ordinance. The Illinois Supreme Court construed the Ordinance's definition of loitering—"to remain in any one place with no apparent purpose"—as providing "absolute discretion to police officers to determine what activities constitute loitering."[79]

The plurality refuted the city's argument that the Ordinance limits enforcement discretion in four ways.[80] First, the plurality concluded that the Ordinance's inapplicability to persons who are moving or have an apparent

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74. *Id.* at 1859 (plurality opinion). The plurality stated:

> Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not.

Id. (plurality opinion).

75. *Id.* at 1859-60 (plurality opinion). Such laws have been upheld in state courts, while "state courts have uniformly invalidated laws that do not join 'loitering' with a second specific element . . . ." *Id.* (plurality opinion).

76. *Id.* at 1860 (plurality opinion).

77. The concurring Justices signed onto the plurality's minimal guidelines holding. However, unlike the plurality, the concurrences questioned the state court's construction. Thus, although the minimal guidelines requirement allowed the Court to reach a majority, it is a majority that hinges squarely on the fact that the state court refused to give the Ordinance a limiting construction.

78. *Id.* at 1861.

79. Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997).

80. *Morales*, 119 S. Ct. at 1861-62.

purpose is an insufficient limitation because it does not reduce "how much discretion the police enjoy in deciding which stationary persons to disperse."[81] Second, the plurality determined that the requirement that an arrest is permitted only after a dispersal order is issued is an insufficient limitation because it does not provide any guidance as to when a dispersal order should be issued.[82] Third, the plurality asserted that the requirement that an officer reasonably believe one of the loiterers is a gang member is an insufficient limitation because the Ordinance requires no harmful purpose and allows arrest of non-gang members as well as gang members.[83] Finally, the plurality concluded that the enforcement instructions set forth in General Order 92-4 are an insufficient limitation on the "vast amount of discretion" granted to the police.[84]

The Concurrences

Justice O'Connor focused solely on the minimal guidelines requirement, avoiding the issue of notice entirely.[85] She concluded that, as construed by the Illinois Supreme Court, the Ordinance "fails to provide police with any standard by which they can judge whether an individual has an apparent purpose."[86] Justice O'Connor argued, "because any person standing on the street has a general purpose—even if it is simply to stand—the ordinance permits police officers to choose which purposes are permissible."[87] Justice O'Connor prefaced each of her conclusive statements by noting that she based her reasoning on the state court's construction of the Ordinance.[88] She asserted that the Ordinance might be constitutional if it only criminalized loitering by gang members, and argued that the state court could have construed it more narrowly.[89]

Justice Breyer asserted that the Ordinance, as applied to some defendants, might meet the fair notice requirement; "[a] statute . . . might not provide fair warning to many, but an individual defendant might still have

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81. *Id.*
82. *Id.* at 1862.
83. *Id.*
84. *Id.*
85. *Id.* at 1863-65 (O'Connor, J., concurring in part and concurring in judgment). Justice O'Connor concluded that, because the Ordinance failed the minimal guidelines requirement, there was no need to address the other issues reached by the plurality. *Id.* at 1864 (O'Connor, J., concurring in part and concurring in judment). Yet, through her refusal to join the plurality's notice requirement argument and through her assertion that the Ordinance "could have been construed more narrowly," two clear inferences can be drawn. Justice O'Connor finds little, if any, significance in the notice requirement, and her vote hinged squarely on the state court's non-limiting construction of the Ordinance.
86. *Id.* at 1862 (O'Connor, J., concurring in part and concurring in judgment).
87. *Id.* at 1863 (O'Connor, J., concurring in part and concurring in judgment).
88. *Id.* at 1863-64 (O'Connor, J., concurring in part and concurring in judgment). The Illinois Supreme Court construed the Ordinance's definition of loitering as providing "absolute discretion to police officers to determine what activities constitute loitering." Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997).
89. *Morales*, 119 S. Ct at 1864-65 (O'Connor, J., concurring in part and concurring in judgment).

been aware that it prohibited the conduct in which he engaged."[90] Justice Breyer concluded, "I believe this ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers."[91] He argued that the Ordinance is invalid in all its applications because the officer enjoys unlimited discretion in all its applications.[92] According to Justice Breyer, "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in one particular case, but rather because the policeman enjoys too much discretion in every case."[93] Like Justice O'Connor, Justice Breyer emphasized that he based his reasoning on the Illinois Supreme Court's construction and that the Ordinance could have been construed more narrowly.[94]

The Dissents

Justice Scalia asserted that the plurality ignored *Salerno's* "no set of circumstances" test and *Hoffman Estates'* "invalid in all its applications" threshold as the rules governing void-for-vagueness facial challenges.[95] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, echoed this assertion:

> [B]ecause this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders ["having no apparent purpose"] is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is vague in all of its applications.[96]

Justice Scalia argued that the conduct of some of the respondents is clearly proscribed by the Ordinance.[97] Thus, the Ordinance is not vague in all its applications and is therefore immune from facial attack.[98] Both dissents concluded that the Ordinance is not vague in its language,[99] that it does not grant police excessive enforcement discretion,[100] and that loitering is not a protected liberty under the Due Process Clause.[101]

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90. *Id.* at 1866 (Breyer, J., concurring in part and concurring in judgment).
91. *Id.* (Breyer, J., concurring in part and concurring in judgment).
92. *Id.* at 1866 (Breyer, J., concurring in part and concurring in judgment).
93. *Id.* (Breyer, J., concurring in part and concurring in judgment).
94. *Id.* at 1867 (Breyer, J., concurring in part and concurring in judgment).
95. *Id.* at 1867-72 (Scalia, J., dissenting).
96. *Id.* at 1887 (Thomas, J., dissenting).
97. *Id.* at 1872 (Scalia, J., dissenting).
98. *Id.* (Scalia, J., dissenting).
99. *Id.* at 1879 (Scalia, J., dissenting); *Id.* at 1886-87 (Thomas, J., dissenting).
100. *Id.* at 1879 (Scalia, J., dissenting); *Id.* at 1885-86 (Thomas, J., dissenting).
101. *Id.* at 1873 (Scalia, J., dissenting); *Id.* at 1883 (Thomas, J., dissenting).

ANALYSIS

By applying the "overly broad" test, the plurality correctly held the Ordinance void for vagueness. The Ordinance clearly reaches a significant amount of innocent conduct, encourages arbitrary and discriminatory enforcement, and has a harsh disparate impact on the ethnic poor. As the dissents' conclusion illustrates, the "hard-core violator" test undermines the utility of the vagueness doctrine. The concurrences correctly sided with the plurality. However, they hid behind the state court's construction and failed to endorse either of the conflicting tests, choosing instead to offer poorly reasoned commentary.

"Overly Broad" Test Leads To Correct Conclusion

In America, individuals cannot be arrested without sufficient evidence or probable cause for crimes that they *might* have committed in the past,[102] and can never be arrested for crimes they *might* commit in the future. In enacting the Ordinance, the Chicago City Council neglected these principles and intentionally targeted innocent conduct. As its preamble states, the purpose of the Ordinance is to enable Chicago police to arrest gang members who otherwise avoid arrest by "committing no offense punishable under existing laws when they know the police are present."[103] The Ordinance is not intended to punish criminal conduct, but rather is intended to "enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[104]

The Ordinance does not permit arrest unless a dispersal order is ignored. However, the dispersal order is triggered by two elements, neither of which is criminal.[105] The first triggering element is that a group remains in one place "with no apparent purpose."[106] The second triggering element is that an officer reasonably believes one person in the group is a gang member.[107] As the Illinois Appellate Court noted, "[g]ang membership itself is not a crime, and standing in a public place with no apparent purpose is not a crime. Adding these actions together does not make them any more criminal. When you add nothing to nothing, you get nothing."[108]

By intentionally targeting innocent conduct, the Ordinance encourages arbitrary and discriminatory enforcement. Under the Ordinance, an officer must make a personal determination as to whether a group has "no apparent

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102. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1971).
103. *See supra* note 5.
104. *Papachristou*, 405 U.S. at 166.
105. *See supra* note 6. The Supreme Court has held that a person cannot be punished for failing to obey a police order that is itself unconstitutional. Wright v. Georgia, 373 U.S. 284, 291-92 (1963).
106. *See supra* note 6.
107. *Id.*
108. Chicago v. Youkhana, 660 N.E.2d 34, 42 (Ill. 1995).

purpose." Common sense dictates that every group has some apparent purpose (even if it is to stand still and do nothing).[109] Thus, the Ordinance "requires the policeman to interpret the words 'no apparent purpose' as meaning, 'no apparent purpose except for _____'."[110] Each officer is free to decide which purposes are permissible and which are not.[111] Such unlimited discretion permits police departments to "sweep the streets clean" as they see fit.[112]

Liberal enforcement of laws aimed at people deemed undesirable by society has consistently had a harsh impact on two groups of people—the ethnic minority and the poor.[113] History indicates that such laws arise when structural changes in a society leave certain groups unemployed with little, at least legal, means of support.[114] As America has evolved from an industry-driven economy to an economy based on high-tech information and suburban services, countless jobs have left the inner-city, leaving its inhabitants a "ghetto underclass."[115] This "ghetto underclass" both comprises the street gangs and bears the brunt of their criminality. However, seeking relief from such gangs through ill-defined laws is to ignore the problem in favor of unconstitutionally attacking a symptom.[116]

Chicago, like other American cities, has valid criminal laws that constitutionally convict gang members for *crimes*.[117] Legislatures and police departments should focus on improving the enforcement of these valid laws,

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109. Chicago v. Morales, 119 S. Ct 1849, 1863 (1999) (O'Connor, J., concurring in part and concurring in judgment); *Id.* at 1866 (Breyer, J., concurring in part and concurring in judgment).

110. *Id.* at 1863 (O'Connor, J., concurring in part and concurring in judgment); *Id.* at 1866 (Breyer, J., concurring in part and concurring in judgment).

111. *Id.* at 1863 (O'Connor, J., concurring in part and concurring in judgment).

112. Chicago's ordinance was used as a street-sweeping device. In 1994, the Chicago Police Department announced Operation EDGE, as part of its efforts to "enforce drug laws and the anti-gang loitering ordinance." *Cops Taking EDGE in Crime Battles*, CHI. SUN-TIMES, July 5, 1994, at 14. Operation EDGE involved flooding "hot spots" by as many as sixty uniformed officers, over a several-hour period, and making dozens of arrests. *Id.* In one such sweep, out of one hundred arrests made, sixty-nine were for gang loitering. *Sweep Nets 100 Arrests*, CHI. SUN-TIMES, Feb. 6, 1995, at Metro Briefings section.

113. *Morales*, 119 S. Ct. at 1858, n. 20; Papachristou v. City of Jacksonville, 405 U.S. 156, 161-62 (1971). Sixty of the sixty-six defendants in *Morales*, whose cases were randomly consolidated, were Black or Latino. Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 776, n. 2, (1999).

114. The English poor laws developed as the feudal system decayed leaving laboring classes, which had been anchored to the soil, little means of support. *Papachristou*, 405 U.S. at 162, n. 4 (citing Ledwith v. Roberts, [1937] 1 K.B. 232, 271). Likewise, during the reconstruction era, vagrancy statutes were used to keep former slaves in a state of quasi-slavery. *Morales*, 119 S. Ct. at 1858, n. 20 (citing T. WILSON, BLACK CODES OF THE SOUTH 76 (1965)).

115. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 39-42 (1987).

116. JOHN HAGEDORN & PERRY MACON, PEOPLE AND FOLKS, GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY 111-128 (1988). Hagedorn and Perry's study reveals that "increased gang involvement by adults is largely due to the drastically changed economic conditions in poor minority urban neighborhoods." *Id.* at 111.

117. *See e.g.*, 720 ILL. COMP. STAT. §§ 5/12-6 (Intimidation); 570/405.2 (Streetgang criminal drug conspiracy); 147/1 (Illinois Streetgang Terrorism Omnibus Prevention Act); 5/25-1 (Mob action), (West 1999).

rather than constructing and relying on ill-defined laws geared at circumventing constitutional standards.

"Hard-Core Violator" Test Undermines Vagueness Doctrine

The "hard-core violator" test undermines the vagueness doctrine. It opposes the doctrine's goals, defeats the beneficial aspects of third-party standing, and grants excessive significance to highly questionable precedent. With respect to the goal of the fair notice requirement, the "hard-core violator" test does require legislatures to write laws that "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. . . . "[118] Instead, the test permits legislatures to write excessively broad laws, so long as they give fair notice in at least one application.[119] With respect to the goal of the minimal guidelines requirement, the "hard-core violator" test does not seek to "prevent arbitrary and discriminatory enforcement" by mandating that "laws must provide explicit standards for those who apply them."[120] Instead, the test endorses laws that grant liberal enforcement discretion, so long as they are not *always* enforced in an arbitrary or discriminatory manner.[121]

With respect to the beneficial aspects of third-party standing, the "hard-core violator" test does not allow the challenging party to attack an invalid rule of law by proving that it criminalizes a significant amount of innocent conduct. Instead, it "usurps that creative role" from the challenger and grants it to the party in support of the vague law, "who can defeat the [respondent's] facial challenge by conjuring up a single valid application of the law."[122] Thus, rather than permitting the legal action of one challenging party to efficiently free others from an impermissibly vague law, the "hard-core violator" test mandates that every party proceed to court if some con-

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118. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

119. *Morales*, 119 S. Ct. at 1871 (Scalia, J., dissenting). Justice Scalia's seemingly clever adaptation of *West Side Story* employs "hard-core violator" analysis, arguing that the Ordinance is not subject to facial attack. Justice Scalia asserts that, "Tony . . . standing alongside and chatting with fellow gang members while staking out their turf . . . flashing gang signs and displaying their distinctive tatoos . . ." would have fair warning that his conduct violates the Ordinance. *Id.* (Scalia, J., dissenting). However, what Justice Scalia neglects to recognize is that his character has an apparent purpose, rather than "no apparent purpose," and thus he could mount a successful as-applied challenge to the Ordinance. Moreover, Scalia's example ignores the fact that Tony's conduct—gang intimidation—is punishable by statute in Chicago. *See supra* note 117.

120. *Grayned*, 408 U.S. at 108.

121. *Morales*, 119 S. Ct. at 1885-86 (Thomas, J., dissenting). Justice Thomas stated:

> I do not overlook the possibility that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should not turn on the proposition that such an event will be anything but rare. Instances of arbitrary and discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise. . . . *Id.*

122. *Id.* at 1871 (Scalia, J., dissenting).

ceivable circumstance exists where the challenged law would give fair warning.

The "hard-core violator" test relies solely on the fair notice requirement, despite the fact that the Court has often stated that the minimal guidelines requirement is the "most meaningful aspect of the [vagueness] doctrine."[123] Rather than following the consistent holdings of *Coates, Smith, Papachristou,* and *Kolender*, the "hard-core violator" test misinterprets the significance of *Parker*, *Hoffman Estates*, and *Salerno.* The holdings of *Parker* and *Hoffman Estates* should be interpreted as applying only to military laws and economic regulations, respectively. The *Parker* Court used a large portion of its opinion to emphasize the differences between civilian and military society, concluding that a greater degree of vagueness is permitted within the Military Code than is permitted with respect to civilian legislation.[124] And in *Hoffman Estates*, the Court stated:

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[125]

Salerno's "no set of circumstances" test, which has been labeled dictum[126] and deemed "draconian,"[127] cannot be reconciled with the *Papachristou, Kolender,* and *Morales* decisions.[128]

The Court should expressly endorse the "overly broad" test as defining the analysis in void-for-vagueness facial challenges. Doing so would eliminate the confusion created by the "hard-core violator" test and its nearly impossible threshold. As it stands, the vagueness doctrine's two elements work against each other. The minimal guidelines requirement lightens the

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123. Smith v. Goguen, 415 U.S. 566, 574 (1974); Kolender v. Lawson, 461 U.S. 352, 358 (1983); *Morales*, 119 S. Ct. at 1863 (O'Connor, J., concurring in part and concurring in judgment).

124. Parker v. Levy, 417 U.S. 733, 756 (1974).

125. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 598 (1982).

126. With respect to the *Salerno* test, the plurality stated, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including Salerno itself . . . We need not, however, resolve the viability of Salerno's dictum . . . ." *Morales*, 119 S. Ct. at 1858, n. 22.

127. Mr. Michael C. Dorf has demonstrated the Court's refusal to apply the "no set of circumstances" test in a number of cases following the *Salerno* decision. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). Applying the same reasoning, Mr. John Christopher Ford points out, "[t]he no-set-of-circumstances test has appropriately been called 'draconian' in effect, rendering it nearly impossible to succeed on a facial challenge." John Christopher Ford, Note, *The Casey Standard For Evaluating Facial Attacks On Abortion Statutes*, 95 MICH. L. REV. 1443, 1445 (1997).

128. All three of these cases fall outside the context of the First Amendment. Yet, in all three cases, the Court did not require the challenger to prove the law invalid in every conceivable application.

challenger's burden, while the fair notice requirement makes the challenger's burden greater.

The immediate solution is for courts to rely solely on the minimal guidelines requirement.[129] By shifting the focus from a subjective inquiry into the arrestee's notice to an objective inquiry into the scope of the enforcing officer's discretion,[130] the minimal guidelines requirement mandates that an all or nothing answer is reached based solely on the text of the challenged law. If the answer is yes—the legislature provided explicit standards to protect against arbitrary and discriminatory enforcement—the law stands. If the answer is no, the law cannot be constitutionally applied to anyone, regardless of their conduct.[131] Thus, a law that fails the minimal guidelines requirement cannot be "saved," even by the harsh thresholds of *Hoffman Estates* and *Salerno.*

Poorly Reasoned Commentary

Although the concurring Justices voted correctly, they softened the majority holding in two ways. First, rather than condemning the Ordinance's intentionally vague language, they hid behind the state court's construction and incorrectly argued that the Ordinance could have been construed more narrowly. Second, rather than acknowledging that the Ordinance unconstitutionally targets the rights of gang members, the concurring Justices suggested that the Ordinance does not single them out enough.

Throughout her concurrence, Justice O'Connor emphasized that she was bound by the Illinois Supreme Court's construction of the Ordinance. Yet, rather than exercising judicial restraint, she asserted:

> In my view, the gang loitering ordinance could have been construed more narrowly. The term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable ar-

129. Some scholars have suggested that the fair notice requirement should be eliminated entirely. For instance, Mr. John C. Jeffries, Jr., argues that actual notice carries little significance in our modern legal system. Jeffries, *supra* note 17, at 205-12. Also, because courts have embraced the notion that simple recordation of laws places people on sufficient notice, fair warning no longer stands as a persuasive rationale for application of the vagueness doctrine. *Id.* at 205-07.

130. Defining the scope of an enforcing officer's discretion necessarily requires a court to examine various circumstances in which the law could be literally applied, and to determine, in each of these circumstances, if the enforcing officer retains too much discretion. Thus, this step takes on an overbreadth-like analysis, granting the challenger third-party standing. However, this step remains objective in that it does not question whether the enforcing officer applied his "discretion wisely or poorly in a particular case," but whether the challenged law grants "the policeman [enjoys] too much discretion in every case." *Morales*, 119 S. Ct. at 1866 (Breyer, J., concurring in part and concurring in judgment).

131. *Morales*, 119 S. Ct. at 1866 (Breyer, J., concurring in part and concurring in judgment).

> eas, to intimidate others from entering those areas, or to conceal illegal activities.[132]

Thus, in her view which was joined by Justice Breyer, courts have the authority to insert clarity where none exists. This view would seem to violate separation of powers principles. Legislatures are required to enact laws that "provide explicit standards for those who apply them."[133] Courts should not imply such standards, especially if they are intentionally left out in the first place.

Justice O'Connor's construction transforms the Ordinance into a law that combines loitering with some harmful purpose or effect.[134] She either is concluding that her construction is what the Chicago City Council intended,[135] or she is suggesting that courts should pursue an active role in upholding intentionally vague laws. Apparently, the latter is true, as she stated, "[t]his Court has never held that the intent of the drafters determines whether a law is vague."[136] While the *Papachristou* opinion indicates that her statement is inaccurate,[137] the fact that her statement ignores a principal canon of statutory construction signals a much larger problem. When the language of a statute is unclear, courts have historically looked to legislative intent. With respect to the Ordinance, one only must look as far as its preamble to see that the legislature intended to authorize arrests of gang members in situations where no constitutional means exist.[138]

Justice O'Connor concluded, "[i]f the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued."[139] Her conclusion suggests that, although it is unconstitutional to prohibit both gang members and their associates from loitering, it might be constitutional to prohibit only gang members from loitering. An ordinance prohibiting only gang members from loitering would have even greater constitutional problems than the Chicago ordinance because it would unconstitutionally criminalize a person's status.[140] The Illinois Appellate Court

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132. *Morales*, 119 S. Ct. at 1864-65 (O'Connor, J., concurring in part and concurring in judgment).
133. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
134. *See supra*, note 131.
135. This would be a ridiculous conclusion because the Chicago City Council has enacted laws proscribing the same harmful purposes that Justice O'Connor inserts into the Ordinance. *See supra* note 117.
136. *Morales*, 119 S. Ct. at 1865 (O'Connor, J., concurring in part and concurring in judgment).
137. Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1971).
138. *See supra* note 5.
139. *Morales*, 119 S. Ct. at 1864 (O'Connor, J., concurring in part and concurring in judgment).
140. Robinson v. California, 370 U.S. 660, 667 (1962). In *Robinson*, the Court struck down a California statute making it a misdemeanor for any person to be a drug addict. The Court held that the law violated the Eighth Amendment's cruel and unusual punishment clause because it made the status of drug addict a criminal offense regardless of whether the defendant had ever used or possessed drugs in

made a persuasive argument that the Ordinance makes status a criminal offense.[141] Such an argument would be difficult, if not impossible, to overcome if the law denied gang members the freedom to loiter, while preserving that freedom for others. As the *Papachristou* Court stated, "[t]he rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."[142]

CONCLUSION

The *Morales* decision demonstrates that the vagueness doctrine is best characterized as a struggle between two conflicting tests. The "overly broad" test is an effective tool for striking down laws that reach a significant amount of innocent conduct and encourage arbitrary and discriminatory enforcement. Yet, as the dissenters' reasoning illustrates, the "hard-core violator" test continues to play an undermining role in void-for-vagueness facial challenges. The concurring Justices should have voted to endorse the "overly broad" test; yet, they chose to hide behind the state court's construction and offer poorly reasoned commentary. Thus, until the Court's membership changes, the most important lesson from *Morales* is that state courts will play a crucial, if not determinative, role in deciding whether void-for-vagueness facial challenges succeed. State courts should empower the vagueness doctrine by endorsing the "overly broad" test and should avoid inserting clarity where there is none.

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California. *Id.* at 667.

141. The Illinois Appellate Court reasoned:

> Once the ordinance is triggered, it may apply equally to persons regardless of gang membership, but the ordinance can only be triggered when a gang member is found loitering. In other words, the Chicago ordinance prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering. Therefore, it is not the conduct, but the status, that triggers this offense.

Chicago v. Youkhana, 660 N.E.2d 34, 42 (1995).

142. *Papachristou*, 405 U.S. at 171.