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CRIMINAL STREET GANG "LOITERING" STATUTE UNCONSTITUTIONALLY VAGUE

In the case of *City of Chicago v. Morales* (No. 97-1121, U.S. 6/10/1999) described herein, the Supreme Court of the United States acknowledged that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."

We have expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution. 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, or the right to move to whatsoever place one's own inclination may direct.

In this particular case, Jesus Morales and others had been found in violation of "the Gang Congregation Ordinance" which prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place.

As described by the Supreme Court, the Chicago City Council enacted this ordinance in 1992 after "explor[ing] the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members."

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings... Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens."

Furthermore, the council stated that gang members "establish control over identifiable areas by loitering in those areas and intimidating others from entering those areas; and members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present." It further found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary

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to preserve the city's streets and other public places so that the public may use such places without fear." Moreover, the council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members."

The ordinance created 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. The following four conditions had to be satisfied to establish a violation of the ordinance:

First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang membe[r]."

Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose."

Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area."

Fourth, 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.

Two months after the ordinance was adopted, the Chicago Police Department issued guidelines to govern its enforcement. In so doing, the police department established the following 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":

The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." The city, however, does not release the locations of these "designated areas" to the public.

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance. Eleven other trial judges ruled that the ordinance was invalid. In one such case, the trial judge had held that the "ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police." The Illinois Appellate Court agreed that the ordinance was invalid and reversed the convictions of Jesus Morales

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and others. In so doing, the state appeals court found the ordinance the ordinance was unconstitutionally vague.

The Illinois Supreme Court affirmed the determination by the appeals court. According to the Illinois state supreme court, "the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." In support of its vagueness holding, the Illinois supreme court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated to cause harm.

Moreover, the state supreme court found "the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance."

The Supreme Court of the United States granted the City of Chicago's petition to review the state supreme court's determination that the ordinance was unconstitutionally vague. As characterized by the Supreme Court, the specific issue was whether "the ordinance violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."

PROHIBIT INTIMIDATING CONDUCT?

In its brief of the case to the Supreme Court, the City of Chicago had argued the following public policy concerns justified enactment of the challenged ordinance:

[T]he very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods.

According to the Supreme Court, "a law that directly prohibited such intimidating conduct would be constitutional." However, in this particular instance, the Court noted "this ordinance broadly covers a significant amount of additional activity." As a result, the Court found "[u]ncertainty about the scope of that additional coverage" provided a basis for Morales' constitutional claim that "the ordinance is too vague."

As cited by the Supreme Court, "[v]agueness may invalidate a criminal law for either of two independent reasons":

First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

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Applying these principles to the challenged ordinance, the Supreme Court stated it would “first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.”

NOTICE OF PROHIBITED CONDUCT?

According to the Supreme Court, “a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.” In this particular instance, the Illinois Supreme Court had “recognized that the term ‘loiter’ may have a common and accepted meaning, but the definition of that term in this ordinance -- ‘to remain in any one place with no apparent purpose’ -- does not.” In so doing, the Illinois Supreme Court emphasized “the law's failure to distinguish between innocent conduct and conduct threatening harm.”

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?

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...

[A] number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime.

In response to this “concern about adequate notice,” the City of Chicago had argued as follows that “loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse.”

[W]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do."

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The Supreme Court, however, found the City's response "unpersuasive." According to the Court, the ordinance would be invalid if "the police are able to decide arbitrarily which members of the public they will order to disperse."

[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.

Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty...

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 the permissible and the impermissible applications of the law.

In addition, the Supreme Court found "the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance."

It provides that the officer "shall order all such persons to disperse and remove themselves from the area." This vague phrasing raises a host of questions. 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?

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted.

The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

As a result, the Supreme Court held that the ordinance was unconstitutionally vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard,

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but rather in the sense that no standard of conduct is specified at all."

ALLOWS DISCRIMINATORY ENFORCEMENT?

In addition to the constitutional requirement that the ordinance provide fair notice of prohibited conduct, the Supreme Court noted further that legislation "may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." Applying this principle to the facts of the case, the Supreme Court found "[t]he broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement." In so doing, the Court noted that there were "no such guidelines in the ordinance."

In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. 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 officer, she may -- indeed, she "shall" -- order them to disperse...

[T]he principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose." As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court.

As described by the Court, the City of Chicago had argued on appeal that "the text of the ordinance limits the officer's discretion in three ways":

First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose.

Second, it does not permit an arrest if individuals obey a dispersal order.

Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

In the opinion of the Supreme Court, each of these proffered limitations on police discretion was "insufficient" to establish "minimal guidelines to govern law enforcement," as required by the

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Constitution:

That the ordinance does not apply to people who are moving -- that is, to activity that would not constitute loitering under any possible definition of the term -- does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance.

Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue.

Furthermore, the Supreme Court found “[t]he ‘no apparent purpose’ standard for making that decision” to be “inherently subjective because its application depends on whether some purpose is ‘apparent’ to the officer on the scene.”

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 is actually apparent...

[T]he requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient 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. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to non-gang members as well as suspected gang members.

It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Moreover, the Supreme Court found it ironic that “the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment.”

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As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs.

As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent.

The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

Accordingly, the Supreme Court found "the Illinois Supreme Court [had] correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards for definiteness and clarity."

We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. We are mindful that the preservation of liberty depends in part on the maintenance of social order. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

As a result, the Supreme Court affirmed the judgment of the state supreme court.