A Failed Attempt to Take Back Our Streets - A Constitutional Triumph for Gangs: City of Chicago v. Morales

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A FAILED ATTEMPT TO TAKE BACK OUR STREETS—A CONSTITUTIONAL TRIUMPH FOR GANGS: CITY OF CHICAGO V. MORALES

I. INTRODUCTION

Nationwide, cities are trying to integrate proactive approaches into their crime fighting initiatives. One such method has been by passing anti-loitering statutes; these statutes are designed to be a practical means for the police to put a halt to crime before it arises. However, these statutes have been the polestar of constant scrutiny, and are continually undergoing constitutional attacks. Courts have repeatedly struck down anti-loitering statutes for being unconstitutional. Three challenges consistently arise: (1) the void for vagueness doctrine, (2) the overbreadth doctrine, and (3) the attempt to criminalize an individ-


2. The Due Process Clause ensures that people are given fair notice and that laws are not arbitrarily enforced. The vagueness doctrine is used to strike down statutes that do not satisfy these requirements. See Robert Batey, Vagueness and the Construction of Criminal Statutes, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997).

"[A] law fails to meet the requirements of the Due Process Clause" not only "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," but also if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."


3. An overbreadth challenge arises under the First Amendment and is basically an assertion that the law prohibits acts protected by the Constitution. See Richard H. Fallon Jr., Making Sense of Overbreadth, 100 YALE L.J. 853, 858 (1991); see also City of Chicago v. Youkhan, 660 N.E.2d 34, 37 (Ill. App. Ct. 1995), aff'd sub nom. City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1997), cert. granted, 118 S. Ct. 1510 (Apr. 20, 1998) ("The overbreadth doctrine 'allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the first amendment, even though those rights do not protect the rights of the defendant.'") (citation omitted).

Overbreadth is a label attached to two distinct concepts. First, the doctrine has a substantive dimension that prohibits public officials from enforcing laws that infringe on constitutionally protected freedoms. Second, the overbreadth doctrine has
ual because of a "status."

In May 1992, the Chicago City Council met to discuss the unrelenting problems that street gangs cause. As a result, the city council enacted a procedural dimension characterized by a special standing rule that allows litigants to raise the rights of third parties to challenge a statute's substantive infirmities.

Berg, supra note 1, at 472-73.

4. See Berg, supra note 1, at 478-83. An arrest cannot be based on mere suspicion or simply criminalize a person because of who they are. See id. at 480; see also Robinson v. California, 370 U.S. 660 (1961) (holding that punishing a person because of a status is similar to cruel and unusual punishment).

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.


5. The phrase "gang" has numerous different meanings. "On the one hand there is the romanticized 'West Side Story' adolescent band whose members are aggressive and rebellious—but appealing. At the other extreme there is the 'gang' of organized crime—the Capone gang, or the Mafia families." JOHN HAGEEDORN & PERRY MACON, PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY 4-5 (1988). The "gangs" targeted by the ordinance in Chicago are groups of individuals who partake in criminal conduct and engage in anti-social behavior, usually a group of individuals with a common name and common identifying sign or symbol. See generally RANDALL G. SHELDON, ET AL., YOUTH GANGS IN AMERICAN SOCIETY 14 (Sabra Horne ed., Wadsworth Publishing Co. 1997).

6. See City of Chicago v. Morales, 687 N.E.2d 53, 57-58 (Ill. 1997), cert. granted, 118 S. Ct. 1510 (1998). The city council listened to residents discuss the problems that were caused as a result of gang members loitering in the public. The council learned that gang members loiter in an effort to "claim territory, recruit new members, and intimidate rival gangs and ordinary community residents." Id. Moreover, the council concluded that loitering often leads to participation in illegal activities. See id. at 58. The City Council included its findings into the preamble of the ordinance. The preamble reads:

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent drug related crimes; and

WHEREAS, The City of Chicago has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gangs members in public places has intimidated many law abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control...
acted the Gang Congregation Ordinance, giving police officers an almost blanket-like-power to make arrests. Known as the “gang loitering ordinance,” Chicago police officers who reasonably believed they saw a gang member loitering, with another person or persons, were permitted to order the people to disperse. Failure to comply with an officer’s order led to an arrest. Several people were charged with violating this ordinance, but the charges were consistently dismissed.

In *City of Chicago v. Morales,* the Supreme Court of Illinois struck down Chicago’s Gang Congregation Ordinance as unconstitutional. The *Morales* decision illustrates the difficulty in drafting a loitering statute that is an effective tool in crime prevention but does not impinge upon personal liberties and violate substantive due process. Further, the decision sets forth guidelines for future legislators to rely on when undertaking the task of drafting anti-loitering statutes. Conforming to these guidelines will assure that a law provides fair notice and is not sus-

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over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
WHEREAS, The City Council has determined that loitering in public places by criminal street gangs members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and
WHEREAS, Aggressive action is necessary to preserve the city’s streets and other public places so that the public may use such places without fear.

*Id.* at 58 (quoting *CHICAGO, ILL., MUN. CODE § 8-4-015*) (1992).
7. *CHICAGO, ILL., MUN. CODE § 8-4-015* (1992) reads:

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

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

8. *BLACK’S LAW DICTIONARY* defines “loitering” as: “To be dilatory; to be slow in movement; to stand around; . . . to lag behind; to linger or spend time idly.” *BLACK’S LAW DICTIONARY* 942 (6th ed. 1990).
9. See *Morales,* 687 N.E.2d at 57.
10. 687 N.E.2d 53.
ceptible to being arbitrarily and discriminatorily enforced.

This Note begins with the facts of Morales and the reasons for the court's holding. Next, other relevant cases are discussed and each constitutional challenge is examined; precedent highlights what a loitering statute must contain to pass constitutional muster. An evaluation of the case follows, and the holding of the court is compared with holdings in similar cases. Finally, an analysis of the impact of the case is presented, focusing on what legislators need to consider when attempting to draft an acceptable anti-loitering statute, if indeed such a statute is conceivable.

II. STATEMENT OF THE CASE

On June 15, 1993, defendants Youkhana and thirteen others were charged with violating Chicago's Gang Congregation Ordinance. The Cook County Circuit Court granted the defendants' motion to dismiss the charges for being unconstitutionally vague. The city appealed and the appellate court affirmed the decision. Defendants in another case were charged with violating the same ordinance; the circuit court dismissed the charges and the appellate court affirmed. Similar charges were again dismissed in circuit court when defendant Ramsey and forty-nine other defendants were charged with violating the same ordinance. Subsequently, the Cook County Circuit Court found defendant Morales and five other defendants guilty of violating the ordinance and sentenced them to jail. The appellate court reversed the decision based on its earlier holding. In Morales in October of 1997, the Supreme Court of Illinois put an end to further inconsistent rulings and affirmed the decision of the appellate court. In April of 1998 the Supreme Court of Illinois

11. See id. at 57.
12. See id. The appellate court found the law to be overly broad, violating First Amendment rights (association, assembly and expression), too vague, violating the Fifth Amendment, and designed to criminalize a person because of status, thereby violating the Eighth Amendment. Moreover, the court held that the ordinance allowed arrests to be made without probable cause. See id. at 59.
13. See id. at 57.
14. See id.
15. See id.
16. See id. The arresting officer's only basis for arresting Morales was that he was wearing black and blue clothing—the colors of a particular street gang in Chicago. See id. at 64 n.1.
17. See id. at 57.
18. See id. at 65. The trial courts in Cook County were not in agreement as to the constitutionality of the ordinance. This appeal involved 70 different defendants who were charged
the United States granted certiorari and the case is presently waiting to be decided.19

III. PRECEDENT

Loitering laws aimed at ending a distinct type of conduct or preventing certain people from behaving a particular way have repeatedly been struck down for several reasons.20 Courts deem laws overly vague in violation of the Fifth Amendment when a law fails to give notice of the type of conduct that it prohibits, when it can be arbitrarily enforced by law enforcement and when it criminalizes innocent behavior.21 When a law is enacted that intrudes upon constitutionally protected freedoms guaranteed by the First Amendment,22 it will most likely be found overly broad.23 When a law undertakes to punish a person for doing nothing,
penalizing a person simply because of a status, it will most likely be found to be an infraction of the Eighth Amendment of the United States Constitution.\textsuperscript{24}

\textbf{A. The Vagueness and Overbreadth Doctrines}

In \textit{Papachristou v. City of Jacksonville},\textsuperscript{26} the Supreme Court struck down a Florida vagrancy ordinance as unconstitutionally vague in violation of the Fifth Amendment Due Process Clause.\textsuperscript{26} The ordinance made common activities criminal.\textsuperscript{27} In striking down the ordinance, the Court held that these types of everyday activities are fundamental in today's society.\textsuperscript{28}

\textsuperscript{24} See Robinson v. California, 370 U.S. 660 (1962) (holding that an individual cannot be found in violation of an ordinance making narcotic addiction a crime). The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

\textsuperscript{25} 405 U.S. 156 (1972).

\textsuperscript{26} See id. \textit{JACKSONVILLE, FLA., OR. CODE} § 26-57 (1965) read as follows:

\begin{quote}
Rogues and vagabonds, or dissolve persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose of object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.
\end{quote}

\textit{Id.} at 156-57 n.1 (quoting \textit{JACKSONVILLE, FLA., OR. CODE} § 26-57 (1965)).

\textsuperscript{27} See id. at 163 ("The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent.").

\textsuperscript{28} The Court stated:

Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. The qualification "without any lawful purpose or object" may be a trap for innocent acts. Persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.

\textit{Id.} at 164 (citation omitted).
[T]hese activities are historically part of the amenities of life as we have know them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. 29

The court emphasized that an ordinance such as the Jacksonville loitering prohibition is too vague because "it furnishes a tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" 30 Moreover, the Court held that the ordinance did not give people adequate notice of what particular type of conduct was proscribed. 31 "This ordinance is void for vagueness . . . in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" 32 Furthermore, the Court acknowledged that loitering, alone, is not illegal and that a statute of this type is "too precarious" of a law. 33

In reaching its decision, the Court did not say that every type of loitering law would be found unconstitutionally vague. 34 In dicta, the Papachristou court suggested what needs to be included in an anti-loitering statute for it to withstand a constitutional challenge. 35 Nevertheless, it is

29. Id. at 164.
30. Id. at 170 (citation omitted).
31. See id. at 162.
32. Id. at 162 (quoting United States v. Hariss, 347 U.S. 612, 617 (1954)).
33. Id. at 171; see, e.g., Wyche v. State of Florida, 619 So. 2d 231, 235 (Fla. 1993) ("Hailing a cab or a friend, chatting on a public street, and simply strolling aimlessly are time-honored pastimes in our society. . . .")
34. Vague statutes violate the Due Process Clause of the United States Constitution. See generally Louisiana v. Muschkat, 706 So. 2d 429, 436 (La. 1998) (holding that a drug-traffic loitering statute was unconstitutionally vague and criminalized constitutionally protected activities).
35. The Court said that laws should let people know what the State "commands or forbids." Papachristou, 405 U.S. at 162. Further, the Court commented that a specific intent requirement may have been helpful in saving the law from being found unconstitutional. See id. at 162-63. Specific intent is defined as follows:

[A] 'specific intent' offense is one in which the definition of the crime: (1) includes an intent to do some future act, or achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the actus reus of the offense; or (2) provides that the actor must be aware of a statutory attendant circumstance. An offense that does not contain either of these features is termed 'general intent.'

For example, consider common law burglary, defined as 'breaking and entering of
obvious that the Court will not uphold any law that is deliberately
drafted in such an imprecise fashion that allows police officers an un-
bounded ability to make arrests. The Court concluded that the Jack-
sonville ordinance permitted individuals “undesirable in the eyes of the
police and prosecu[ tors] [to be convicted] although they are not charge-
able with any other particular offense.”36 In sum, the Court acknowl-
enced that although the ordinance may be an advantageous tool for
prevention, it cannot be upheld because of its inability to be en-
forced impartially. The specifications set forth by the Papachristou
Court will insure that future legislators who propose loitering ordi-
nances will not be enacting legislation that is unconstitutionally vague.37

More recently, in Kolender v. Lawson,38 the United States Supreme
Court struck down a California loitering ordinance. The ordinance re-
quired people who were discovered loitering on the streets to identify
themselves and account for what they were doing.39 The ordinance re-
quired citizens to provide “credible and reliable identification and to ac-
count for their presence when requested by a police officer.”40 Of par-
ticular significance to the Court was the fact that the police had complete
discretion to decide if a suspect had furnished adequate identification
and acceptably explained his purpose for being about.41 Consequently,
the Court concluded that the ability to enforce the ordinance arbitrarily
existed.

The Kolender Court specifically pointed out that this type of vague
statute gives police officers too much discretionary power.42 In sum, the

the dwelling of another in the nighttime with the intent to commit a felony.’ The ac-
tus reus of this offense is complete when the offender breaks and enters another
person’s dwelling at night; he need not commit a felony inside to be convicted of a
burglary. The requisite mens rea, therefore, pertains to a planned future act (com-
misson of a felony) that is not part of the actus reus. Consequently, a common law
burglary is a specific-intent offense.

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.06, at 119 (2d ed. 1995) (foot-
notes omitted).
36. Papachristou, 405 U.S. at 166.
37. See Berg, supra note 1, at 464-65.
39. See id. at 353.
40. Id.
41. See id. at 361. The Court held that an initial detention by a police officer may be jus-
tified, but because there is no clear standard as to what satisfies the identification require-
ment, it fails to meet “constitutional standards for definiteness and clarity.” Id.
42. See id. at 358. (“The statute placed complete discretion in the hands of the police
and created the ‘potential for arbitrarily suppressing First Amendment liberties.’”).
Court addressed the vagueness issue, and held that the statute was: "vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." Without any sort of guidelines, the ordinance is subject to abuse. Furthermore, because there was no notice requirement, people did not have forewarning of what specific behavior was proscribed. Due process requires that people be given reasonable notice of what type of conduct is unlawful. The undoing of the statute occurred because failing to answer a police officer’s question satisfactorily would trigger an arrest, rather than an arrest resulting from some sort of illegal conduct or behavior.

In Justice White’s dissenting opinion, he rejected the majority’s finding that the statute was susceptible to a facial review because it was claimed to be vague. Justice White brought attention to the majority’s finding that the ordinance was unconstitutional on its face. He suggested that the requirement to furnish identification when requested by a police officer is not necessarily nebulous in all of its applications. Justice White further emphasized the difference between challenging a statute for being vague and for being overly broad. Justice White pointed out that if a person knows that his conduct is criminal, he couldn’t successfully challenge the law because others may not be mind-
ful that their behavior is unlawful. In conclusion, Justice White reiterated that although the overbreadth doctrine allows a facial challenge when a law intrudes upon rights protected by the First Amendment, he believed that the majority was mistaken in using the overbreadth doctrine to permit a facial invalidation of a law that was not vague when applied to the defendant, but may be vague when applied to others.

In 1989, the Wisconsin Supreme Court upheld a similar statute in City of Milwaukee v. Nelson. The statute was challenged as being both too vague and overly broad. The court first considered the vagueness challenge. The enacted statute prohibited loitering "in a place, at a time or in a manner not usual for law-abiding individuals under circumstances

50. See id. at 370. ("[I]t would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.").

51. See id. at 371. The dissent argued:

If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstances the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations.

Id.

52. The Wisconsin Supreme Court upheld Milwaukee City Ordinance 106-31(1)(a). The ordinance reads:

Loitering or Prowling. Whoever does any of the following within the limits of the city of Milwaukee may be fined not more than five hundred dollars ($500) or upon default of payment thereof, shall be imprisoned in the house of correction of Milwaukee county for not more than 90 days.

LOITERING. Loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

439 N.W.2d 562, 563 n.1 (Wis. 1989) (quoting MIL., WIS., CITY ORD. 106-31(1)(a)).

53. 439 N.W.2d 562 (Wis. 1989).
that warrant alarm for the safety or property in the vicinity.\textsuperscript{54} The Nelson court drew attention to the fact that there was additional language only limiting loitering \textit{in addition} to some other sort of behavior. The Nelson court upheld the ordinance because it met the criteria set forth by the Wisconsin Supreme Court nine years earlier in Wisconsin v. Starks.\textsuperscript{55} In 1971, the Starks court had held that a loitering ordinance would be found constitutional if it met "specificity requirements as to scope, place or purpose."\textsuperscript{56} In sum, the Nelson court was satisfied that an arrest would not occur solely for loitering because the term loiter was given a limited meaning.\textsuperscript{57} The court concluded "that the ordinance here is constitutional in that it provides \textit{sufficient notice and guidelines} to law enforcement officials, judges, and ordinary citizens by limiting the term 'loiter' in scope, place or purpose."\textsuperscript{58}

The court next examined the ordinance to determine if it was overly broad. The defendant claimed that an individual could be at fault for simply taking advantage of constitutionally protected freedoms.\textsuperscript{59} The defendant argued that "a person could be subject to a loitering offense while taking a stroll, sitting on a park bench, seeking shelter from the elements in a doorway, or as a candidate shaking hands while campaigning."\textsuperscript{60} The court was quick to point out, however, that it was "highly unlikely" that a person would be doing any of the activities suggested by the defendant in a "manner not usual for law-abiding individuals under circumstances that warrant alarm to police officers for the safety of persons or property within the vicinity."\textsuperscript{61} In conclusion, the court found that the ordinance was not overly broad because of the additional requirement and the ability of a police officer to recognize easily what behavior is constitutionally protected and what is not.\textsuperscript{62}

\textsuperscript{54} Id. at 563 n.1 (emphasis added).
\textsuperscript{55} See id. at 575; State v. Starks, 186 N.W.2d 245, 248 (Wis. 1971) (finding a vagrancy statute unconstitutional because it did not name with "specificity and particularity the locations where loitering may not occur").
\textsuperscript{56} Starks, 186 N.W.2d at 248-49. The Starks court held that because the specificity requirements were not met, the term loiter "renders the statute vague as it fails to provide fair notice of the proscribed conduct, it classifies innocent conduct as criminal, and it is susceptible to arbitrary law enforcement." Id. at 248.
\textsuperscript{57} See 439 N.W.2d at 567.
\textsuperscript{58} Id. (emphasis added); see also City of Milwaukee v. Wilson, 291 N.W.2d 452, 456-57 (Wis. 1980).
\textsuperscript{59} See Nelson, 439 N.W.2d at 568-69.
\textsuperscript{60} Id. at 568.
\textsuperscript{61} Id. at 569.
\textsuperscript{62} See id. ("The ordinance in question here, ... does allow an officer to differentiate between conduct which is constitutionally protected from that which is not.").
In her dissenting opinion, Justice Abrahamson expressed her dissatisfaction with the majority's willingness to find the language of the ordinance adequate. Justice Abrahamson did not find an adequate standard for what was to be deemed an "unusual place, time or manner for a law abiding citizen to be out in public. . . ." She pointed to the fact that no clear standards were set forth to know "what circumstances warrant alarm." Justice Abrahamson compared the ordinance to the statute in Kolender v. Lawson, where the United States Supreme Court found that because too much discretion rested in the hands of law enforcement, the statute was unconstitutional. In the instant case, Justice Abrahamson believed that a police officer was not given adequate guidance from the ordinance to determine what exactly "warrants alarm." Justice Abrahamson argued that "[t]he ordinance leaves all of the critical definitions up to the discretion of law enforcement and so, under Kolender, it violates the federal Constitution.

Additionally, although Justice Abrahamson agreed that it is ultimately the judge who will decide if a suspect's explanation is satisfactory, she points out that even though a defendant is entitled to a trial after an arrest, that does not "obviate[e] the constitutional requirement[s] that laws include minimal guidelines . . . ." Further, Justice Abrahamson said that the loitering ordinance did not include any specific intent element unlike a loitering ordinance that was upheld in City of Milwaukee v. Wilson. In sum, Justice Abrahamson concluded that the language in the ordinance was not sufficiently particular to fit the constitutionally mandated scope, place, or purpose requirements and therefore was simply too vague.

64. Id.
65. 461 U.S. 352.
66. See id. at 361. The Kolender court found the statute to be "a virtually unrestrained power to arrest and charge persons with a violation." Id. at 360 (citation omitted).
67. 439 N.W.2d 562, 577 ("Like the statute in Kolender, the Milwaukee ordinance leaves the definition of this 'opportunity' entirely up to the individual judgment of the police officer making the stop.").
68. Id. (emphasis added).
69. Id.
70. "This loitering ordinance, unlike the ordinance upheld in Milwaukee v. Wilson, . . . does not require a specific intent to commit a crime." Id. at 577 (Abrahamson, J., dissenting). For an explanation of "specific intent," see supra note 35.
71. See 439 N.W.2d at 577; Wilson, 291 N.W.2d 452, 457-58 (holding that a Milwaukee ordinance is not unconstitutionally vague or overbroad).
72. See Nelson, 439 N.W.2d at 575-78. (Abrahamson, J., dissenting).
B. Eighth Amendment Challenges: Cruel & Unusual Punishment

The Supreme Court has addressed several cases in which it has had to decide if the law punishes a person because of her "status" or because of an act. In 1962, the United States Supreme Court found a statute unconstitutional in *Robinson v. California* because it criminalized a person exclusively because of his status. The California statute made it a crime for an individual to be "addicted to the use of narcotics." The trial judge instructed the jury that the [defendant] could be convicted if the jury agreed that the defendant "use[d] a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics." After an appeal to California's highest court and an affirmation, the United States Supreme Court granted certiorari to determine whether there was a Fourteenth Amendment issue. The Court

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73. Basic criminal law principles remind us that for a person to be found guilty of a crime he or she must have committed a voluntary act—actus reus. See generally Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968); Pottinger v. Miami, 810 F. Supp. 1551 (1992). BLACK'S LAW DICTIONARY defines actus reus as: "The guilty act. A wrongful deed which renders the actor criminally liable if combined with mens rea; a guilty mind. The actus reus is the physical aspect of the crime, whereas the mens rea (guilty mind) involves the intent factor." BLACK'S LAW DICTIONARY 36 (6th ed. 1990).


76. *Robinson*, 370 U.S. at 660. Section 11721 of the California Health and Safety Code read as follows:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

*Id.* at 660-61 (quoting CAL. HEALTH & SAFETY CODE § 11721) (1957).

77. *Id.* at 663.

78. See *id.* at 664. The Supreme Court had to interpret the language of the statute in the same manner that California's highest court did. See *id.* at 666. The Court therefore found that the law did not proscribe any sort of act, but instead simply a condition. See *id.* ("This statute, therefore, is not one which punishes a person for the use of narcotics, for their pur-
was troubled with the fact that an individual was punished not for the *use, possession, purchase* or *sale* of narcotics, but instead for being an addict—a status.  

It is highly unlikely that any State at this moment in history would attempt to make it a criminal offense, for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Six years later in *Powell v. Texas*, the Supreme Court examined a law which made it a crime for a person to be in public while under the influence of alcohol. The appellant claimed that he suffered from "chronic alcoholism" and that his "appearance in public" was not of his "own volition." Further, the defendant argued that punishing him would constitute cruel and unusual punishment under the meaning set forth in *Robinson*. The Court distinguished the instant situation from the situation and holding in *Robinson*. The Court expressed the difference between a law which jails a person for suffering from a drug addiction and a law which does not punish a person merely for drinking, but for being in public while intoxicated. The *Powell* Court made a clear distinction between attempting to punish a person because of a condition and punishing a person for wrongdoing. The Court found the

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79. See id. at 666.
80. Id.
82. The *TEX. PENAL CODE. ANN.* § 477 (West 1952) read as follows: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."
83. 392 U.S. at 517.
84. See id. at 532.
85. See id.
86. See id. at 533. Justice Marshall, writing for the majority, highlighted why the holding in *Robinson* is not applicable here:
status of being addicted to drugs is similar to that of being ill and therefore distinguished a law that punishes one for being addicted versus one that punishes for voluntary acts like *using, possessing, purchasing* or *selling* contraband.\(^7\)

Justice Black's concurring opinion grapples with the objection that some individuals cannot control their drinking\(^8\) and therefore should not be subject to such laws.\(^9\) Black suggests that criminal law benefits punishing a person who have disregarded what laws proscribe without considering whether his actions were "'compelled' by some elusive 'irresponsible' aspect of his personality."\(^90\) Justice Black indicated that the "punishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment."\(^91\) In sum, Justice Black was satisfied with the Court's limited application of *Robinson* and he believes that if the Court were to expand its holding to allow people to claim that they suffer from "'irresistible impulse'" or "'compulsions' that are 'symptomatic' of a 'disease,'" then too many people would be deemed unpunishable, claiming they suffer from some sort of abnormality.\(^92\) Justice Black concluded:

The entire thrust of *Robinson*’s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some *act*, had engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.

\(^{Id.}\) at 533 (emphasis added).

\(^{87}\) *See* 392 U.S. at 532-33.

\(^{88}\) Evidence was offered at trial that alcoholism is a disease and therefore some alcoholics should not be found criminally liable. *See id.* at 518-37.

\(^{89}\) *See* id. at 540-45.

\(^{90}\) *Id.* at 540.

\(^{91}\) *Id.* at 540-41 ("I cannot think the States should be held constitutionally required to make the inquiry as to what part of the defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a 'compulsion'.").

\(^{92}\) *Id.* at 544-45. Justice Black concluded that

such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for 'being' in possession of drugs or, for that matter, 'being' guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease.

\(^{Id.}\) at 545.
I would hold that *Robinson v. California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict.  

The United States Supreme Court has clearly articulated what needs to be included in an anti-loitering law for it not to interfere with the public's fundamental rights. The Supreme Court's decisions should act as blueprints for prudent legislators to draft laws so that they will not later be struck down for being too vague, for being overly broad, or for punishing a person for committing no wrongful act.

### IV. Evaluation of the Case

The Supreme Court of Illinois upheld the appellate court's decision in *Youkhana* and relied solidly upon precedent set forth by the United States Supreme Court. It should not have come as a surprise that the law was found unconstitutional, considering the similarities between the ordinance enacted in Chicago and other similarly worded statutes that have been found unconstitutional.

The City of Chicago argued that the ordinance specifically defined what type of behavior would be found unlawful. Further, the city argued that the ordinance was a permissible restriction on fundamental rights, that it did not create a status offense, and that it required law enforcement officials to establish probable cause before an arrest could be made. In its decision, the Supreme Court of Illinois ruled that the ordinance was too vague. The court held that the gang loitering ordinance was an arbitrary restriction on personal liberties—a violation of the Fifth Amendment of the United States Constitution. Because the court struck the ordinance down for being too vague, it refrained from ruling on whether it created a status offense and whether it would per-

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93. *Id.* at 548.
95. *See id.* at 59, 65.
96. *See id.* at 59.
97. *See id.*
mit arrests without probable cause. The court first examined the ordinance to determine whether it violated the Fifth and Fourteenth Amendments of the United States Constitution. The court disagreed with the city's contention that the ordinance was sufficiently clear so that "ordinary persons" could comprehend what type of behavior was prohibited. Further, the court was troubled by the city's definition of the term "loiter." Applying the definition of the term loiter, as set forth by the city, the court concluded that people with entirely innocent purposes may be found in violation of the ordinance if it were not evident to a nearby police officer exactly what the person's purpose was. Additionally, the court pointed out that the ordinance makes ordinary behavior criminal. Because there is no additional conduct specified in the ordinance, in addition to loitering, citizens have no idea how to act. The city asserted that the ordinance only prohibits loitering with the accompaniment of a gang member. However, the court interpreted the ordinance to allow police officers to make an arrest when they have a "reasonable belief" that a person may be a gang member. The court held that the guidelines as to who is to be classified as a gang member were ambiguous. The court reasoned that not only was this additional element vague, but a "reasonable belief" is not probable cause and that is not adequate to maintain a criminal conviction.

The city further contended that the ordinance gave people ample notice because they could only be in violation if they failed to obey an officer's directive to move on. The court analogized this to the ordinance in Shuttlesworth where it was determined that too subjective a standard

98. See id.
99. The Fifth Amendment reads: "No person shall be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.
100. Morales, 687 N.E.2d at 60-61.
101. See id. at 61.
102. See id. at 61 ("For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.").
103. See id.
104. See id. at 62.
105. See id.
106. See id.
107. Id.
108. See id.
existed, and people would be allowed to "stand on a public sidewalk . . .
only at the whim of any police officer." The court opined that the lack
of any sort of direction for police officers leaves the door too wide open
for abuse and for arbitrary enforcement of the statute. Intentional
vagueness in the drafting of a statute works to give police officers the
ability to interpret the law as they see fit and often leads to it being en-
forced in a discriminatory manner. Moreover, the court reasoned that
the City Council enacted the ordinance because of their belief that gang
members were an ominous threat and because of the city's incessant dif-
ficulty in arresting gang members for other crimes that they were sus-
ppected of committing.

Lastly, the court determined that a restraint on a person's right to
associate with others and move around is a restriction on personal lib-
erty. Although, the court recognized the fact that personal liberties
are not absolute, the court held that the Chicago ordinance unduly inter-
fered with personal liberties and therefore could not be upheld. The
fact that a person is a member of a gang or associating with a member of
a gang is not enough to arrest the person. The ordinance authorized law
enforcement officials to arrest any gang member who may be walking
the street, regardless of whether he had committed a crime. Because
gang members and anyone caught associating with them can be arrested
for doing nothing, the ordinance would punish people exclusively for
who they are.

V. ANALYSIS OF THE CASE

The Supreme Court of Illinois came to the appropriate outcome in
Morales. There is an extensive history of loitering laws that have been
challenged to determine whether they are within the constitutional
realm. Society is unquestionably in need of more ways to fight crime
and curb gangs' abilities to escape being punished; however, enacting a

109. See id. (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965)).
110. See id. at 63-64.
111. See Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (citing Thornhill
v. Alabama, 310 U.S. 88, 97-98 (1940)). "Where lawmakers fail to provide minimal guidelines
to govern law enforcement, a criminal law, 'may permit a standardless sweep [that] allows
policeman, prosecutors and juries to pursue their personal predilections.'" Morales, 687
N.E.2d at 63 (citation omitted).
112. See Morales, 687 N.E.2d at 64.
113. See id. at 65.
114. See id. ("Only government actions which intrude upon personal liberties arbitrarily
or in an utterly unreasonable manner violate the due process clause.").
115. See id.
law that tramples upon the Constitution is not the way to accomplish this goal. Criminal gang activity needs to be quelled, but people cannot be arrested if they have not committed a crime. The problem with trying to enact anti-gang loitering laws is that they are designed to put an end to crime before it happens. The United States Court of Appeals for the District of Columbia in *Ricks v. District of Columbia*, succinctly summarized why these particular laws are composed in such an imprecise fashion. The court held that "[d]efiniteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." As established in *Papachristou*, the Supreme Court will not hesitate to strike down a law that confers upon a police officer an indefinite measure of power. Additionally, it is important to remember that due process requires that everyone be aware of what the state forbids. The Chicago ordinance does not set forth a clear definition of loitering, nor does it make clear to law enforcement personnel when an arrest should be made. Further, an individual may not be aware that he is with a gang member while standing on the street, yet still be found in violation of the law. Regardless of how effective a tool this law may be for the Chicago Police Department for arresting individuals who are evading the law, the United States Supreme Court is presumably going to find it unconstitutionally vague.

Although the Supreme Court of Illinois did not rule on whether the Chicago ordinance interfered with protected freedoms, that challenge will certainly be brought in front of the United States Supreme Court. The First Amendment protects not only freedom of speech, but also the right of association. Thus, legislation that impinges on these protected freedoms is subject to overbreadth analysis. Simply loitering is not illegal, so any type of limitation on loitering must include a restriction on some other sort of conduct. Laws that criminalize loitering, in addition to some other activity, have prevailed. However, the problem that arises if a comprehensive list of every type of prohibited conduct were to

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116. 414 F.2d 1097, 1110 (1968) (holding that a vagrancy statute that leaves people uncertain as to what type of conduct is prohibited is too vague and therefore unconstitutional).
117. Id. at 1109.
119. For an explanation of due process, see Batey, *supra* note 2.
121. See *Papachristou*, 405 U.S. at 164.
accompany a law is that the law may fail for being too vague.122 Furthermore, commentators have suggested that because gangs are involved in so many different kinds of crime, and a list would have to include an intent element for each crime, this notion may simply be impractical.123 The attempt by the Chicago City Council to add an additional component to the law is itself vague.124 Interpreting the statute as the Supreme Court of Illinois did and relying on precedent from the United States Supreme Court it is doubtful that this ordinance will survive an overbreadth challenge.

In Shuttlesworth v. City of Birmingham,125 the city of Birmingham enacted a statute similar to Chicago's Gang Congregation Ordinance.126 A literal reading of the statute resulted in a person only being allowed to stand on a street or sidewalk with the blessing of a police officer.

Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of the city. The constitutional vice of so broad a provision needs no demonstration. It "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."127

In Shuttlesworth, the Supreme Court was bound by the Alabama Court of Appeal's earlier interpretation of the statute.128 The court of

122. See generally Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding the ordinance prohibited so many types of behavior that it was vague).
123. See Berg, supra note 1, at 498.
125. 382 U.S. 87 (1965).
126. The City of Birmingham's ordinance read as follows:

It shall be unlawful for any person or any number of persons to stand, loiter, or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along the street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.

Id. at 88 (quoting BIRMINGHAM, ALA. GEN. CITY CODE § 1142).
127. Id. at 90.
128. "The Alabama Court of Appeals has thus authoritatively ruled that §1142 applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty, of course, to accept this state judicial construction of the ordinance." Id. at 91.
appeals did not read the statute literally, but instead interpreted it in a more narrow sense.\textsuperscript{129} The Alabama Court of Appeals read the ordinance only to apply when a person “stands, loiters or walks on a street or sidewalk . . . obstruct[ing] free passage [and] refuses to obey a request by an officer to move on.”\textsuperscript{130} It was this narrow rendering of the statute that allowed it not to be deemed unconstitutional.\textsuperscript{131} The court of appeals held that by including some sort of additional requirement in addition to loitering, the statute was constitutional; the ordinance prohibited loitering that obstructs free passage and refusal to obey a police officer’s request to move on. Because the Alabama Court of Appeals interpreted the statute to clearly prohibit loitering, in addition to other conduct, the Supreme Court was bound to interpret it the same way and therefore held that it was apparent what specific type of conduct was prohibited.\textsuperscript{132} In the Court’s holding it noted that even with this narrow interpretation the opportunity remained for the ordinance to be applied unconstitutionally.\textsuperscript{133} However, because the Alabama Court of Appeals interpreted the ordinance this way, the Supreme Court did the same, and also found the ordinance to be constitutional.

In his concurring opinion, Justice Brennan reiterated that had the lower court given the statute a different interpretation the Court would have reached a different outcome.\textsuperscript{134} Justice Brennan asserted that “[i]t is only this limiting construction which saves the statute from the constitutional challenge that it is overly broad.”\textsuperscript{135}

The Illinois courts did not give the Chicago ordinance a narrow rendering like the Alabama Court of Appeals did in \textit{Shuttlesworth}.\textsuperscript{136} The Illinois courts chose to pursue a different approach in determining the
fate of the ordinance in *Morales.* The Supreme Court of Illinois perceived the statute to have a "sweeping effect" and to be constitutionally flawed. Consequently, the United States Supreme Court must defer to the highest state court's interpretation of the statute as it did in *Shuttlesworth.* Because such an expansive interpretation has been attached to the Chicago ordinance, the United States Supreme Court will be compelled to read it in the same light and, accordingly, find it unconstitutional.

The Supreme Court of Illinois did not consider whether the ordinance created a status offense, but this too is presumably going to be argued to the Supreme Court. Commentators have discussed the reasons for individual gang involvement and the motivations that cause individuals to join gangs. Some commentators are of the opinion that gangs stem from the underclass and are the "consequence of restricted opportunities." This notion implies that social and economic obstacles are the impetus of criminal gang activity and that gang members are not presented with any options. However, an alternative proposition is that gangs exist because of individuals' choices and because of "persisting individual cultural traits."

*Robinson* and *Powell* illustrate the boundaries on what type of activities can be made criminal. Whether being a "gang member" should be considered a status so that the holding of *Robinson* would be applicable is a separate query that has not yet been addressed by the Court. In addressing this issue, a court would have to determine whether suffering from a narcotic addiction and actively participating in a criminal gang are equivalents. Alternatively, the *Powell* Court upheld a statute that made it illegal for an intoxicated person to be out in public. One may be able to analogize being a criminal gang member to the situation in *Powell.* The *Powell* Court held that the defendant was punishable because he partook in "public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community."

As a society, we need to hold individuals responsible for their crimes

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137. See id.
138. See id.
139. See *Shuttlesworth,* 382 U.S. at 87.
141. Id. at 113.
and not make justifications for them. Nevertheless, deciding whether gang members are powerless to change their way of life, and therefore a "status," is not the object of this Note; however, in light of past cases that notion will certainly be made and ultimately have to be decided. This is a very precarious area and the Court may simply choose to overlook this area and base its holding on more familiar grounds.

The Supreme Court of Illinois acted judiciously when it did not construe the text in the manner that the City Council had hoped it would. The court would have committed an injustice had it been satisfied that a second specific element was present. This ordinance is an obvious attempt to give the police department a new weapon against gangs. As promising as Chicago's Gang Congregation Ordinance may have been as a crime prevention tool, it did not meet the standards set forth in Papachristou for it to pass constitutional scrutiny. Currently, Morales is an affirmation of the guidelines set forth by the United States Supreme Court. The future of Morales is uncertain, but if the Supreme Court abides by stare decisis it will almost certainly affirm the decision of the Supreme Court of Illinois. 143

VI. CONCLUSION

The Supreme Court of Illinois followed persuasive guidelines set forth by the United State Supreme Court in deciding Morales. Although the City of Chicago is trying to use proactive measures to assist in its battle against gangs, this particular law dangerously encroaches upon constitutionally protected rights. If this statute were to be upheld, constitutional rights guaranteed to every citizen would be in jeopardy. Although the City of Chicago is in need of a method to curtail its expanding gang violence, it cannot be achieved by singling out so called "undesirables" in society and taking away rights that are guaranteed to them in the United States Constitution. Although criminal gang activity is an epidemic that must be dealt with, it must be remembered that constitutional rights are guaranteed to every U.S. citizen, regardless of whom they decide to associate with.

Drafting an anti-loitering statute to satisfy all the concerns of the

143. As the Supreme Court has stated: "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986)). But see Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[T]his Court has never felt constrained to follow precedent.").

Chicago City Council is not impossible, but it certainly cannot be achieved in such an indiscriminate way. The City of Chicago would certainly benefit from having a statute that would prevent criminal gang activity; however, legislators need to follow the framework set forth by the United States Supreme Court, using caution not to craft a law that infringes upon protected rights. The Morales court correctly summarized: "[T]he city cannot empower the police to sweep undesirable persons from the public streets through vague and arbitrary criminal ordinances." Morales demonstrates the consequences of drafting a law without investigating what the judicial boundaries are. A preventative law is conceivable if done in an appropriate way. The Chicago Legislature has a justifiable concern in trying to rid the city of criminal gangs and cities have a responsibility to keep their streets clear of crime. Nonetheless, if this type of law were to be upheld a person could be arrested not for what they have done, but simply for who they are.

THOMAS L. DOERR, JR.*

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145. See Morales, 687 N.E.2d at 58.
146. Id. at 65.
147. The Court stated:

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


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