

Gang Congregation Ordinance Supreme Court Invalidation

By DANIEL L. SCHOFIELD, S.J.D.



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On June 10, 1999, in the case of *City of Chicago v. Morales*,¹ the U.S. Supreme Court held by a 6-3 vote that Chicago's Gang Congregation Ordinance is unconstitutional. Understanding the law enforcement implications of *Morales* is complicated because the decision includes six separate opinions. This article begins with a description of the ordinance and the reasons for its enactment. Next, the article summarizes

the differing views of the justices. Finally, the article assesses the likely impact of *Morales* on using ordinances and injunctions to combat gang activity.

CONSEQUENCES OF LOITERING GANG MEMBERS

The Chicago City Council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street

gangs. Based on evidence from residents and other sources, the council determined that public loitering by gang members had 1) increased the murder rate; 2) escalated violent and drug-related crimes; and 3) enabled gang members to establish control of areas that intimidated residents and created a justifiable fear for the safety of people and property in those areas. Of particular significance, the city council found that criminal street gangs

avoided arrest by committing no offense punishable under existing laws when they knew the police were present.

CHICAGO GANG CONGREGATION ORDINANCE

The ordinance created a criminal offense based on the following four predicates: 1) an officer must reasonably believe that at least one of the two or more individuals present in a “public place” is a criminal street gang member; 2) the individuals must be “loitering,” defined as “remaining in any one place with no apparent purpose”; 3) the officer then must order “all” of the individuals to disperse and remove themselves from the area; and 4) a person must disobey the officer’s order. If any person, whether a gang member or not, disobeys the officer’s order, that person is guilty of violating the ordinance.²

After the Chicago Police Department issued a general order providing guidelines to govern enforcement of the ordinance, officers, issued over 89,000 dispersal orders and arrested more than 42,000 people over a 3-year period. An Illinois court invalidated the ordinance, ending its enforcement and beginning years of litigation that culminated in the Supreme Court’s deciding that the ordinance is unconstitutionally vague.

THE MORALES DECISION

Six justices concluded that the Chicago ordinance is unconstitutionally vague because it fails to provide adequate standards to guide

police discretion. Three of those justices (the plurality) also concluded that the ordinance infringes a constitutional right to innocent loitering and fails to give residents adequate notice of how to conform their conduct to the confines of the law. Three justices dissented, finding the ordinance constitutional.

Majority—Inadequate Limits on Police Discretion

Six justices (the majority) agreed that the ordinance reaches a substantial amount of innocent conduct and is unconstitutional because the city council failed to “establish minimal guidelines to govern law enforcement.”³ The absence of such guidelines “necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.”⁴

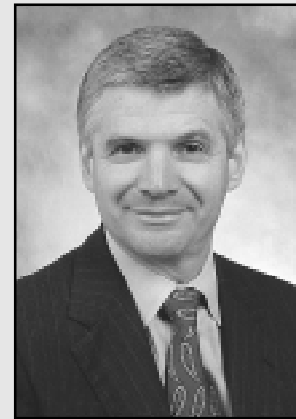
The majority focused on the vast discretion conferred on police to determine whether a person is “loitering,” which the ordinance defined as “to remaining in any one

place with no apparent purpose.”⁵ That definition provides officers absolute discretion in deciding whether to issue a dispersal order. “The ‘no apparent purpose’ standard for making that decision is inherently subjective because its application depends on whether some purpose is ‘apparent’ to the officer on the scene.”⁶

The majority noted somewhat disdainfully that the ordinance directs the police to issue an order for individuals to disperse without first making any inquiry about their possible purposes⁷ and then observed:

It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officers, they may—indeed, they “shall”—order them to disperse.⁸

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The majority was troubled that an officer could treat an innocent purpose such as engaging in idle conversation as too frivolous to be “apparent” or order dispersal “even though an illicit purpose is actually ‘apparent.’”⁹ And literally interpreted, the “no apparent purpose” definition of loitering would have no applications to loitering that has an obviously threatening or illicit purpose that excludes “from its converge much of the intimidating conduct that motivated its enactment.”¹⁰

The majority rejected the argument that requiring officers to reasonably believe that a group of loiterers contains a gang member is a sufficient limitation but then added that police discretion could be sufficiently limited “if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members.”¹¹ Finally, the majority concluded that the general order issued by the police department limiting enforcement to certain designated areas in the city did not cure the otherwise-unconstitutional ordinance because those internal rules would not provide a defense to a loiterer arrested in violation of those rules as long as the arrest was consistent with the broader provisions of the ordinance.¹²

Plurality—Ordinance Infringes Constitutional Right to Loiter

Three justices (the plurality) premised their decision to invalidate the ordinance on the notion that “liberty,” protected by the Due

Process Clause of the Fourteenth Amendment, affords citizens a *right* to engage in loitering that is entirely harmless in both purpose and effect.¹³ They also concluded that the ordinance failed to meet the requirements of the Due Process Clause because “it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.”¹⁴



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The plurality focused on the uncertainty of what loitering is covered by the ordinance and what is not. Even though loiterers are not subject to arrest unless they disobey a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. Therefore, the plurality reasoned that “if the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty.”¹⁵ Moreover, the terms of the dispersal order compound the inadequacy of the notice because it is unclear how long the loiterers must remain apart and how far they must move.

Dissenters—Ordinance Affords Police Traditional and Constitutional Peacekeeping Authority

Justice Thomas’ dissenting opinion, which the Chief Justice and Justice Scalia joined, begins with this ominous prediction: “By invalidating Chicago’s ordinance which was enacted to prevent gangs from establishing dominion over the public streets, the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery.”¹⁶ In support of his conclusion that “[t]he ordinance does nothing more than confirm the well-established principle that the police have the duty and the power to maintain the public peace, and when necessary, to disperse groups of individuals who threaten it,”¹⁷ Justice Thomas offered several arguments.

First, neither history nor Court precedent support the plurality view that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” Furthermore, the ordinance does not criminalize loitering *per se* but instead penalizes the failure to obey an officer’s order to disperse. Justice Thomas offered historical and legal support for the proposition that “as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse.... The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations.”¹⁸ Second, police must inevitably exercise discretion in performing their peacekeeping responsibilities. Based on the

requirement that officers issue dispersal orders *only* if they “observe a person whom they reasonably believe to be a criminal street gang member loitering in any public place,” the ordinance is a constitutionally acceptable allocation of police discretion. Conceding the possibility that some officers may abuse that discretion, Justice Thomas wrote:

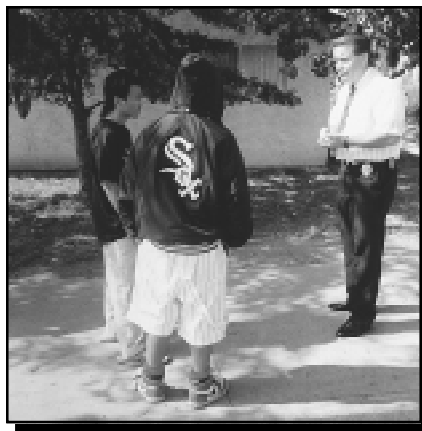
Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds.¹⁹

Third, the ordinance is not vague in terms of what is forbidden and what is permitted because “there is nothing vague about an order to disperse.”²⁰ Because there is no “fundamental right to loiter,” it is erroneous to assume, as the plurality did, that the ordinance proscribes constitutionally protected conduct. Moreover, persons of ordinary intelligence sufficiently understand what it means “to remain in any one place with no apparent purpose.”²¹

Justice Thomas concluded his opinion by criticizing the majority for focusing on the rights of gang members and their companions at the expense of the residents of Chicago, who suffer the consequences of gang loitering. “By focusing exclusively on the imagined rights of the two percent, the Court has denied our most vulnerable citizens the...freedom of movement.”²²

Concurring Opinions Illustrate Narrow Scope of Decision

Justices O’Connor, Kennedy, and Breyer wrote opinions in which they concurred with one another in part and also concurred in the judgment. The concurrence of Justice O’Connor that Justice Breyer joined is noteworthy for the following suggestions it offers on how the Chicago ordinance and other gang



loitering ordinances might be structured to pass constitutional muster:

- 1) if the ordinance applied *only* to individuals reasonably believed to be gang members;²³ 2) if the ordinance only applied to loitering that had an apparent harmful purpose or effect;²⁴ 3) if the ordinance incorporated limits on the area and manner in which the laws may be enforced;²⁵ 4) if the ordinance directly prohibited the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways that intimidates residents;²⁶ 5) if the term

“loiter” had been narrowed to mean “to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities”;²⁷ and 6) if there were limitations that restricted the ordinance’s criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.²⁸

CONCLUSION

All Supreme Court justices in *Morales* recognized that lawmakers and law enforcement officers face many difficult challenges in trying to combat the serious problems caused by gang-related activities. Justice Scalia noted that those difficulties are compounded by the fact reliance on existing laws that prohibit intimidating and unlawful conduct (that are presumably constitutional) are rendered largely ineffective when, as the Chicago City Council found, “gang members cease their intimidating and unlawful behavior under the watchful eye of the police officers but return to it as soon as the police drive away.”²⁹

Chicago’s solution to that reality was to enact an ordinance that gave police discretion to clear the streets of loitering gang members and their associates. In Justice Scalia’s view, Chicagoans “decided that depriving themselves of the freedom to ‘hang out’ with a gang member is necessary to eliminate

pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other.”³⁰

While the Court in *Morales* invalidated Chicago’s ordinance, lawmakers should carefully consider structuring gang loitering ordinances in accordance with the suggestions in Justice O’Connor’s concurring opinion. An ordinance that is deemed constitutional by Justices O’Connor and Breyer presumably also would be upheld by the three dissenting Justices in *Morales*.

Finally, the article “Combating Gangs: The Need for Innovation” that appeared in the February 1998 issue of the *FBI Law Enforcement Bulletin* addressed the use of civil injunctions to abate gang activity

under the theory that ongoing gang activity is a public nuisance.³¹ Importantly, the holding in *Morales* has no apparent effect on the continued use of injunctions to prohibit named gang members with a documented history of intimidating residents and unlawful conduct in designated areas from *loitering together* in those areas. ♦

Endnotes

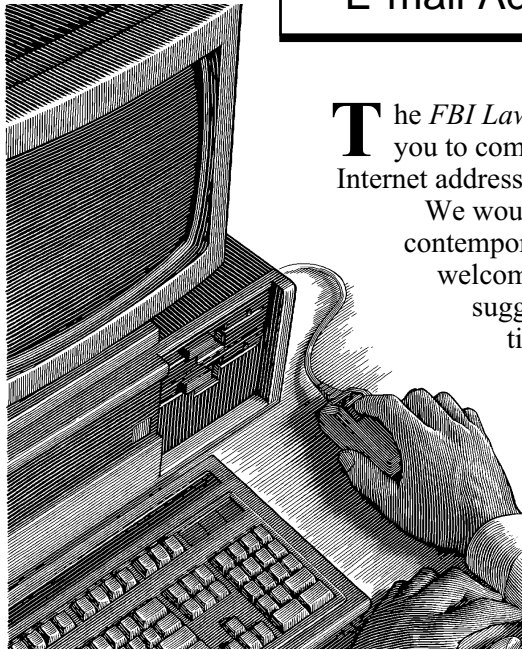
- ¹ 119 S. Ct. 1849 (1999)
- ² *Id* at 1854.
- ³ *Id* at 1861.
- ⁴ *Id*.
- ⁵ *Id*.
- ⁶ *Id* at 1862.
- ⁷ *Id* at 1861.
- ⁸ *Id*.
- ⁹ *Id* at 1862.
- ¹⁰ *Id*.
- ¹¹ *Id*.
- ¹² *Id*.
- ¹³ *Id* at 1857.

- ¹⁴ *Id* at 1859.
- ¹⁵ *Id* at 1860.
- ¹⁶ *Id* at 1879.
- ¹⁷ *Id* at 1881.
- ¹⁸ *Id* at 1884.
- ¹⁹ *Id* at 1886.
- ²⁰ *Id*.
- ²¹ *Id* at 1887.
- ²² *Id*.
- ²³ *Id* 1964.
- ²⁴ *Id*.
- ²⁵ *Id*.
- ²⁶ *Id*.
- ²⁷ *Id* at 1964-65.
- ²⁸ *Id* at 1865.
- ²⁹ *Id* at 1878.
- ³⁰ *Id* at 1879.

³¹ Regini, J.D., “Combating Gangs: The Need for Innovation,” *FBI Law Enforcement Bulletin*, February 1998, 25-32.

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

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