

Striking a Balance: The Efforts of One Massachusetts City to Draft an Effective Anti-Loitering Law Within the Bounds of the Constitution

“It’s an icy evening, and Herrzon and Carlos, crouching in a Burger King booth, slouch somewhere inside hooded sweatshirts and oversized jeans, beneath wool hats that obscure young, scowling faces. . . . There is a gang problem in East Somerville [Massachusetts], but these two say they’re only afraid of police. The stories they recount are echoed by a growing chorus of male Latino youths: complaints of frequent police interrogations, alleged threats of deportation, and accusations of gang membership.”¹

I. INTRODUCTION

In August of 2004, Massachusetts Acting Governor Kerry Healey signed into law a “gang loitering” bill that made Somerville the first city in the state where gang members could be arrested for disobeying a police officer’s order to disperse from designated public places.² The impetus for the law dates back to October of 2002, when individuals associated with a nationwide street gang known as MS-13 brutally raped two disabled teenage girls in a Somerville park.³ At the time of the incident, MS-13 had been tied to a wave of violent assaults against Somerville residents and was estimated to have roughly 100 members in the area.⁴ As residents grew increasingly concerned for their safety, Somerville’s governing Board of Alderman approved a sweeping anti-loitering ordinance, which has sparked debate over the constitutionality of such

1. Benjamin Gedan, *Closely Watched Latinos Weary of the Attention*, BOSTON GLOBE, Dec. 22, 2002, (City Weekly), at 10.

2. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004). Somerville is a city located in Middlesex County, Massachusetts, just north of Boston. See About Somerville, <http://www.ci.somerville.ma.us/aboutsomerville.cfm> (last visited Feb. 22, 2006). According to the 2000 census, the city had a total population of 77,478. *Id.*; see also *infra* note 3 (discussing passage of state law).

3. Press Release, Commonw. of Mass., Executive Dep’t, Lt. Gov. Healey Signs Bill Cracking Down on Somerville Gangs (Aug. 26, 2004) (on file with author) [hereinafter Commonwealth] (noting events preceding passage of Somerville anti-loitering ordinance). MS-13 is an international Latino gang that started in El Salvador and has developed increasing strength in the Northeast. Hillary Chabot, *City Seeks to Calm MS-13 Fears After Gang Rape*, SOMERVILLE J., Oct. 31, 2002 (explaining origins and background of MS-13 gang). MS-13 gang members have lived in Somerville since at least the mid-to-late 1990s, but gang-related incidents increased in the years leading up to the passage of the ordinance in 2002. *Id.*; see also *infra* note 26 (detailing criminal activities of MS-13 gang in Somerville and nationwide).

4. Commonwealth, *supra* note 3 (drawing connection between increased presence of MS-13 street gang and violence in area).

measures and their effectiveness in curbing violent gang activity.⁵

The ordinance authorizes Somerville police officers to warn criminal street gang members, caught loitering in designated areas of the city, that they must disperse immediately.⁶ Officers may arrest those who disobey the order, or who return to the same location within three hours of the warning.⁷ In light of concerns from Latino residents that the ordinance unfairly targets members of their communities, lawmakers took steps to ensure that the measure is narrow in scope, and not susceptible to arbitrary police enforcement.⁸ Each Somerville police cruiser is equipped with a list of suspected gang members, including names and photographs, that officers must consult before approaching any individual whom the officer believes may be violating the law.⁹ The ordinance also requires the police chief to designate specific locations for enforcement, such as particular parks, street corners or neighborhoods.¹⁰ Finally, the mayor appointed an advisory board to help train police and oversee enforcement before the law went into effect.¹¹ Despite these precautions the Latino population is skeptical, and while no lawsuits have been filed to date, immigrant groups have predicted legal trouble for the city and have pledged to call attention to any improper enforcement of the ordinance.¹²

A number of other municipalities have passed anti-loitering statutes in an effort to curb criminal activity, though few have survived constitutional challenges.¹³ In the seminal case of *City of Chicago v. Morales*,¹⁴ the United

5. Benjamin Gedan, *Law Targets Gangs in Somerville; Activists Fear Racial Profiling*, BOSTON GLOBE, Aug. 27, 2004, at B1 (describing sentiments of city leaders and activists concerned about public safety and discriminatory enforcement). The Board of Aldermen is the city's legislative branch and is responsible for adopting ordinances and regulations on a broad range of issues. See City of Somerville, <http://www.ci.somerville.ma.us/Department.cfm?orgunit=aldermen> (last visited Feb. 22, 2006). The Board gave preliminary approval to the gang loitering ordinance in December, 2002. Bridget Samburg, *Gang Law Goes Back*, BOSTON GLOBE, Feb. 29, 2004, (City Weekly) at B9.

6. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (permitting police to target suspected gang members for loitering).

7. *Id.* (explaining procedures police must follow when enforcing ordinance). A first time offender faces a fine of up to \$500 as well as a possible prison sentence of up to six months. *Id.* A mandatory minimum five-day jail sentence is imposed for all second and subsequent offenses. *Id.*

8. See Gedan, *supra* note 5, at B1 (describing policymakers' response to concerns of arbitrary police enforcement of ordinance); see also *infra* notes 83-86 and accompanying text (discussing ordinance provisions limiting police discretion).

9. Gedan, *supra* note 5, at B1 (detailing procedure police officers use to identify gang members); see also H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(c)(3) (Mass. 2004) (requiring police chief to promulgate procedures to identify current members of criminal street gangs).

10. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(b) (Mass. 2004) (requiring police chief to determine areas of Somerville where enforcement of ordinance necessary).

11. *Id.* (establishing gang-advisory board to ensure proper enforcement of ordinance).

12. Gedan, *supra* note 5, at B1 (detailing activists' response to ordinance).

13. See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983) (striking down loitering statute as unconstitutionally vague and susceptible to arbitrary enforcement); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding vagrancy ordinance void for vagueness because for failing to provide notice of forbidden conduct); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (invalidating loitering ordinance for failing to specify standard of conduct); see also *infra* notes 34-43 and accompanying text (discussing legal

States Supreme Court struck down an anti-loitering statute aimed at curbing gang violence in Chicago as void-for-vagueness under the Due Process Clause of the Fourteenth Amendment.¹⁵ The Court, however, produced six different opinions and failed to articulate a coherent decision on whether the activity of loitering is a constitutionally-protected, individual liberty interest.¹⁶ Consequently, the possibility remains that a more precisely worded anti-loitering ordinance would pass constitutional muster.¹⁷ In a concurring opinion, Justice O'Connor described in some detail how the Chicago City Council could have drafted its ordinance to withstand constitutional scrutiny, providing a roadmap for other communities looking to adopt similar measures in response to gang violence.¹⁸

After *Morales*, general loitering and drug zone ordinances faced renewed vulnerability in state and federal courts, while more narrow, public-order measures aimed at behavior other than loitering have generally been upheld.¹⁹ These decisions form a framework within which to evaluate the Somerville ordinance, and to consider whether lawmakers struck a constitutionally permissible balance between public safety and individual freedom.²⁰ After examining the constitutional doctrines that typically pertain to anti-loitering ordinances, this Note will compare provisions of the Somerville ordinance to similar laws of varying success.²¹ A consideration of the expanded definitions of culpable conduct, the specific dispersal order and the robust safeguards against arbitrary police enforcement included in the Somerville measure will ultimately suggest that the law would likely survive a constitutional challenge where others have failed.

history of anti-loitering ordinances).

14. 527 U.S. 41 (1999).

15. *Id.* at 59-60 (determining Chicago gang congregation ordinance failed to provide adequate notice of prohibited conduct).

16. Angela L. Clark, *City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 114 (1999) (noting lack of consensus in *Morales*); see also *infra* Part II.C.1 (discussing *Morales* decision generally).

17. See Clark, *supra* note 16, at 148 (speculating on Court's willingness to accept validity of more specific anti-loitering ordinance).

18. *Morales*, 527 U.S. at 65-68 (O'Connor, J., concurring) (offering suggestions for constitutionally acceptable provisions of anti-loitering ordinance); see *infra* notes 71-76 and accompanying text (detailing Justice O'Connor's recommendations).

19. Kim Strosnider, Note, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 126 (2002) (linking scope of anti-loitering ordinances to their success in passing constitutional muster); see *infra* notes 77-81 and accompanying text (comparing varying success of loitering ordinances post-*Morales*).

20. See *infra* Part III.A-B (discussing Somerville ordinance in light of similar measures challenged after *Morales*).

21. See *infra* Part III.A-B (comparing features of Somerville ordinance to similar anti-loitering laws).

II. HISTORY

A. *The Growing Problem of Gang Violence*

A “youth gang” is generally defined as a “self-formed association of peers” between the ages of twelve and twenty-four, that manifests a sense of identity through either a gang name or style of clothing, and has an “elevated level of involvement in delinquent or criminal activity.”²² Gang-related crime has drawn increasing attention from law enforcement officials over the past two decades, and for good reason.²³ In cities nationwide, gangs have been linked to an increasingly large percentage of violent crime.²⁴ Many inner city residents live at the mercy of street gangs, confined to their homes by the omnipresent threat of violent gang activity in their neighborhoods.²⁵

1. *Gang Violence in Somerville, Massachusetts*

The City of Somerville, like other cities across the nation, faces high rates of violent crimes and drug offenses, and city officials have determined that criminal street gang activity is largely responsible.²⁶ Throughout the city, Gang

22. See National Youth Gang Center, Frequently Asked Questions <http://www.iir.com/nygc/faq.htm> (last visited Feb. 23, 2006) (describing characteristics of youth gangs). According to a 2001 survey conducted by the National Youth Gang Center, forty-nine percent of gang members nationwide are Hispanic/Latino, thirty-four percent are African American/black, ten percent are Caucasian/white and six percent are Asian. *Id.*

23. Arlen Egley, Jr., and Aline K. Major, *Highlights of the 2002 National Youth Gang Survey*, U.S. DEP'T. OF JUST. (2004) (summarizing results of annual survey on gang activity), available at <http://www.ncjrs.gov/pdffiles1/ojdp/fs200401.pdf>. “Approximately 731,500 gang members and 21,500 gangs were active in the United States in 2002.” *Id.* “All U.S. cities with a population of 250,000 or more reported problems with youth gangs, as did eighty-seven percent of cities with a population between 100,000 and 249,999.” *Id.*

24. See Christopher LaVing, Comment, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?*, 51 BAYLOR L. REV. 389, 389-90 (1999) (noting growth of gang membership in schools); Silvia Perez, Comment, *Alternatives in Fighting Street Gangs: Criminal Anti-Gang Ordinances v. Public Nuisance Laws*, 13 ST. THOMAS L. REV. 619, 619 (2001) (discussing growing prominence of street gangs); Jocelyn L. Santo, Note, *Down on the Corner: An Analysis of Gang-Related Anti-Loitering Laws*, 22 CARDOZO L. REV. 269, 269 (2000) (discussing “rapid growth” of street gangs in urban centers nationwide).

25. See Santo, *supra* note 24, at 270 (describing “paralyzing” effect of street gangs on urban communities).

26. City of Somerville, Massachusetts, Gang Loitering Ordinance (May 13, 2004) [hereinafter Somerville Gang Ordinance], available at <http://www.provost-citywide.org/gangloitering-june04.html> (explaining lawmakers’ rationale behind proposed ordinance). Law enforcement officials linked the suspects in the rape of two disabled girls in a Somerville park to a street gang known as MS-13. See Commonwealth, *supra* note 3. Active in at least twenty-eight states, the gang is believed to have originated in the 1980s when soldiers and their families fled civil war in El Salvador. Douglas Belkin & Michael Rosenwald, *Rape Case Stirs Gang Worries*, BOSTON GLOBE, Oct. 30, 2002, at B2; see also Michelle Nicolosi, *Salvadoran Gang Said to Span the Nation*, BOSTON GLOBE, Dec. 28, 2002, at A3 (describing MS-13 as most dangerous gang on East Coast). In the aftermath of the September 11 attacks, intelligence officials in Washington warned national law enforcement agencies that al-Qaeda terrorists were spotted with members of MS-13 in El Salvador, raising concerns the gang was smuggling Islamic terrorists into the country. Michele McPhee, *Gang Tied To Terrorists*, BOSTON HERALD, Jan. 5, 2005, at 5.

members have established control over identifiable public areas by loitering and intimidating others from entering or passing through.²⁷ As residents voiced their concerns, law enforcement officials were faced with the difficult task of rounding up members of these criminal street gangs who routinely avoided arrest by committing no offense punishable under existing law in police presence.²⁸ In response, the Somerville Board of Aldermen preliminarily approved the anti-loitering measure, which gave police broad powers to arrest suspected gang members for loitering in public places.²⁹

B. Anti-Loitering Ordinances: Background

Vagrancy laws originated in Elizabethan England, where they were first developed to curb the growing number of poor and displaced workers who took to the streets and resorted to crime in order to support themselves.³⁰ American vagrancy laws, patterned on these Elizabethan “poor laws,” were initially enacted following the birth of the Republic, primarily as a means to prevent crime.³¹ By the twentieth century, various anti-loitering laws gave police officers the authority to arrest “vagrants,” “loafers” and other such “rogues” in order to maintain order in public places.³² The majority of these statutes remained largely unchallenged until 1963.³³

1. Anti-loitering Ordinances and the United State Supreme Court

The United States Supreme Court first addressed the constitutionality of anti-loitering statutes in *Papachristou v. City of Jacksonville*,³⁴ decided in 1972.³⁵ In this landmark case, the Court consolidated its review of five vagrancy cases and suggested for the first time that an ordinance criminalizing

27. *Somerville Gang Ordinance*, *supra* note 26 (discussing growing threats to general public posed by street gangs).

28. *Id.* (highlighting difficulties of curbing gang loitering without special loitering ordinance); *see also* Farah Stockman, *Somerville Mulls Ban On “Criminal Loitering,”* BOSTON GLOBE, Nov. 14, 2002, at B1 (describing public concern over increasing gang violence in Somerville).

29. *Somerville Gang Ordinance*, *supra* note 26 (permitting police to disperse and arrest loitering gang members); *see also* Kevin Rothstein, *Somerville Adopts Loitering Ordinance to Combat Gangs*, BOSTON HERALD, Dec. 4, 2002, at 10 (describing Board of Aldermen’s decision to pass anti-loitering ordinance).

30. Santo, *supra* note 24, at 270-71 (describing origins of anti-loitering laws).

31. *See* Clark, *supra* note 16, at 115 (tracing development of American vagrancy laws).

32. *Id.* at 116 (surveying various forms of twentieth-century vagrancy laws).

33. *Id.* at 117 (noting few court challenges to vagrancy laws prior to 1963). In 1963, the Supreme Court held that indigent criminal defendants have a right to counsel in felony prosecutions before state courts, opening the door to more serious challenges to anti-loitering laws. *Id.* (citing *Gideon v. Wainright*, 372 U.S. 335 (1963)).

34. 405 U.S. 156 (1972).

35. *Id.* at 156 n.1 (explaining ordinance under review); *see also* Ernesto Palomo, “*The Sheriff Knows Who The Troublemakers Are. Just Let Him Round Them Up*”: *Chicago’s New Gang Loitering Ordinance*, 2002 U. ILL. L. REV. 729, 735-36 (2002) (distinguishing “mere” loitering ordinances found unconstitutional in *Papachristou* from loitering laws covering more specific activities).

mere loitering may be unconstitutional.³⁶ The various defendants were convicted of crimes such as prowling by auto, loitering and being a vagabond under a city ordinance that derived from early English law.³⁷ The Court held the ordinance unconstitutionally vague because it failed to provide a person of ordinary intelligence with fair notice of the prohibited conduct.³⁸ Furthermore, the Court warned that the ordinance encouraged arbitrary and erratic arrests and convictions because there were no standards governing the exercise of police discretion in enforcing the law.³⁹ Despite unanimously striking down the ordinance, however, the Court acknowledged that some vagrancy and loitering ordinances are useful and constitutional so long as they apply evenly to all people.⁴⁰

In contrast to the ordinance in *Papachristou*, loitering ordinances that proscribe specific illegal conduct beyond mere loitering have generally survived constitutional challenges.⁴¹ For example, courts have upheld ordinances that forbid loitering in common areas of a building, loitering while carrying a concealed weapon, and loitering that obstructs city sidewalks.⁴² These loitering laws can be distinguished from those that courts have struck down as vague because they all require some form of conduct that is objectively apparent to police.⁴³ Cases such as these are more the exception than the rule, however, and since *Papachristou*, relatively few anti-loitering

36. *Papachristou*, 405 U.S. at 163-64 (noting ordinance cast too wide a net by criminalizing normally innocent activities). The Court noted that many of the activities barred by the ordinance are “historically part of the amenities of life as we have known them.” *Id.* at 164. Drawing on examples from literature, the Court suggested that the idea of persons “wandering or strolling from place to place” has been celebrated by Walt Whitman and Vachel Lindsey, and noted that “nightwalkers” could include many sleepless people “hopeful that sleep-inducing relaxation will result.” *Id.* at 163.

37. *Id.* at 158 (explaining behavior ordinance sought to prohibit).

38. *Id.* at 162 (indicating ordinance does not provide notice of criminal activity to potential offender).

39. *Id.* at 168 (warning against “unfettered discretion” law places in hands of Jacksonville police); see also *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (invalidating California statute requiring suspected loiters adequately identify themselves to police). The statute permitted officers to arrest individuals loitering or wandering the streets who could not provide credible and reliable information about themselves, or account for their presence when questioned by a police officer. *Kolender*, 461 U.S. at 353. Holding the statute unconstitutionally vague, the Court concluded that the law afforded police officers “virtually complete discretion . . . to determine whether a suspect had satisfied the statute” because it contained no standard for determining what constitutes “credible and reliable” identification. *Id.* at 358.

40. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (suggesting some vagrancy ordinances constitutional if fairly applied).

41. See *Santo*, *supra* note 24, at 292-96 (highlighting qualities of anti-loitering ordinances upheld in state and federal courts); see also *Palomo*, *supra* note 35, at 736-37 (contrasting scope of successful loitering laws with those invalidated for vagueness).

42. See *Yuen v. Mun. Ct.*, 125 Cal. Rptr. 87 (Cal. Ct. App. 1975) (upholding ordinance prohibiting loitering while carrying concealed weapon); *Henrichs v. Hildreth*, 207 N.W.2d 805 (Iowa 1973) (upholding ordinance forbidding loitering on sidewalks when obstructing passage); *People v. Pagnotta*, 253 N.E.2d 202, 206-7 (N.Y. 1969) (upholding ordinance forbidding loitering in common areas of building); see also *Palomo*, *supra* note 35, at 736 (describing generally ordinances withstanding vagueness challenges); *Santo*, *supra* note 24, at 292-96 (summarizing specific proscriptions of successful loitering ordinances).

43. *Palomo*, *supra* note 35, at 736 (highlighting qualities of successful loitering ordinances).

statutes have survived constitutional challenges.⁴⁴ Courts most frequently strike down these statutes on the grounds that they are vague and overbroad.⁴⁵ Whether an ordinance might survive a constitutional challenge based on either vagueness or overbreadth is a complicated question, but an examination of these doctrines forms a context in which to analyze the legality Somerville ordinance.

a. Void-for-Vagueness

The “void-for-vagueness” doctrine derives from the due process requirements of the Fifth and Fourteenth Amendments, and covers two related topics pertaining to anti-loitering laws: (1) adequate notice of prohibited conduct, and (2) the prevention of arbitrary and discriminatory law enforcement.⁴⁶ To satisfy the notice requirement, a criminal statute must define the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited.”⁴⁷ Courts have noted however, that the more critical aspect of the doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.⁴⁸ If the

44. See Santo, *supra* note 24, at 290 (noting unsuccessful attempts by many U.S. cities to draft constitutionally valid anti-loitering ordinances).

45. See Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 382 (1995) (citing basis of constitutional challenges to anti-loitering laws); Santo, *supra* note 24, at 278-83 (discussing common constitutional challenges to anti-loitering laws). Although the void-for-vagueness and overbreadth doctrines are the two most common constitutional barriers to loitering ordinances, other obstacles exist. See Santo, *supra* note 24, at 283-90 (explaining Fourth, Eighth, and Fourteenth Amendment-based challenges to anti-loitering laws). Anti-loitering ordinances also face challenges under the Fourth Amendment, which limits police discretion by requiring law enforcement officers to furnish probable cause before making a valid search or arrest. See *Carroll v. U.S.*, 267 U.S. 132, 162 (1925) (defining constitutional requirement of probable cause); Santo, *supra* note 24, at 284 (explaining elements required to establish probable cause). The common Fourth Amendment concern with regard to anti-loitering laws is that the measures seek to prevent crime before it occurs, a motive that runs counter to the definition of probable cause. See Santo, *supra* note 24, at 286. The “reasonable suspicion” test set forth in *Terry v. Ohio* provides a means to overcome probable cause difficulties. *Terry v. Ohio*, 392 U.S. 1, 16-18 (1968); see Santo, *supra* note 24, at 285 (explaining “stop and frisk” exception to Fourth Amendment probable cause requirement). The test permits officers to stop, question and frisk suspects when the officers have reasonable suspicion, based on articulable facts, that criminal activity is about to take place. *Terry*, 392 U.S. at 30 (articulating “stop and frisk” exception).

46. Poulos, *supra* note 45, at 389-91 (explaining nature of vagueness doctrine as applied to loitering laws).

47. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (stating actual notice requirement of vagueness doctrine); see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The notice element of the vagueness doctrine requires that a criminal statute must provide “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v. Harriss*, 347 U.S. 612, 617 (1954).

48. *Smith*, 415 U.S. at 574 (indicating importance of governing enforcement); see also Poulos, *supra* note 45, at 390 (identifying prevention of arbitrary police enforcement as “far more persuasive” rationale for vagueness doctrine).

legislature fails to provide police with specific guidelines for enforcing a law, the police are free to pursue their “personal predilections” and have unfettered discretion to decide whom to arrest.⁴⁹ Such discretion carries with it the potential for erratic arrests and standardless intrusions, as police, prosecutors, and juries may reach different conclusions about the purpose or application of a law.⁵⁰

b. The Overbreadth Doctrine

The second Constitutional obstacle that has led to the demise of anti-loitering ordinances is the overbreadth doctrine.⁵¹ A statute is overbroad if it prohibits conduct or activities protected by the First Amendment.⁵² Overbroad statutes might violate freedom of speech, association and assembly, for example.⁵³

Recognizing that lawmakers must balance First Amendment protections with other “compelling needs of society,” however, the Supreme Court in *Broadrick v. Oklahoma*⁵⁴ limited the application of the overbreadth doctrine by distinguishing between statutes intended to govern “pure speech” and those primarily regulating conduct.⁵⁵ With respect to statutes governing conduct, such as loitering, the Court determined that the statutory overbreadth “must not only be real, but substantial as well,” before invalidation of the statute is permissible.⁵⁶ This heightened standard theoretically suggests that anti-

49. *Smith*, 415 U.S. at 575 (describing dangers of standard-less sweeps).

50. *Id.* (stating concerns regarding police discretion in place of legislative standards) ; *see also* Santo, *supra* note 24, at 280 (explaining potential abuse of loitering laws lacking guidelines for law enforcement). A common example of the uneven enforcement of vague laws is the disproportionate arrests of minorities. *Id.* at 280-81. Without a specific explanation of prohibited behavior, police are free to “reinforce stereotypes against people they believed [are] generally suspicious.” *Id.* at 81.

51. Santo, *supra* note 24, at 281 (describing overbreadth doctrine as constitutional barrier to anti-loitering statutes). The overbreadth doctrine is similar in scope to the void-for-vagueness doctrine, but is rooted in the First Amendment. *Id.* at 281-282.

52. *See* *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (invalidating anti-loitering ordinance for violating right to free assembly and association); *Thornhill v. Alabama*, 310 U.S. 88, 105-6 (1940) (invalidating anti-loitering statute due to impermissible First Amendment restrictions). The ordinance in *Coates* made it a criminal offense for three or more persons to assemble on a sidewalk and “conduct themselves in a manner annoying to persons passing by.” *Coates*, 402 U.S. at 611. The Court held that the ordinance criminalized conduct, namely assembly, protected by the Constitution. *Id.* at 616.

53. *See* Poulos, *supra* note 45, at 392-93 (explaining scope and rationale of overbreadth doctrine); Santo, *supra* note 24, at 282 (listing protected activities upon which overbroad statutes frequently encroach).

54. 413 U.S. 601 (1973).

55. *Id.* at 615-16 (suggesting overbreadth should be considered through case-by-case analysis); *see also* Poulos, *supra* note 45, at 392 (detailing changes in ways courts review overbreadth challenges to statutes regulating conduct). The *Broadrick* Court noted that the First Amendment needs “breathing space” and statutes limiting the exercise of First Amendment rights “represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broadrick*, 413 U.S. at 611-12. Application of the overbreadth doctrine, the Court noted, is, “manifestly, strong medicine.” *Id.* at 613.

56. *Broadrick*, 413 U.S. at 615 (setting forth criteria for determining whether statute violates overbreadth doctrine). More recently, the Court rejected an overbreadth challenge to a housing authority trespass law. *See*

loitering laws prohibiting otherwise innocent conduct may survive overbreadth challenges.⁵⁷

C. Gang Loitering Ordinances and City of Chicago v. Morales

In the 1999 *City of Chicago v. Morales* decision, the Supreme Court weighed in for the first time on lawmakers' efforts to use anti-loitering laws to curb gang activity.⁵⁸ The case focused on an anti-loitering ordinance that the Chicago City Council passed in an effort to curb increasing gang activity.⁵⁹ While the Court struck down the law as void for vagueness, certain justices indicated that, with minor revisions, a similar ordinance might survive constitutional scrutiny.⁶⁰

The Gang Congregation Ordinance, as the law was known, directed a police officer who "observe[d] a person whom he reasonably believe[d] to be a criminal street gang member loitering in any public place with one or more persons," to "order all such persons to disperse and remove themselves from the area."⁶¹ In the first three years of its enforcement, police made more than

Virginia v. Hicks, 539 U.S. 113, 121-24 (2003). In doing so, the Court indicated it would rarely, if ever, uphold an overbreadth challenge to regulations not primarily directed at speech or speech-related conduct. *Id.*

57. Santo, *supra* note 24, at 283 (speculating on success of overbreadth challenges to loitering laws in wake of *Broadrick*).

58. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (reviewing Chicago ordinance intended to curb gang-loitering). Lower courts have weighed in on similar issues. *See People ex rel Gallo v. Acuna*, 929 P.2d 596, 602 (Cal. 1997) (allowing city officials to restrict non-criminal conduct of gang members constituting a public nuisance). The City of San Jose obtained an injunction that prevented thirty-eight individuals linked to a criminal street gang from engaging in otherwise legal activities, such as congregating with associates, wearing clothes bearing certain symbols, and carrying a beeper. *Id.* at 624 n.3. The California Supreme Court upheld the injunction, rejecting First Amendment free association objections because the street gang's conduct failed to qualify as protected form of association. *Id.* at 608. The court held that city officials had the authority to restrict certain non-criminal activities of habitual lawbreakers in order to assure the freedom of law-abiding citizens who felt threatened by their neighbors. *Id.* at 618.

59. *Morales*, 527 U.S. at 46-47 (describing Chicago anti-loitering ordinance at issue). Concerned by rising violence associated with street gangs in their neighborhoods, a predominantly white Chicago community group launched a campaign to curb gang activity. Palomo, *supra* note 35, at 739. After conducting research on anti-gang legislation, the group submitted proposals to Mayor Richard Daley and the Chicago City Council. *Id.* In 1992, the City held hearings to determine the extent of the problem posed by loitering gang members, and after much debate, passed the Gang Congregation Ordinance by a thirty-one to eleven margin. *Id.*; *see also* Robert Delchin, *The Gang's All Here: Anti-Loitering Laws in the Face of City of Chicago v. Morales*, 48 CLEV. ST. L. REV. 215, 216-17 (2000) (providing background on adoption of Chicago gang loitering ordinance).

60. *Morales*, 527 U.S. at 66 (O'Connor, J., concurring) (discussing possible measures to cure existing constitutional deficiencies).

61. *Id.* at 45, 47 n.2 (discussing provisions of ordinance). Under the ordinance, any person who does not "promptly obey" a police officer's order to disperse may be arrested. *Id.* at 47 n.2. A defense to an alleged violation of the ordinance exists when no person who was observed loitering was in fact a member of a street gang. *Id.* at 47 n.2. Two months after the adoption of the ordinance, the Chicago Police Department enacted a General Order to provide guidelines that limited police officers' discretion in enforcing the law. *Id.* at 48. The order established detailed criteria for defining street gangs, and restricted the enforcement of the ordinance to designated areas. *Id.* The City, however, did not reveal the location of these designated areas to the public. *Id.* at 49.

42,000 arrests for violating the ordinance and issued over 89,000 dispersal orders.⁶² A number of individuals arrested for violating the ordinance challenged the constitutionality of the law in state court, and eleven of the thirteen trial judges who heard enforcement proceedings found the ordinance to be constitutionally invalid.⁶³ After the Illinois Court of Appeals and the Illinois Supreme Court affirmed a series of consolidated appeals, the United States Supreme Court granted certiorari in 1998.⁶⁴

1. *The Supreme Court Weighs in on a Case of First Impression*

Observers initially believed that *Morales* would provide an opportunity for the Court to definitively identify fundamental liberty interests in connection with loitering activities.⁶⁵ But while a 6-3 majority agreed that the ordinance was unconstitutionally vague, multiple opinions produced little agreement on the fundamental right to loiter.⁶⁶ The Court invalidated the ordinance based on the vagueness doctrine because it violated the Fourteenth Amendment's Due Process requirement that "a legislature establish minimal guidelines to govern law enforcement."⁶⁷ Additionally, the Court concluded that the ordinance did

62. *Id.* (citing volume of police activity pursuant to ordinance).

63. *Id.* at 49 (discussing results of trial court hearings on alleged violations of ordinance). A trial court convicted defendant Jesus Morales, who was arrested after a police officer concluded, based on the color of his clothing, that he belonged to street gang. Clark, *supra* note 16, at 128.

64. *City of Chicago v. Morales*, 527 U.S. 41, 49-50 (1999) (describing case's procedural history). The Cook County Circuit Court initially dismissed the city's actions against alleged loiterers, finding the ordinance unconstitutionally vague. *See City of Chicago v. Youkhana*, 660 N.E.2d 34, 36 (Ill. App. Ct. 1995). The Illinois Appellate Court affirmed on appeal. *Id.* at 38. The City then appealed to the Illinois Supreme Court, which affirmed the Appellate Court's ruling and held that the gang loitering ordinance was impermissibly vague on its face because it placed arbitrary restrictions on personal liberties. *City of Chicago v. Morales*, 687 N.E.2d 53, 57 (Ill. 1997).

65. *See Debra Livingston, Gang Loitering, The Court and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141, 141 (1999) (speculating on potential for "major statement" from *Morales* court).

66. Shawn P. Napier, *America Responds to Criminal Gang Activity: Taking Back Our Streets: A Critical Analysis of Chicago v. Morales*, 29 CAP. U. L. REV. 719, 733-34 (2002) (discussing lack of consensus in *Morales*); *see also City of Chicago v. Morales*, 527 U.S. 41, 41-45 (1999) (containing opinions by six Justices). Justice Stevens wrote the plurality opinion; Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer joined in part, while only Justices Souter and Ginsberg joined in the entire opinion. *Id.* Justices O'Connor, Kennedy and Breyer each wrote their own concurring opinions, while Justices Scalia and Thomas wrote dissenting opinions. *Id.* Chief Justice Rehnquist and Justice Scalia joined in Justice Thomas's dissent. *Id.*

67. *Morales*, 527 U.S. at 60 (finding no guidelines in ordinance to govern law enforcement sufficient to satisfy constitutional requirements). While the Court did find the ordinance unconstitutionally vague, the plurality also agreed with the Illinois Appeals Court that it was not overbroad because the ordinance did not have a sufficiently substantial impact on conduct protected by the First Amendment. *Id.* at 52-53. The ordinance did not prohibit any form of speech, and "[b]ecause the term 'loiter' is defined as remaining in one place with 'no apparent purpose,' it does not prohibit any form of conduct that is apparently intended to convey a message." *Id.* at 53. Similarly, the Court noted that the definition of loiter rendered the ordinance inapplicable to assemblies that were designed to demonstrate a group's support of, or opposition to, a particular point of view. *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984)). Finally, the Court held that the ordinance's impact on the "social contract" between gang members and others did not infringe upon the First Amendment right of association recognized in other cases. *Id.* at 53. The City of Chicago made similar contentions regarding the First Amendment in its brief to the U.S. Supreme Court and further fleshed

not meet the fair notice requirement because it did not provide ordinary citizens with adequate notice of what constituted prohibited conduct.⁶⁸ Writing for the plurality, Justice Stevens concluded that the definition of “loitering” provided in the ordinance, failed to distinguish between innocent and threatening conduct, and as a result, left police with wide discretion in determining whether a person was violating the law.⁶⁹ With a nod to the “serious and difficult” problems faced by Chicago residents, however, only three of the six justices in the majority agreed that loitering is a constitutionally protected liberty interest, thereby leaving the door open for more narrowly-tailored gang loitering ordinances.⁷⁰

Justice O’Connor wrote a concurring opinion in *Morales* detailing how the

out the distinctions that spared the Chicago ordinance from a successful overbreadth challenge. Br. for Pet’r at 19, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121). The City noted, for example, that the gang loitering ordinance was not directed at protected activities such as speech, but rather at loitering, and applied to loiterers who refused to move after being directed to do so, irrespective of whether those loiterers were speaking. *Id.* Furthermore, the petitioners suggested that the very purpose of an assembly is to express or convey a message to others, and that the right to assemble does not protect persons merely because they are standing in proximity to each other. *Id.* at 19-20. In addressing potential violations of an individual’s “freedom of association,” the petitioners pointed out that such protection is not expressly provided by the Constitution, and thus association, like assembly, is entitled to constitutional protection only when individuals gather for a particular and protected purpose. *Id.* at 20-21.

68. *Morales*, 527 U.S. at 57 (determining law leaves public uncertain about nature of criminal conduct). The Court concluded that the ordinance was not vague about the normal meaning of “loitering,” but rather about the forms of loitering which were covered by the ordinance. *Id.*

69. *Id.* at 62 (explaining insufficient limitations on police discretion). The ordinance defined “loiter” as “remain[ing] in any one place with no apparent purpose.” *Id.* at 47. The Court held that this standard was subjective because “its application depends on whether some purpose is ‘apparent’ to the officer on the scene.” *Id.* at 62. Justice Stevens acknowledged, however, the requiring an officer to reasonably believe that a group of loiterers contained a gang member limited the officer’s authority to order dispersal. *Id.* at 62. That limitation would “no doubt be sufficient,” Justice Stevens wrote, if the ordinance applied only to “loitering by persons reasonably believed to be criminal gang members.” *Id.*

70. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (recognizing troubling conditions leading to enactment of ordinance). In Section III of his opinion, in which only Justices Souter and Ginsberg joined, Justice Stevens stated that the “freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 53. Justice Stevens noted that the Court has “expressly identified the ‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty protected by the Constitution.’” *Id.* (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900)). Justice Thomas disagreed, and, in his dissent, argued that “[l]aws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman conquest.” *Id.* at 103 (Thomas, J., dissenting). Justice Scalia, too, criticized the plurality opinion recognizing a fundamental right to loiter, and suggested that Justice Stevens’ used the term “constitutional right” in a “renegade sense.” *Id.* at 84 (Scalia, J., dissenting). Seizing upon the “vast historical tradition” of criminalizing loitering that Justice Thomas described, Justice Scalia opposed the notion that the “right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or the adoption of the Fourteenth Amendment.” *Id.* Furthermore, Justice Scalia wrote that the citizens of Chicago were within their rights to impose a “minor limitation upon the free state of nature” in order to limit the dangers posed by gang members who terrorized their neighborhoods. *Id.* at 74 (Scalia, J., dissenting). Justice Scalia compared the loitering ordinance to speed limits and laws that authorized police to disperse crowds gawking at car accidents, illustrating how citizens of Chicago voluntarily limited their freedoms in a constitutionally permissible manner. *Id.* at 73; see also Delchin, *supra* note 59, at 219-20 (describing divide of *Morales* Court).

Chicago City Council could have drafted the ordinance to withstand constitutional scrutiny.⁷¹ Her opinion provides specific guidelines to help future lawmakers remain within the bounds of the constitution in drafting similar anti-loitering ordinances.⁷² First, Justice O'Connor suggested that anti-loitering laws that target only persons reasonably believed to be gang members might cure the vagueness problem by specifying those to whom a dispersal order could be issued.⁷³ Second, Justice O'Connor noted that the term "loiter" could be defined in a more limited fashion 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."⁷⁴ She wrote that such a definition would avoid the vagueness problems because it limits the absolute discretion of police officers to determine which activities are statutorily permissible.⁷⁵ While Justice O'Connor agreed that the Chicago ordinance was unconstitutionally vague, she concluded that "reasonable alternatives" exist for municipalities looking to combat the "very real threat posed by gang intimidation and violence," so long as such alternatives incorporate limits on the area and manner in which the laws may be enforced.⁷⁶

D. Anti-loitering Ordinances Post-Morales

Since the Supreme Court decided *Morales* in 1999, general loitering and drug-zone ordinances have remained vulnerable in the lower courts, while narrower public-order measures focusing on actions beyond mere loitering have generally survived constitutional challenges.⁷⁷ For example, the Georgia Supreme Court struck down a municipal ordinance that prohibited drug-related loitering and prowling because the law was "too vague to justify the imposition

71. *Morales*, 527 U.S. at 67 (O'Connor, J., concurring) (emphasizing narrow scope of Court's holding). According to Justice O'Connor, a state supreme court may impose limiting constructions of a statute in order to make it constitutional, but the United States Supreme Court is powerless to adopt them on its own. *Id.* at 68.

72. *Id.* at 67 (O'Connor, J., concurring) (suggesting constitutionally permissible alternatives to Chicago ordinance); see also Clark, *supra* note 16 at 144 (noting Justice O'Connor's suggestions may themselves be vague).

73. *Morales*, 527 U.S. at 66 (O'Connor, J., concurring) (posing options to limit scope of ordinance).

74. *Id.* at 68 (O'Connor, J., concurring) (noting definition of "loiter" provided in ordinance open to broad interpretation).

75. *Id.* at 68 (O'Connor, J., concurring) (suggesting ways to impose more rigid standards on police enforcement of anti-loitering laws). Under the Illinois Supreme Court's construction of the ordinance, any police officer in Chicago could arbitrarily "order at his whim any person standing in a public place with a suspected gang member to disperse." *Id.* at 66. Because the ordinance lacked any standard to determine whether an individual has an "apparent purpose" the officer ultimately decided which purposes were permissible. *Id.* at 65-6.

76. *City of Chicago v. Morales*, 527 U.S. 41, 67 (1999) (recognizing some degree of police discretion necessary).

77. See Strosnider, *supra* note 19, at 126 (linking validity of anti-loitering ordinances post-*Morales* to breadth of laws). Strosnider suggests, however, that the ordinances at issue in these cases would likely have been struck down under earlier precedent, namely *Papachristou*. *Id.* at 127 n.198.

of criminal punishment for its violation.”⁷⁸ On the other hand, courts have distinguished *Morales* in a number of cases where specific public-order statutes targeted actions other than loitering.⁷⁹ In *City of Chicago v. Powell*,⁸⁰ for example, an Illinois appeals court upheld an ordinance aimed at curbing drug sales and prostitution because the law adequately defined the “unlawful business” which it sought to prohibit.⁸¹

E. The Somerville Anti-Loitering Ordinance

With these constitutional pitfalls in mind, the drafters of the Somerville ordinance took steps to address some of the deficiencies that have rendered other anti-loitering ordinances constitutionally invalid.⁸² First, the ordinance seeks to prohibit not mere loitering, but “gang loitering,” which is explicitly defined to include activities such as intimidating others, attempting to control identifiable areas, and threatening to commit a crime.⁸³ Similarly, the law

78. *Johnson v. Athens-Clarke County*, 529 S.E.2d 613, 616 (Ga. 2000) (invalidating municipal anti-loitering ordinance on vagueness grounds). The Athens-Clark County Municipal Ordinance prohibited drug-related loitering or prowling “in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.” *Id.* at 614 (quoting Athens-Clark County Municipal Ordinance § 3-5-23). Citing *Morales*, the court struck down the ordinance because it failed to provide notice as to which areas were targeted for enforcement, and because its prohibition of “unlawful drug activity” offered no guidelines to law enforcement in determining which behavior triggered criminal liability. *Id.* at 616-17. The court held that the ordinance did not pass constitutional muster because an innocent person unfamiliar with the drug culture could stand or sit in a “known drug area” without knowing the area had been designated as such. *Id.* at 616.

79. See Strosnider, *supra* note 19, at 127-30 (examining successful anti-loitering laws post-*Morales*); see also *City of Chicago v. Powell*, 735 N.E.2d 119, 130-31 (Ill. App. Ct. 2000) (reversing trial court invalidation of ordinance prohibiting solicitation of unlawful business); *Bentancourt v. Giuliani*, 97 Civ. 6748 (JSM), 2000 U.S. Dist. LEXIS 18516, at *5 (S.D.N.Y. Dec. 26, 2000) (upholding ordinance barring obstructions in public places). The plaintiff was arrested while sleeping on a park bench in a human-sized “tube,” constructed from cardboard boxes. *Id.* at *3. He argued that the New York City Quality of Life Initiative, which prohibited this conduct, was unconstitutionally vague as it was applied. *Id.* at *4-5. The court held that unlike the *Morales* ordinance, which did not offer guidance on what constituted loitering, the ordinance at issue offered guidance by listing specific objects, including boxes, that should not be left in public spaces. *Id.* at *12-13.

80. 735 N.E.2d 119 (Ill. App. Ct. 2000).

81. *Id.* at 131 (upholding anti-loitering ordinance with specific criminal purpose). The Chicago ordinance, previously declared unconstitutionally vague in the state trial court, prohibited any person from “standing upon, using or occupying the public way to solicit any unlawful business.” *Id.* at 122. Because the ordinance went on to define the “unlawful business” which it sought to prohibit, the court held that, unlike *Morales*, the law provided sufficient notice of the forbidden conduct. *Id.* at 130.

82. See Commonwealth, *supra* note 3 (quoting Somerville Mayor Joe Curtone on measures to prevent illegal or unfair police practices).

83. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(d) (Mass. 2004) (limiting ordinance to loitering in furtherance of street gang activity). The ordinance defines “Gang loitering” as:

one who, with the intent to further the common purpose or existence of a criminal street gang: (i) engages in conduct with the intent to control identifiable areas which renders such areas impassable without unreasonable inconvenience or hazard; (ii) threatens to commit a crime; (iii) defaces real or personal property in violation of section 126A of chapter 266 of the General Laws; (iv) intimidates another; or (v) engages in disorderly behavior or a breach of the peace.

targets gang members only, and requires the chief of police to promulgate procedures to identify current street gang members.⁸⁴ Finally, upon consultation with persons knowledgeable about the effects of gang activity, the chief of police must designate areas of the city in which he has determined that enforcement of the ordinance is necessary.⁸⁵

The ordinance also establishes a gang advisory board to help monitor and prevent improper police enforcement.⁸⁶ The Board provides recommendations on the training of police personnel to implement enforcement of the ordinance, and confers with the chief of police to establish procedures to prevent its enforcement against persons who are engaged in constitutionally protected activities.⁸⁷ The board consists of representatives from the Somerville Human Rights Commission, a representative from the police department, a member of the Board of Aldermen, and three representatives from the community, at least two of whom must be minorities.⁸⁸

III. ANALYSIS

To curb rising levels of violent gang activity in the city's streets and parks, the Somerville Board of Aldermen adopted a measure that permits police

Id.

84. *Id.* (stating guidelines and procedures for enforcement of ordinance). The scope of the ordinance is restricted to members of a criminal street gang, which is defined as:

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 the definition of 'criminal gang activity,' and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Id. Furthermore, the ordinance states that the chief of police:

shall, by written directive, promulgate procedures to identify current members of criminal street gangs for updating criminal street gang records regularly including, but not limited to, removing former members of criminal street gangs from such lists and shall promulgate regulations to ensure that any required notices under this act are provided in a language reasonably calculated to be understood by the alleged violator.

Id.

85. *Id.* (describing procedures by which police may designate areas for enforcement of ordinance). The ordinance requires that the chief of police indicate, in writing, areas of the city where he has determined that enforcement of its provisions is necessary. *Id.* In making this determination, the chief "shall consult with persons who are knowledgeable" about these areas. *Id.* Such persons may include members of the police department with special training or experience related to criminal street gangs, other police personnel with particular knowledge of gang activities in the proposed designated area, elected and appointed officials and community-based organizations. *Id.*

86. *See id.* (establishing Somerville Gang Advisory Board).

87. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(c)(2) (Mass. 2004) (explaining purpose and functions of Gang Advisory Board).

88. *Id.* (setting forth composition of Gang Advisory Board).

officers to arrest suspected gang members who loiter in designated public areas and refuse to disperse.⁸⁹ The Board's objectives in passing the ordinance were not new, as many other municipalities nationwide have adopted comparable measures seeking to curb rising levels of crime and drug activity.⁹⁰ However, a constitutionally permissive statute requires some form of novelty to overcome the constitutional problems that have plagued similar anti-loitering ordinances over the past four decades.⁹¹ By limiting the scope of its ordinance to members of criminal street gangs and providing detailed descriptions of prohibited conduct, Somerville lawmakers may have struck a permissible balance between public safety and individual freedom.⁹² Features such as a specific dispersal provision and an expanded definition of "gang loitering" distinguish the Somerville ordinance from other attempts to curb violent gang activity, and bode well for the possibility that the measure will survive constitutional challenges.⁹³

A. *Void-For-Vagueness*

1. *Sufficient Notice of Prohibited Conduct*

As discussed above, courts have relied heavily on the void-for-vagueness doctrine when striking down anti-loitering ordinances, holding in many instances that such measures fail to provide adequate notice of prohibited conduct.⁹⁴ In particular, courts have noted that the terms governing when and how loiterers must disperse often compound the inadequacy of notice.⁹⁵ The Somerville ordinance, however, includes a precisely worded dispersal order and sets forth specific guidelines for conformity.⁹⁶ The dispersal order in the

89. Commonwealth, *supra* note 3 (describing impetus for Somerville anti-loitering ordinance).

90. See *supra* notes 34-43 and accompanying text (citing examples of anti-loitering ordinances passed to curb illegal gang activity).

91. See *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (voiding anti-loitering measure for vagueness); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (striking down loitering statute as unconstitutionally vague and susceptible to arbitrary enforcement); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating vagrancy ordinance for failing to provide notice of forbidden conduct); *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (invalidating loitering ordinance aimed at constitutionally protected activity).

92. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1 (a), (d) (Mass. 2004) (limiting prohibited activity to behavior expressly defined as "gang loitering").

93. See *supra* notes 96-100, 102-116 accompanying text (discussing distinguishing characteristics of Somerville ordinance).

94. See *supra* notes 46-50 and accompanying text (discussing void-for-vagueness challenges to anti-loitering ordinances).

95. *Morales*, 527 U.S. at 59 (stating factors contributing to lack of notice in anti-loitering measures). The *Morales* Court notes that while a "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," such ambiguities do support the conclusion that "the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted." *Id.* at 59-60.

96. Compare H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (explaining procedures by which

Somerville ordinance addresses particular questions raised by the *Morales* court, such as how long loiterers must remain from a specific area, and how far away they must move.⁹⁷ While the Chicago ordinance simply required that loiterers “disperse and remove themselves from the area,” the Somerville ordinance directs loiterers to “remove themselves from within sight and hearing or of the place at which the order was issued.”⁹⁸ Furthermore, the Somerville ordinance contains a specific dispersal order, in that those ordered to disperse may not return to the place where the order was issued during the next three hours, or face the possibility of arrest.⁹⁹ These features provide greater notice to citizens as to what conduct triggers criminal liability, and how to conform their behavior to comply with the statute.¹⁰⁰

2. Limiting Unfettered Police Discretion

Minimal standards that inadequately guide law enforcement have led to the demise of anti-loitering measures under the void-for-vagueness doctrine.¹⁰¹ One key distinction between the Somerville ordinance and the measure struck down by the U.S. Supreme Court in *Morales* is the definition of “loiter.”¹⁰² The Chicago City Council defined “loiter” as simply “to remain in any one place with no apparent purpose,” and Justice O’Connor noted in her concurrence that such a definition is vague because it fails to provide any standard for law enforcement to determine whether an individual indeed has an “apparent purpose.”¹⁰³ The Somerville ordinance, on the other hand, prohibits not just loitering, but “gang loitering.”¹⁰⁴ The open-ended language which troubled the *Morales* Court is replaced by a provision that prohibits activities furthering the “common purpose. . . of a criminal street gang.”¹⁰⁵ The drafters

officers must request loiterers to disperse and conditions governing their return), with *Morales*, 527 U.S. at 59 (noting lack of specificity in order to disperse).

97. See *supra* note 96 and accompanying text (discussing dispersal order); see also Palomo, *supra* note 35, at 747 (analyzing dispersal order in 2002 Chicago ordinance passed in response to *Morales* decision).

98. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (noting specific instructions governing terms of dispersal); *Morales*, 527 U.S. at 59 (noting lack of specificity in order to disperse in Chicago ordinance).

99. H.B. 5045, 183d Gen. Ct., Reg. Sess. (Mass. 2004) § 1(a)(iii) (explaining procedures for police requesting loiterers to disperse and conditions governing their return).

100. See *Morales*, 527 U.S. at 59 (calling on drafters of anti-loitering ordinances to provide clearer notice of culpable conduct).

101. See *supra* notes 48-50 and accompanying text (explaining requirement that laws provide standards to guide law enforcement as to application).

102. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(d) (Mass. 2004) (discussing expanded definition of “gang loitering” in Somerville ordinance).

103. *City of Chicago v. Morales*, 527 U.S. 41, 66 (1999) (O’Connor, J., concurring) (criticizing vague definition of culpable conduct in Chicago ordinance).

104. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(d) (Mass. 2004) (setting out specific activities constituting “gang loitering”).

105. *Id.* (describing behavior ordinance seeks to prohibit). Gang loitering furthers the common purpose or existence of a criminal street gang when members engage in certain proscribed behaviors. *Id.*

of the Somerville ordinance provide an expansive list of specific activities to guide law enforcement in determining the purpose of a criminal street gang, including an intent to control identifiable areas of the city and defacing property.¹⁰⁶ Instead of penalizing loitering, the Somerville law requires police officers to leave people alone unless they are engaging in specific conduct that the Board of Aldermen seeks to prevent.¹⁰⁷ The determination of whether an individual is doing so is no longer left to the subjective judgment of the officer.¹⁰⁸

The class of individuals subject to enforcement of the Chicago gang ordinance is another deficiency in that law that drafters of the Somerville measure seem to have cured.¹⁰⁹ While the Chicago ordinance applied to anyone loitering in the company of a gang member, enforcement of the Somerville measure is limited explicitly to members of criminal street gangs.¹¹⁰ The distinction is critical because, as the *Morales* court noted, the Chicago ordinance applied to friends, relatives, counselors and even total strangers who happened to engage in public conversation with a member of a street gang.¹¹¹ In Somerville, restrictions on the application of the ordinance to members of criminal street gangs limit police officers' authority to order dispersal, a significant step in overcoming the vagueness problems that plagued the Chicago ordinance.¹¹²

Furthermore, the Somerville law offers greater protections against arbitrary police enforcement than those included in other anti-loitering ordinances.¹¹³ For example, police officers may only apply the law in designated areas of the city, where the chief of police has determined that enforcement is necessary.¹¹⁴ The police chief must also maintain records that officers are to consult to identify current street gang members.¹¹⁵ Finally, while the drafters of the Chicago ordinance concluded that any limitations on police discretion

106. *Id.* (listing behaviors which further common purpose and existence of a street gang). Such behavior includes conduct with the intent to control identifiable areas which renders such areas impassable, threatens to commit a crime, defaces real or personal property, intimidates another or engages in disorderly behavior or breach of the peace. *Id.*

107. *See supra* note 106 and accompanying text.

108. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(d) (Mass. 2004) (limiting police discretion in enforcement of ordinance).

109. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (limiting class of persons subject to enforcement of law); *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (discussing concern over application of ordinance to non-gang members).

110. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (explaining narrow scope of Somerville ordinance).

111. *Morales*, 527 U.S. at 62-63 (noting "wide net" cast by Chicago ordinance).

112. *See id.* at 62 (requiring stricter limitations on police discretion).

113. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(b), (c) (Mass. 2004) (advancing provisions aimed at preventing arbitrary police enforcement of ordinance).

114. *Id.* (requiring police chief to designate areas for enforcement where gang violence is prevalent).

115. *Id.* (requiring police chief to promulgate procedures for identifying current gang members subject to enforcement).

would best be developed through public policy, and not within the ordinance itself, the Somerville ordinance formalizes the input of community members and local officials.¹¹⁶ The law calls for the creation of a Gang Advisory Board, which is to provide recommendations on police training to implement the Act, and address citizens' concerns about arbitrary or unfair enforcement.¹¹⁷ These combined features limit the potential for abuse of police power that has troubled courts in the past, leading to the invalidation of numerous anti-loitering ordinances on vagueness grounds.¹¹⁸

B. Overbreadth

In addition to vagueness issues, anti-loitering ordinances have traditionally faced scrutiny for potential restrictions on First Amendment freedoms of speech, association and assembly.¹¹⁹ As the *Morales* court did not invoke the overbreadth doctrine to invalidate the Chicago ordinance, the Somerville ordinance would likely survive a challenge on similar grounds.¹²⁰ The hypothetical concern, however, is that police would apply the ordinance to persons who appear to be loitering, but are actually engaged in conduct protected by the First Amendment.¹²¹ Because "gang loitering," as defined in the Somerville ordinance, does not prohibit conduct that is intended to convey a message, it does not appear to prohibit speech.¹²² The law targets suspected loiterers for their acts, regardless of speech, and punishes loiterers only after they have refused to move.¹²³ As for freedom of assembly, the definition of "gang loitering" again appears to render the ordinance inapplicable to a purposeful gathering, such as a demonstration, public speech or other expressive activity.¹²⁴ Gatherings for these purposes go well beyond

116. *City of Chicago v. Morales*, 687 N.E.2d 53, 58-59 (Ill. 1997) (explaining drafters' decision to omit police authority provisions in Chicago ordinance). After the Chicago City Council enacted the gang loitering ordinance, the Chicago police department issued a general order providing enforcement guidelines. *Id.* at 59; H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(c)(2) (Mass. 2004) (establishing board to advise Somerville police on enforcement of ordinance).

117. *See supra* notes 86-88 and accompanying text (discussing advisory board overseeing implementation of Somerville ordinance).

118. *See City of Chicago v. Morales*, 527 U.S. 41, 62-63 (1999) (discussing legislature's duty to provide guidelines to govern law enforcement).

119. *See supra* notes 51-57 and accompanying text (detailing challenges to anti-loitering ordinances on First Amendment grounds).

120. *Morales*, 527 U.S. at 52-53 (concluding Chicago ordinance does not have "sufficiently substantial impact on conduct protected by First Amendment"); *see also supra* note 67 (noting Chicago ordinance does not impact conduct protected by First Amendment).

121. *See Br. for Pet'r at 22, City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121) (speculating on possibility of anti-loitering ordinance infringing on constitutionally protected activities).

122. *See supra* note 83 and accompanying text (prohibiting loitering in furtherance of street gang activity).

123. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(a) (Mass. 2004) (providing guidelines when law may be applied).

124. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1(d) (Mass. 2004) (limiting application of law to activities furthering existence or common purpose of street gangs).

the behaviors prohibited in the ordinance under the umbrella of “furthering the common purpose or existence of a criminal street gang.”¹²⁵ Like assembly, association is entitled to constitutional protection only when individuals gather for a particular and protected purpose.¹²⁶ This ordinance infringes neither type of protected activity because it is not directed at speech or assembly within the meaning of the First Amendment.¹²⁷

C. Potential for Problems

The Somerville ordinance largely reflects the suggestions that Justice O’Connor set forth in her concurrence in *Morales*, where she described how lawmakers could draft a constitutionally permissible anti-loitering ordinance.¹²⁸ Only Justice Breyer supported those recommendations, however, and the possibility remains that other justices would not agree.¹²⁹ Because the *Morales* court failed to produce a majority opinion, many questions surrounding the constitutionality of anti-loitering ordinances remain open to interpretation.¹³⁰ Nonetheless, Justice O’Connor provided a starting point, and the drafters of the Somerville ordinance faithfully adopted her suggestions.¹³¹

IV. CONCLUSION

In the fall of 2002, after a series of heinous crimes in their community, Somerville lawmakers faced a dilemma: criminal street gangs were largely to blame for the high rate of violent crime, but police were unable to make any arrests because gang members committed no punishable offense when they knew that police officers were present. In response to this untenable situation, the city’s Board of Aldermen passed an anti-loitering law empowering police to arrest suspected gang members who refused to disperse from designated areas of the city. In doing so, Somerville joined a number of other municipalities across the country that have enacted anti-loitering laws to curb a variety of urban ills, including gang violence.

In light of the Supreme Court’s *Morales* decision, Somerville lawmakers had to devise a measure that was potent enough to reduce violent gang activity, but

125. See *supra* note 67 (distinguishing constitutionally protected assembly from gatherings void of any expressive activity).

126. See *supra* note 67 (arguing loitering by gang members not covered by constitutional right to association).

127. See *supra* note 67 (noting freedom to associate applies only when individuals gather for otherwise protected purpose).

128. *City of Chicago v. Morales*, 527 U.S. 41, 67 (1999) (O’Connor, J., concurring) (suggesting ways to draft constitutionally valid ordinance prohibiting loitering).

129. See Palomo, *supra* note 35, at 750 (noting ordinance adopting Justice O’Connor’s suggestions may fail to meet constitutional standards of other justices).

130. See Clark, *supra* note 16, at 133 (emphasizing issues remaining unresolved following *Morales*).

131. H.B. 5045, 183d Gen. Ct., Reg. Sess. § 1 (Mass. 2004) (incorporating language from O’Connor concurrence in *Morales* decision to satisfy constitutional requirements).

narrow enough to cure the constitutional deficiencies that doomed the Chicago ordinance. Moreover, Somerville officials faced growing skepticism from Latino residents that any such law would unfairly target minorities. With these concerns in mind, drafters of the Somerville measure appear to have struck an appropriate balance, and devised a law that will withstand constitutional scrutiny.

First, a specific prohibition against “gang loitering” in the Somerville measure narrows the definition of culpable conduct set forth in the Chicago ordinance, and provides law enforcement with a clear description of behavior that trigger enforcement of the law. Second, a specific dispersal order provides greater notice to citizens as to what conduct triggers criminal liability, and how to conform their behavior accordingly. Finally, the establishment of a gang advisory board to advise city leaders about police training and implementation of the ordinance addresses concerns that police will apply the law arbitrarily. These features resolve the vagueness problems that have plagued similar anti-loitering measures, and bode well for the possibility that the Somerville law will survive a constitutional challenge.

Michael J. Rossi