Discrimination Lurking on the Books: Examining the Constitutionality of the Minneapolis Lurking Ordinance

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Introduction

The Minneapolis lurking law section 385.80 states: "No person, in any public or private place, shall lurk, lie in wait or be concealed with intent to commit any crime or unlawful act."[1] The Minneapolis community is divided over the desirability of the lurking law. Some citizens approve of the ordinance as a means of providing law enforcement officers effective crime-fighting tools, while others argue that it allows police officers too much discretion to use those tools discriminatorily.[2]

City Council members,[3] advocacy groups,[4] and criminal justice advocates[5] have all criticized the law as discriminatory. "[The lurking law criminalizes] standing on a corner after ten

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1. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.80 (2005). Violation of the ordinance is punishable by a fine of up to seven hundred dollars, imprisonment of up to ninety days, or both. *Id.* § 1.30.

2. *See* Vickie Evans Nash, *Beware! Discrimination Lurking in Minneapolis*, TWIN CITIES DAILY PLANET, Apr. 20, 2007, http://www.tcdailyplanet.net/node/4340 (last visited June 9, 2008); Mike Mosedale, *What Lurks Beneath?*, CITY PAGES, Feb. 28, 2007, at 13, *available at* http://articles.citypages.com/2007-02-28/news/what-lurks-beneath/.

3. *See* Nash, *supra* note 2 ("Currently, city council members Gary Schiff, Betsey Hodges, Elizabeth Glidden and Cam Gordon have already expressed their intent to back the repeal [of § 385.80], with council members Diane Hofstede and Don Samuels still undecided.").

4. *See* More on Our "Lurking" Ordinance, http://secondward.blogspot.com /2007_03_01_archive.html (Mar. 16, 2007, 15:50 CST) [hereinafter Our Lurking Ordinance] (listing community organizations and foundations that support repeal of the lurking ordinance, including the NAACP, the African American Men Project, and the Minneapolis Urban League). This information comes from Minneapolis Second Ward City Council Member Cam Gordon's blog, which he uses as a public policy forum to discuss council activities and explain his position on various issues. *Id.*

5. *See* Mosedale, *supra* note 2, at 13.

o'clock at night when you're [B]lack."[6] Despite such criticisms, others in the community feel the law is justified. In response to challengers who argued that the lurking law is discriminatory, the President of the City Council argued: "[If] you're the person who is waiting for the bus and is frightened by someone who is lurking, what validity does [a claim of racial disparity] have?"[7] In order to repeal the ordinance, a majority of Minneapolis City Council members must support the repeal.[8] However, repeal will not come without a fight from those members of the community who feel that the law makes their neighborhoods safer.[9] With the community divided over the desirability of the lurking law, it is important to step back and understand the underlying issues by analyzing section 385.80 in light of the history of vagrancy and loitering laws throughout the United States, the history of the ordinance itself, and relevant constitutional law.

This Article identifies probable constitutional violations embedded in the lurking law and recommends that the City Council repeal section 385.80. Part I explores the context of section 385.80 by examining the history and relevant case law on loitering and vagrancy laws in the United States generally, and Minneapolis loitering and lurking laws specifically. Part II examines potential constitutional challenges to the "lurking law," focusing on vagueness, overbreadth, and Fourth Amendment violations. The Article concludes that, in addition to being unconstitutional, the lurking law is rendered unnecessary by section 385.50, the city's more carefully constructed and detailed loitering ordinance.[10]

I. Lurking, Loitering, and Vagrancy Laws: A History

The Minnesota Supreme Court has noted that, "[d]espite doubtless differences in nuance, 'lurking' is not significantly different from 'loitering.'"[11] Therefore, an examination of loitering

6. *Id.*

7. *Id.*

8. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 4, § 9 (2005).

9. *See* Nash, *supra* note 2.

10. § 385.50 ("No person shall loiter on the streets or in a public place or in a place open to the public with intent to solicit for the purposes of prostitution, illegal narcotic sale, distribution, purchase or possession, or any other act prohibited by law.").

11. State v. Armstrong, 162 N.W.2d 357, 360 (Minn. 1968). The court found the term "loitering" to be "a term of common usage with a meaning reasonably understood by persons of common intelligence," yet failed to give it a definition. *Id.* The court also found that, "[a]lthough 'lurking' may have a primary connotation of hiding or concealment, it equally connotes a persistent presence or a furtive

laws illustrates the likely constitutional challenges the lurking law will face. This Section begins by examining the history of loitering laws in the United States and then explains typical constitutional challenges to such laws. Finally, this Section explores Minneapolis lurking and loitering laws in detail, focusing on the enactment and enforcement history of sections 385.80 and 385.50.

A. *Evolution of Loitering Laws in the United States*

1. An Early History

American loitering laws derive from English vagrancy laws.[12] The breakdown of the feudal system in England following the Black Plague led to the passage of the Statute of Labourers in 1349.[13] The goal of the statute was to combat labor shortages by prohibiting labor movement and wage increases.[14] Following the collapse of the feudal system, vagrancy laws survived as a means of crime prevention, as it was thought that the unemployed supported themselves through crime.[15] English vagrancy laws also typically included prohibitions against loitering, reflecting the overlapping nature of the "offenses" of loitering and vagrancy.[16]

Early in their history, the American colonies adopted loitering and vagrancy laws similar to those of England that were also founded on principles of crime prevention.[17] A typical statute defined a vagrant as "any person who wanders or strolls about in idleness, or lives in idleness, who is able to work, and has no property sufficient for his support."[18] The constitutionality of these laws went virtually unchallenged for nearly two hundred years, due in large part to the fact that poor defendants had little access to legal counsel.[19] In the 1960s, soon after the Supreme

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movement in a place." *Id.*

12. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161–62 (1972).

13. *See id.*

14. *Id.* at 161.

15. *See* Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 463 (1993).

16. *See id.* at 462 n.15 (explaining the nexus between vagrancy and loitering). Loitering is often defined in terms of spending time idly, while vagrancy is often understood as pertaining to an idle person without visible means of support who wanders from place to place. *Id.*

17. *Id.* at 463–64.

18. Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 783 (1968) (quoting an Alabama statute no longer in force).

19. *See id.*

Court decided *Gideon v. Wainwright*,[20] which guaranteed legal representation to any indigent defendant charged with a felony, challenges to vagrancy laws began to gain momentum.[21]

2. Evolving Attitudes

After *Gideon*, more and more courts began hearing constitutional challenges to vagrancy and loitering laws.[22] In 1972, the Supreme Court unanimously struck down a vagrancy ordinance as unconstitutionally vague in *Papachristou v. City of Jacksonville*.[23] The Court held that the vagrancy law at issue failed to give citizens adequate notice of what conduct was forbidden, and the law did not sufficiently limit police discretion.[24] The Court was concerned that the law did not give fair notice of the forbidden conduct to the "poor among us, the minorities, [and] the average householder . . . ."[25] The Court also noted that the ordinance's vagueness led to discriminatory enforcement, allowing "men to be caught who are vaguely undesirable in the eyes of

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20. 372 U.S. 335, 339–40 (1963).

21. *See* Berg, *supra* note 15, at 464.

22. *See, e.g.*, Baker v. Bindner, 274 F. Supp. 658, 662 (W.D. Ky. 1967) (finding a Kentucky vagrancy statute unconstitutional for vagueness and overbreadth); United States v. Margeson, 259 F. Supp. 256, 268 (E.D. Pa. 1966) (finding a New Jersey law, which defined a "disorderly person" as someone unable to account for his presence, unconstitutionally vague); Alegata v. Commonwealth, 231 N.E.2d 201, 204–05 (Mass. 1967) (finding a Massachusetts statute, which allowed police to arrest persons walking at night who were unable to account for themselves, unconstitutionally vague); Fenster v. Leary, 229 N.E.2d 426, 427–28 (N.Y. 1967) (finding a New York law, which punished persons "(1) being without visible means of support, (2) being without employment, and (3) being able to work but refusing to do so" as vagrants, violated due process and gave police too much discretion in enforcing the law (quoting the statute)).

23. 405 U.S. 156, 156 (1972). The Jacksonville ordinance at issue, Ordinance Code § 26-57, read:

> Rogues and vagabonds, or dissolute 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 or 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.

Id. at 156–57 & n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57, *invalidated by Papachristou*, 405 U.S. 156).

24. *Id.* at 162.

25. *Id.* at 162–63.

police and prosecution, although not chargeable with any particular offense."[26] Finally, the Court was concerned about possible violations of the Fourth and Fourteenth Amendments in enforcing such a vague law.[27]

Since the Court's decision in *Papachristou*, state and federal courts around the country have ruled on the constitutionality of vagrancy and loitering laws. Courts generally find that vagrancy statutes are void-for-vagueness or that they impermissibly punish status.[28] Similarly, statutes that target mere loitering are generally found unconstitutional;[29] however, loitering laws that are more narrowly drawn tend to survive constitutional challenges.[30] Loitering legislation is particularly prone to judicial disapproval where the legislature fails to sufficiently define or give examples of loitering so as to give the public notice of prohibited conduct and to narrow law enforcement discretion.[31]

As society faces increasing crime rates, particularly in inner cities, city and state governments have attempted to combat these societal problems through the use of ordinances and statutes that prohibit loitering for a specific purpose.[32] Despite careful crafting,

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26. *Id.* at 165–66.

27. *See id.* at 169.

28. *See, e.g.*, *id.* at 162; Derby v. Town of Hartford, 599 F. Supp. 130, 130 (D. Vt. 1984) (holding a town vagrancy ordinance unconstitutional for vagueness and overbreadth because it allowed unguided discretion for the enforcing officer); State v. Richard, 836 P.2d 622, 628–29 & n.1 (Nev. 1992) (finding a vagrancy law unconstitutional for punishing the status of being a vagrant—a person who "loiters, prowls, or wanders upon the private property of another, without visible or lawful business with the owner" (quoting the Nevada statute)); 77 AM. JUR. 2D, *Vagrancy* § 2 (2007); Frank J. Wozniak, Annotation, *Validity, Construction, and Application of Loitering Statutes and Ordinances*, 72 A.L.R. 5th 1 (1999).

29. *See* Wozniak, *supra* note 28, at 22–23; *see, e.g.*, Bullock v. City of Dallas, 281 S.E.2d 613, 615–16 (Ga. 1981) (finding a loitering law unconstitutionally vague and overbroad); City of Portland v. White, 495 P.2d 778, 778 (Or. Ct. App. 1972) (finding a loitering law unconstitutionally vague).

30. *See, e.g.*, State v. Kemp, 429 So. 2d 822, 824 (Fla. Dist. Ct. App. 1983) (holding an ordinance, which forbids loitering that hinders pedestrians and vehicles, was not overbroad or vague); Bell v. State, 313 S.E.2d 678, 681 (Ga. 1984) (holding that a Georgia loitering statute, which required circumstances warranting justifiable concern for persons or property and that listed factors to be considered by officers, was not unconstitutionally vague); City of Tacoma v. Luvene, 827 P.2d 1374, 1386 (Wash. 1992) (holding that a drug–loitering ordinance that required specific intent and overt acts was not unconstitutionally overbroad or vague).

31. Wozniak, *supra* note 28, at 22; *see, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (finding a loitering law unconstitutional because it did not sufficiently define what constituted "credible and reliable" identification); State v. Aucoin, 278 A.2d 395, 395 (Me. 1971) (finding the term "loitering" provided an incomprehensible standard and was therefore inadequate in delimiting criminal conduct).

32. *See generally* Michael J. Rossi, *Striking a Balance: The Efforts of One*

even some of these specific-purpose, anti-loitering measures have been attacked for constitutional deficiencies.[33] In the latest loitering case to reach the Supreme Court *City of Chicago v. Morales*,[34] the Court found Chicago's anti-gang loitering law unconstitutionally vague because it failed to establish minimal guidelines for enforcement.[35] Constitutional jurisprudence spanning from *Papachristou* through the present has significantly limited the scope of activities that loitering laws may constitutionally reach.[36]

B. Constitutional Challenges to Loitering Laws

While there are a variety of laws aimed at crime prevention, including the laws of attempt, solicitation, and conspiracy,[37]

Massachusetts City to Draft an Effective Anti-Loitering Law Within the Bounds of the Constitution, 39 SUFFOLK U. L. REV. 1069, 1069–88 (2006) (discussing post-*Morales* attempts to draft constitutional loitering laws); Kim Strosnider, *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, 101–46 (2002) (surveying anti-gang statutes and ordinances).

33. *See* sources cited *supra* note 31.

34. 527 U.S. 41, 41 (1999).

35. *Id.* The Chicago ordinance stated:

> (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.
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> (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.
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> (c) As used in this Section:
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> (1) 'Loiter' means to remain in any one place with no apparent purpose.
>
> (2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Id. at 47 n.2 (quoting CHI., ILL., MUNICIPAL CODE § 8-4-015 (1990) (effective June 17, 1992), *invalidated by Morales*, 527 U.S. 41). The Court's unusually narrow holding focused on the possibility for discrimination with six justices finding that the ordinance's definition of loitering was so vague that it provided law enforcement officers too much discretion in making arrests. *See* Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 156–57.

36. Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 383 (1995).

37. Jordan Berns, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 717 (1989). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 405–95 (4th ed. 2006) (surveying criminal law substance and theory, including common law doctrines, the Model Penal Code ("MPC"), and constitutional law affecting criminal law).

"loitering statutes and ordinances are probably the most controversial laws used to prevent crime."[38] A basic tenet of criminal law is that bad thoughts alone ought not be punished; thus, American criminal law generally requires both an actus reus and a mens rea element.[39] One exception to this general rule is loitering statutes. Loitering laws rarely require any independent criminal act and thereby provide police officers and courts with substantial discretion in applying such laws.[40] Courts employ several tests to determine the constitutional validity of loitering laws in order to minimize such abuses of discretion.

1. The Void-for-Vagueness Doctrine

The void-for-vagueness doctrine derives from the constitutional requirement of due process.[41] Due process requires that laws be defined with sufficient clarity so that citizens understand what conduct is prohibited.[42] The void-for-vagueness doctrine involves two central principles: notice and the prohibition against arbitrary enforcement.[43] Laws that fail to meet these standards are void-for-vagueness and constitutionally deficient.[44]

Under the first prong of the void-for-vagueness test, the penal statute must provide notice by "defin[ing] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited."[45] In *Papachristou*, the Supreme Court emphasized that all persons are entitled to know what the law "commands and forbids."[46] More important than the

38. Berns, *supra* note 37, at 717.

39. *See* DRESSLER, *supra* note 37, at 91–93 (explaining the actus reus and mens rea components of a crime and the rationale behind the act requirement).

40. Berg, *supra* note 15, at 467.

41. The Fifth Amendment applies to the federal government and provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment applies to states and provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1; *see* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); Berg, *supra* note 15, at 468.

42. *See Connally*, 269 U.S. at 391 ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable, is a well recognized requirement . . . ."); Berg, *supra* note 15, at 468.

43. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

44. Berg, *supra* note 15, at 468.

45. *Kolender*, 461 U.S. at 357.

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

notice aspect of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."[47] Under this second prong of the void-for-vagueness doctrine, the legislated crimes must be sufficiently clear so as not to encourage arbitrary and discriminatory enforcement.[48] In *Kolender v. Lawson*,[49] the Supreme Court invalidated a California statute requiring persons who loiter to provide "credible and reliable" identification and to account for their presence when requested by a police officer.[50] The Court found the statute unconstitutionally vague because it did not clarify what constituted "credible and reliable" identification, thereby allowing police officers complete discretion to determine if the statute was satisfied.[51]

While loitering laws are especially prone to vagueness challenges, carefully crafted loitering laws can pass constitutional muster.[52] Most constitutionally valid loitering laws include both an intent element and a conduct element.[53] For example, in *City of Cleveland v. Howard*,[54] the court upheld a loitering statute with guidelines relating "to the intent of the offending party and delineat[ing] some of the overt conduct that an officer might consider . . . ."[55]

However, even when a statute requires intent and lists examples of prohibited conduct, a court may still find the statute unconstitutional. For example, courts are split even as to the constitutionality of loitering statutes based on the Model Penal

47. *Kolender*, 461 U.S. at 358 (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)); *see also* Strosnider, *supra* note 32, at 120–26 (discussing the connection between the arbitrary enforcement prong of the vagueness doctrine and equal protection concerns and arguing that the vagueness doctrine is a way for courts to get around the heightened levels of proof required to prove discriminatory purpose).

48. *Kolender*, 461 U.S. at 357. As far back as 1875, the Court expressed concern over minimal guidelines. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1875).

49. 461 U.S. 352.

50. *Id.* at 357, 361.

51. *Id.* at 358.

52. Wozniak, *supra* note 28, at 25–31.

53. *See* Berg, *supra* note 15, at 492.

54. 532 N.E.2d 1325 (Ohio Mun. Ct. 1987).

55. *Id.* at 1330.

Code,[56] which provides in part that a person commits a violation if he or she "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 the safety of persons or property in the vicinity."[57] Even statutes that aim to prevent loitering for a single purpose, such as loitering for the purpose of soliciting prostitution or engaging in illegal drug transactions, have been held unconstitutional.[58] For example, in *Coleman v. City of Richmond*,[59] the court held unconstitutional a law aimed at preventing loitering with the intent to solicit prostitution and listed three types of conduct that could trigger application of the law.[60] The court found that, if the delineated acts were sufficient in and of themselves to demonstrate intent, then the statute was overbroad because the contemplated conduct included constitutionally protected acts.[61] If the acts were insufficient in and of themselves to demonstrate intent, then the law was unconstitutionally vague since it no longer carried an intent

56. *Compare* Fields v. City of Omaha, 810 F.2d 830 (8th Cir. 1987) (invalidating a loitering law based on the MPC for vagueness), *with* State v. Ecker, 311 So. 2d 104 (Fla. 1975) (upholding a loitering law based on the MPC).

57. MODEL PENAL CODE § 250.6 (1962).

58. Poulos, *supra* note 36, at 383.

59. 364 S.E.2d 239 (Va. Ct. App. 1988).

60. *Id.* at 242–43. The relevant portion of the ordinance reads:

> (a) It shall be unlawful for any person, within the city limits, to loiter, lurk, remain, or wander about in a public place, or in any place within view of the public or open to the public, in a manner or under circumstances manifesting the purpose of engaging in prostitution, or of patronizing a prostitute, or of soliciting for or engaging in any other act which is lewd, lascivious or indecent. Among the circumstances which may be considered in determining whether any such purpose is manifested by a particular individual are the following:
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> (i) that, to the knowledge of the arresting officer at the time of arrest, such individual has within one year prior to the date of arrest been convicted of any offense chargeable under this section, or under any other section of this Code or the Code of Virginia, relating to prostitution, pandering, or any act proscribed as lewd, lascivious or indecent;
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> (ii) that such individual repeatedly beckons to, stops, attempts to stop, or interferes with the free passage of other persons, or repeatedly attempts to engage in conversation with passersby or individuals in stopped or passing vehicles; or
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> (iii) that such individual repeatedly stops or attempts to stop motor vehicle operators by hailing, waving arms, or other bodily gestures. No arrest shall be made for a violation of this section unless the arresting officer first affords such person an opportunity to explain the conduct in question, and no one shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.

Id. at 242 (quoting RICHMOND, VA., CITY CODE § 20-83, *invalidated by Coleman*, 364 S.E.2d 239).

61. *Id.* at 243.

element.[62] Therefore, the court found that the law simply "proscribes loitering with an unlawful intent; since loitering is not unlawful, the statute proscribes no illegal conduct."[63] *Coleman* illustrates the care required in drafting sufficiently clear loitering laws and demonstrates that even a requirement of intent and a conduct element cannot always save a law from a void-for-vagueness challenge.

2. The Overbreadth Doctrine

Closely related to the void-for-vagueness doctrine is the overbreadth doctrine,[64] which courts also use in finding loitering laws unconstitutional.[65] Impermissible vagueness (i.e. overbreadth) leads to the possibility that the statute will reach constitutionally protected activities, chilling the exercise of those rights and encouraging arbitrary enforcement.[66] Derived from the First Amendment,[67] the overbreadth doctrine invalidates statutes that substantially infringe upon constitutionally protected activities, regardless of whether or not the statutes may be legitimately applied in a particular case.[68] However, the application of the doctrine has its limits.[69] The Supreme Court recognizes the overbreadth doctrine as "strong medicine" that will not be "invoked when a limiting construction has been or could be placed on the challenged statute."[70] In order to facially invalidate statutes primarily governing conduct, "the overbreadth of a statute must not only be real, but substantial as well . . . ."[71]

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62. *Id.*

63. *Id.* at 244.

64. *See* Poulos, *supra* note 36, at 394 (arguing that vagueness and overbreadth in loitering laws can be analyzed under a single approach because both doctrines are concerned with preventing chilling effects on the exercise of constitutionally protected rights and preventing arbitrary enforcement).

65. *See, e.g.*, Johnson v. Carson, 569 F. Supp. 974, 977–80 (D.C. Fla. 1983) (striking down a loitering ordinance that prohibited loitering for the purpose of prostitution for overbreadth since it reached innocent, protected activities); *Coleman*, 364 S.E.2d at 241, 244 (finding a loitering with intent to solicit prostitution statute unconstitutional because it was overbroad in violation of the First Amendment and vague in violation of the Fourteenth Amendment).

66. *See* City of Houston v. Hill, 482 U.S. 451, 464 (1987) (holding a law prohibiting harassing police officers overbroad and finding it encouraged arbitrary enforcement).

67. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. CONST. amend. I.

68. 16 C.J.S. *Constitutional Law* § 117 (2005).

69. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

70. *Id.*

71. *Id.* at 615.

Loitering laws are particularly susceptible to overbreadth challenges because they often encroach on First Amendment rights,[72] including the freedoms of association,[73] assembly,[74] and even thought.[75] In fact, overbreadth as a doctrine originated in *Thornhill v. Alabama*,[76] which struck down a statute prohibiting loitering for the purpose of influencing others not to associate with a business.[77] Since then, other loitering laws have been struck down for overbreadth. For example, in *Farber v. Rochford*,[78] the court found a violation of the right to assemble in a Chicago ordinance that made it unlawful to loiter near establishments serving alcohol with anyone known to be an alcoholic, drug dealer, drug user, or prostitute.[79] In *Coleman*, the court found the ordinance, which prohibited loitering with intent to engage in prostitution, chilled the rights of expression and of association.[80] Finally, the right to freedom of thought is inherent in the First Amendment and protected by the "liberty" guarantee of the Due Process clauses of the Fifth and Fourteenth Amendments.[81] Freedom of thought encompasses the freedom to think bad thoughts and even to contemplate crime.[82] Since the act of loitering by itself is not criminal nor a sufficient act upon which to establish mens rea,[83] mere loitering with intent statutes are

72. *See* U.S. CONST. amend. I; Berg, *supra* note 15, at 474.

73. Berg, *supra* note 15, at 475–76.

74. *See id.* at 467–77.

75. *See infra* text accompanying notes 81–84.

76. 310 U.S. 88 (1940).

77. *See* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 65 (2004) (asserting that the First Amendment doctrine of overbreadth originated in *Thornhill v. Alabama*, 310 U.S. at 96–98, 107).

78. 407 F. Supp. 529 (D.C. Ill. 1975).

79. *Id.* at 534.

80. Coleman v. City of Richmond, 364 S.E.2d 239, 241, 244 (Va. Ct. App. 1988).

81. Palko v. Connecticut, 302 U.S. 319, 326 (1937) ("[N]either liberty nor justice would exist if [the privileges and immunities, incorporated to apply to the states by the Fourteenth Amendment,] were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." (citation omitted)), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 793 (1969).

82. Proctor v. State, 176 P. 771, 772 (Okla. Crim. App. 1918) ("Guilty intention . . . [is not] the subject of punishment . . . ."); *see also* Pamela Sirkin, *The Evanescent Actus Reus Requirement: California Penal Code § 647 (d) - Criminal Liability for "Loitering with Intent . . ." Is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 190–93 (1990) (arguing that California's section 647 violates the First Amendment by punishing mere thought).

83. *Coleman*, 364 S.E.2d at 242 ("Loitering, wandering, idling, and lurking are not, by themselves unlawful, despite attempts of many municipalities to make them so.").

overbroad and reach constitutionally protected activities.[84]

Some scholars argue that the overbreadth doctrine applies outside of the First Amendment context to protect other fundamental rights.[85] While the Supreme Court expressly denies the existence of the overbreadth doctrine outside of the First Amendment,[86] "[t]here are a limited number of cases in which the court used overbreadth or an analysis paralleling overbreadth to strike down statutes that were infringing upon rights falling outside the scope of the First Amendment."[87] Although the loitering ordinance in *Morales* was held unconstitutional based solely on vagueness grounds, Justice Stevens's lead opinion found the "liberty" protected by the Fourteenth Amendment to include the freedom to loiter, suggesting a finding of overbreadth.[88] Advocates of a strong overbreadth doctrine urge courts to use the doctrine to protect other constitutional rights,[89] which, after *Morales*, may include loitering.[90]

3. Fourth Amendment Doctrine

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[91] The probable cause requirement gives courts the power to review the

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84. *See* Sirkin, *supra* note 82, at 193 (arguing that loitering statutes impermissibly reach the right to think freely).

85. *See* Decker, *supra* note 77, at 54 (arguing that the overbreadth doctrine exists outside of the First Amendment and citing Supreme Court precedent in support of this position); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264–71 (1994) (arguing that overbreadth analysis should not be confined to the First Amendment but that it should also pertain to a few unenumerated fundamental rights).

86. Schall v. Martin, 467 U.S. 253, 268–69 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

87. Decker, *supra* note 77, at 79. Decker discusses the cases and areas of law where the Court recognizes overbreadth outside the First Amendment, including the right to vote, the right to privacy against government surveillance, and the right to travel. *Id.* at 79–94; *see also* Papachristou v. Jacksonville, 405 U.S. 156, 164 (1972). The Court notes that many activities included in the vagrancy law "are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights . . . . These amenities have dignified the right of dissent . . . ." *Id.*

88. City of Chicago v. Morales, 527 U.S. 41, 53 (1999). However, the plurality rejected a claim that the law was overbroad on First Amendment grounds, finding that the law did not sufficiently impact conduct protected by the First Amendment because groups gathered for the "apparent purpose" of conveying a message would not be subject to the law. *Id.* at 52–53.

89. Decker, *supra* note 77, at 105–07.

90. *Morales*, 527 U.S. at 53–54.

91. U.S. CONST. amend. IV.

reasonableness of a police search and guards against harassing and discriminatory police conduct.[92] Arrests and searches not based on probable cause are invalid and evidence seized pursuant to an invalid search is inadmissible in court.[93] Yet, courts recognize the need to give law enforcement flexibility in dealing with dangerous situations as they arise.[94] In *Terry v. Ohio*, the Court developed a balancing test, weighing the need to search against the resulting personal invasion and allowing a search only if the officer has a reasonable suspicion based on articulable facts.[95] "[B]ecause the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause . . . ."[96]

Often, even police officers determined to apply loitering statutes in good faith cannot justify such arrests consistent with the principles of the Fourth Amendment.[97] In the context of vagrancy and loitering, this problem is often caused by or confounded by the vagueness problems that plague these laws.[98] For example, in *Papachristou*, the Court noted a relation between constitutional problems of statutory vagueness and the Fourth Amendment probable cause requirement.[99] The Court argued that vague vagrancy laws give police unfettered discretion to make arrests based on suspicion of future criminality rather than on probable cause in violation of the Fourth Amendment.[100] Furthermore, in *Terry*, the Court acknowledged that failing to limit police discretion may exacerbate hostile relationships

92. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968).

93. *See* Dunway v. New York, 442 U.S. 200, 216 (1979); Papachristou v. Jacksonville, 405 U.S. 156, 169 (1972); Newsome v. Malcolm, 492 F.2d 1166, 1173–74 (2d Cir. 1974).

94. *See, e.g.*, *Terry*, 392 U.S. at 10.

95. *Id.* at 20–22.

96. *Newsome*, 492 F.2d at 1172 (finding that the loitering statute violated the Due Process Clause of the Fourteenth Amendment "not only because it fails to specify adequately the conduct it proscribes, but also because it fails to provide sufficiently clear guidance for police, prosecutors, and the courts so that they can enforce the statute in a manner that is consistent with the Fourth Amendment").

97. *See, e.g.*, Hall v. United States, 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc) (finding that a suspect arrested pursuant to an unconstitutionally vague vagrancy laws was denied the protections of the Fourth Amendment).

98. *See Papachristou*, 405 U.S. at 168–70; *Hall*, 459 F.2d at 837.

99. *Papachristou*, 405 U.S. at 168–69.

100. *Id.*; *see also* Kolender v. Lawson, 461 U.S. 352, 362 (1982) (Brennan, J., concurring) (arguing that in addition to being vague, the loitering statute at issue violated the Fourth Amendment).

between officers and communities.[101]

C. Section 385.80: The Minneapolis Lurking Ordinance

1. Section 385.80 and the City Council

Enacted in 1960, the original Minneapolis lurking ordinance section 385.80 read: "No person[] in any public or private place, shall lurk, lie in wait or be concealed with intent to do any mischief or to commit any crime or unlawful act."[102] "In 2003, the Community Advisory Board on Homelessness recommended that the City repeal its lurking . . . ordinance, or amend [it] so that [it] give[s] specific guidelines and criteria for illegal conduct."[103] In August of 2005, the Public Safety & Regulatory Services Committee moved to amend section 385.80 by removing the prohibition against lurking with intent to "do any mischief."[104] The City Attorney's Office supported this amendment, arguing that "[t]he phrase 'do any mischief' is antiquated and vague, and deleting this phrase adds clarity to the ordinance."[105] The Council passed the motion for amendment in September of 2005.[106] Despite this amendment, as of April 2007, four City Council members supported repeal of the entire statute.[107] Still, repealing an ordinance requires a majority vote,[108] meaning seven of Minneapolis's thirteen council members[109] must vote against the ordinance in order for a repeal to succeed.

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101. Terry v. Ohio, 392 U.S. 1, 12 (1968).

102. State v. Armstrong, 162 N.W.2d 357, 359 (Minn. 1968) (quoting MINNEAPOLIS, MINN., CODE OF ORDINANCES § 870.050 (1960)).

103. Our Lurking Ordinance, *supra* note 4.

104. Minneapolis City Council Official Proceedings 705 (Aug. 5, 2005) (on file with the City Clerk's Office), *available at* http://www.ci.minneapolis.mn.us/council/archives/proceedings/2005/20050805-proceedings.pdf.

105. Lisa Godon, Assistant Minneapolis City Att'y & 5th Precinct Cmty Att'y, Presentation to City Council: Lurking Amendment (Aug. 24, 2005) (on file with author).

106. Minneapolis City Council Official Proceedings 770 (Sept. 2, 2005) (on file with the City Clerk's Office), *available at* http://www.ci.minneapolis.mn.us/council/archives/proceedings/2005/20050902-proceedings.pdf.

107. Nash, *supra* note 2 ("Currently, city council members Gary Schiff, Betsey Hodges, Elizabeth Glidden and Cam Gordon have already expressed their intent to back the repeal, with council members Diane Hofstede and Don Samuels still undecided.").

108. MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 4, § 9 (2005).

109. City Council Members, http://www.ci.minneapolis.mn.us/council/ (last visited Jan. 22, 2008) (listing the council members by ward: Paul Ostrow, Cam Gordon, Diane Hofstede, Barbara Johnson, Don Samuels, Robert Lilligren, Lisa Goodman, Elizabeth Glidden, Gary Schiff, Ralph Remington, Scott Benson, Sandy Colvin Roy, and Betsy Hodges).

2. Enforcement of Section 385.80

The core disagreement between council members regarding the lurking law revolves around police enforcement of the law.[110] Supporters of repeal feel the ordinance is used arbitrarily to discriminate,[111] pointing to examples like the arrest of Lance Handy, a Black Minneapolis citizen.[112] After Handy bought a pack of cigarettes from a corner store in South Minneapolis, police stopped him and asked what he was doing; they told him "this is an area where drugs are being sold."[113] When Handy replied that "this is an area where people buy food and go shopping, too," the policeman frisked him, drove him to the station, and charged him with lurking.[114] After two court appearances, the charge was dropped.[115] Despite discriminatory anecdotes like this, defenders argue section 385.80 is a useful policing tool that keeps neighborhoods safe.[116] Barb Johnson, City Council President, argues: "I wouldn't want to throw out a useful tool because officers aren't always clear about why they are citing someone."[117] In opposition, council member Cam Gordon feels the law is not only discriminatory, but that "it is also not smart policing. It [is] ineffective and wastes valuable resources that we should be putting into preventing and eliminating crime."[118]

Disagreements over the effectiveness of low-level misdemeanor offenses like lurking led the Council on Crime and Justice[119] to prepare a report in November 2004 entitled *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes*.[120] Based on 2001 data, the study "examine[d] potential disparities in police behavior and subsequent court outcomes for

110. *See generally* Nash, *supra* note 2 (explaining the debate over the lurking law and different positions on the law taken by various council members).

111. *Id.*

112. Mosedale, *supra* note 2, at 13.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See generally* Nash, *supra* note 2.

117. Mosedale, *supra* note 2, at 13.

118. Waiting on "Lurking" Repeal, http://secondward.blogspot.com/2007_03_01_archive.html (Mar. 19 2007, 15:08 CST).

119. "The Council on Crime and Justice is an independent, non-profit . . . organization . . . . [Its] mission is to address the cause and consequences of crime and violence through research, demonstration, and advocacy." Council on Crime and Justice, http://www.crimeandjustice.org/index.cfm (last visited Feb. 20, 2008).

120. COUNCIL ON CRIME AND JUSTICE, LOW LEVEL OFFENSES IN MINNEAPOLIS: AN ANALYSIS OF ARRESTS AND THEIR OUTCOMES 3 (2004).

seven low level offenses."[121] The study showed significant racial disparity occurring at the point of contact between police and citizens. "Blacks were fifteen times more likely to be arrested than Whites," and they were "seven times more likely than Whites to be convicted."[122] Seventy-five percent of arrests for lurking were of Black people.[123] In 2006, forty-six out of fifty-five homeless individuals arrested for "lurking' in Minneapolis were Black.[124]

"[M]ost people who get arrested for low-level offenses in Minneapolis don't get convicted."[125] Only four and half percent (4.5%) of Blacks charged with lurking and three and two-tenths percent (3.2%) of Whites charged with lurking are actually found guilty.[126] Even without a conviction, charges cost taxpayers a significant price; it is estimated that "a typical lurking bust costs taxpayers about $75-$500 for the booking fee and $250 for a night in jail, plus four hours of wages for the cops who make the

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121. *Id.* at 5. The seven low-level offenses studied include: "Driving after Revocation, Driving after Cancellation, No Valid Driver's License, Disorderly Conduct, Loitering with Intent to Commit Prostitution, Loitering with Intent to Sell Narcotics, and Lurking with the Intent to Commit a Crime." *Id.*

122. *Id.* at 3.

123. *Id.* at 21.

124. Email from Lynn White, Assistant to City Attorney, Minneapolis City Attorney's Office, to Sarah Corris Riskin, Editor-in-Chief, Law and Inequality: A Journal of Theory and Practice (May 27, 2008, 13:18 CST) (on file with author and journal). The data compiled by the Minneapolis City Attorney's Office came from the Minneapolis Police Department CAPRS database. *Id.* For purposes of data collection, persons were considered "homeless" if they either provided no home address to police or listed the address of a homeless shelter. *Id.* From January 1, 2007 to April 11, 2008, eleven of the twenty-two homeless individuals arrested for "lurking" were Black. *Id.* According to 2000 U.S. census data, the percentage of Minneapolis's total population that identified as Black or African American was 18%. U.S. Census Bureau, State & County Quickfacts: Minneapolis, Minnesota, http://quickfacts.census.gov/qfd/states/27/2743000.html (last modified Jan. 2, 2008). An October 2006 study conducted by the Wilder Research Group found that "[n]early half of all homeless persons in the Twin Cities metro area are African American." WILDER RESEARCH, OVERVIEW OF HOMELESSNESS IN MINNESOTA IN 2006: KEY FACTS FROM THE STATEWIDE SURVEY 9 (2007), *available at* http://www.wilder.org/reportsummary.0.html?&no_cache=1&tx_ttnews[swords]=overview%20of%20homelessness&tx_ttnews[tt_news]=1963&tx_ttnews[backPid]=311&cHash=a0560074dc.

125. Brandt Williams, Report: Disparity Between Arrests, Convictions Cause for Concern, Minnesota Public Radio, Nov. 8, 2004, available at: http://news.minnesota.publicradio.org/features/2004/11/08_williamsb_disparities/ (last visited Apr. 2, 2008).

126. COUNCIL ON CRIME AND JUSTICE, *supra* note 120, at 26. The only offense with a lower rate of guilty convictions is prostitution, with conviction rates of 0% for both races. *Id.* The next lowest conviction rate was for loitering, where 8.7% of Whites were found guilty and eight and three-tenths percent of Blacks were found guilty. *Id.*

arrest."[127] Those advocating repeal of section 385.80 argue that, due to low conviction levels, community resources would be better spent elsewhere.[128]

3. The Minneapolis Loitering Law

In addition to its lurking ordinance, Minneapolis has a detailed loitering ordinance, section 385.50.[129] Originally, the law only targeted prostitution,[130] but it was amended in 2004 to also

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127. Mosedale, *supra* note 2, at 13 (quoting Guy Gambill, a criminal justice advocate).

128. Our Lurking Ordinance, *supra* note 4. "Resources that would be better invested in investigating real crimes and convicting real criminals as well as addressing root causes of crime and developing community based strategies are instead wasted on an ineffectual criminal justice 'revolving door.'" *Id.*

129. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.50 (2005). The relevant portions of the ordinance reads as follows:

> (a) No person shall loiter on the streets or in a public place or in a place open to the public with intent to solicit for the purposes of prostitution, illegal narcotic sale, distribution, purchase or possession, or any other act prohibited by law.
>
> (b) No person shall be present in a motor vehicle stopped, parked or operated on the street, in a public place or in a place open to the public with intent to solicit for the purposes of prostitution, illegal narcotic sale, distribution, purchase or possession, or any other act prohibited by law.
>
> (c) Among the circumstances which may be considered in determining whether a person intends to loiter for the purposes of engaging in prostitution are whether a person:
>
> (1)Repeatedly beckons to, stops or attempts to stop, or engages passersby in conversation;
>
> (2)Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture;
>
> (3)Is a known prostitute or procurer of prostitutes; or
>
> (4)Inquires whether a potential patron, procurer or a prostitute is a police officer or searches for articles that would identify a police officer or requests the touching or exposing of male or female genitals or female breasts to prove that the person is not a police officer.
>
> (d) Among the circumstances which may be considered in determining whether a person intends to loiter for the purpose of engaging in distributing illegal narcotics are whether a person:
>
> (1)Repeatedly beckons to, stops or attempts to stop, or engages passersby in conversation.
>
> (2)Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or other bodily gesture.
>
> (3)Acts as a look-out.
>
> (4)Transfers small objects or packages of currency or any other thing of value in a furtive fashion which would lead an observer to believe or ascertain that a drug transaction has or is about to occur.
>
> (5)Carries small objects or packages in one's mouth and transfers such objects or packages to another person for currency or any other thing of value, or swallows or attempts to swallow the objects or packages if approached by a law enforcement officer.

Id.

130. Minneapolis City Council Official Proceeding 409–10 (May 28, 2004) (on file at the City Clerk's office), *available at* http:www.ci.minneapolis.us/council/

target drug-related loitering.[131] Section 385.50 provides that "[n]o person shall loiter on the streets or in a public place or in a place open to the public with intent to solicit for the purposes of prostitution, illegal narcotic sale, distribution, purchase or possession, or any other act prohibited by law."[132] The law goes on to articulate specific circumstances and acts that may be considered in assessing criminal intent.[133] Police use the loitering law much more frequently than the lurking law.[134] Police also use the loitering law with more success; in 2001, almost twice as many of those arrested for loitering than for lurking are found guilty.[135]

4. Minnesota Court History

In *State v. Duggan*,[136] the Minnesota Supreme Court ruled that the State must prove the intent element in order to support a conviction for loitering or lurking.[137] In *State v. Armstrong*,[138] the court considered the constitutionality of both the Minneapolis loitering and lurking ordinances.[139] The court found the loitering and lurking ordinances were neither unconstitutionally vague nor violative of constitutional due process.[140] The court based its decision in large part on the fact that similar ordinances had existed without challenge in Minnesota and elsewhere in the country for most of the century.[141] Subsequent Supreme Court decisions in cases like *Papachristou*[142] and *Morales*,[143] however, essentially negate the precedent upon which the *Armstrong*

archives/proceedings/2004/20040528-proceedings.pdf. The loitering ordinance originally read: "No person shall loiter on the streets or in a public place or in a place open to the public with intent to solicit for the purposes of prostitution or any other act prohibited by law." *Id.*

131. *Id.*

132. § 385.50(a).

133. *Id.*

134. COUNCIL ON CRIME AND JUSTICE, *supra* note 120, at 26 (showing that there were 1,317 Black population citations and 354 White population citations for loitering in 2001, compared with 116 Black population citations and 30 White population citations for lurking in 2001).

135. *Id.* at 26 (showing that 8.7% of White and 8.3% of Black persons were found guilty of loitering, compared to 3.2% of White and 4.5% of Black persons found guilty of lurking).

136. 192 N.W.2d 185 (Minn. 1971).

137. *See id.* at 185 (holding that the State failed to prove intent and that the officer based his arrest merely upon his own suspicion).

138. 162 N.W.2d 357 (Minn. 1968).

139. *Id.* at 357.

140. *Id.* at 359.

141. *Id.*

142. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

143. City of Chicago v. Morales, 527 U.S. 41, 41 (1999).

decision is based.[144] It is likely that if a similar case reached the court today, the Minnesota Supreme Court would reach a different conclusion regarding the validity of the laws. Analyzing section 385.80 in light of current case history, a court might well find the law unconstitutional for vagueness, overbreadth, and/or for violating the Fourth Amendment.

II. Lurking Unconstitutionality: Analyzing Section 385.80 for Vagueness, Overbreadth, and Fourth Amendment Violations

Section 385.80, the Minneapolis lurking law, states that "[n]o person, in any public or private place, shall lurk, lie in wait or be concealed with intent to commit any crime or unlawful act."[145] The term "lurk" is the heart of the ordinance and is what makes the ordinance unique from other criminal statutes. "Lying in wait" and being "concealed" with intent to commit a crime are already punishable under attempt laws.[146] Thus, those who commit these acts can be arrested for attempt of the contemplated crime rather than pursuant to section 385.80. As lurking is the only conduct prohibited by section 385.80 that is not concurrently covered by other laws, the remainder of this Article focuses on the term "lurk" in arguing that section 385.80 is unconstitutional.

A. Vagueness

Section 385.80 should be found void-for-vagueness both because it fails to give citizens adequate notice as to what conduct is prohibited and because it encourages arbitrary police enforcement. Section 385.80 does not satisfy the notice requirement of the vagueness doctrine because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[147] Neither the statute itself nor the language of the *Minneapolis Code of Ordinances* defines the term "lurk."[148] The Minnesota Supreme Court definition of a "persistent presence or a furtive movement in a place" fails to

144. *See supra* Part I.A.2 (detailing cases that successfully challenged lurking and loitering ordinances).

145. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.50 (2005).

146. *See* MODEL PENAL CODE § 5.01(2)(a) (1962) (listing "lying in wait" as an act to be considered in establishing guilt for criminal attempt); DRESSLER, *supra* note 37, at 91–93 (4th ed. 2006) (describing the list of factual circumstances where an actor's conduct may be considered a substantial step toward the commission of a crime).

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

148. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.50 (2005).

sufficiently clarify matters.[149] Like the statute at issue in *Papachristou*, section 385.80 brings within its sweep conduct that cannot conceivably be considered criminal, like being "persistently present" in a place.[150] Under the ordinance, innocent conduct, such as waiting for a ride, standing outside and smoking,[151] or stepping into a doorway to avoid the rain, particularly if carried out in a "bad" neighborhood, may be considered lurking.[152] The statute does not even contain a list of examples of conduct that give rise to arrest and prosecution, leaving the public without notice.[153] Nor does the requirement of intent to commit a crime put the public on notice; it is not illegal to stand in public and think bad thoughts.[154] Without reasonably defining "lurking" and conduct relevant to the arrest decision, section 385.80 does not give the public a reasonable opportunity to know what the law "commands and forbids,"[155] and it denies citizens the opportunity to tailor their behavior accordingly.

The Minneapolis lurking ordinance also fails the second prong of the vagueness doctrine because it fails to establish minimal guidelines for enforcement. The vagueness deficiencies of section 385.80 under the notice prong of the vagueness test contribute to the ordinance's enforcement issues. "Definiteness is designedly avoided so as to allow the net to be cast at large . . . ."[156] Because the term "lurk" may encompass a wide variety of behaviors and is not narrowed by the statute, section 385.80 encourages arbitrary and discriminatory enforcement.[157] Further, section 385.80 does not delineate specific guidelines for law enforcement to follow when determining whether to arrest. The ordinance is not sufficiently narrowed by the requirement of criminal intent because section 385.80 gives police absolute discretion to decide if a citizen, absent any overt act, has criminal intent.[158] When a statute fails to provide minimal guidelines for

149. State v. Armstrong, 162 N.W.2d 357, 360 (Minn. 1968).

150. *See Papachristou*, 405 U.S. at 162.

151. Mosedale, *supra* note 2, at 13 (telling the story of a man arrested for lurking who had just purchased cigarettes at a store in an area known for drug dealing).

152. City of Chicago v. Morales, 527 U.S. 41, 57 (1999) (arguing that much innocent conduct is hard to distinguish from loitering).

153. *See supra* notes 30–31 and accompanying text.

154. *See supra* note 39 and accompanying text.

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

156. *Id.* at 166. (citing Lan Zetta v. New Jersey, 206 U.S. 451 (1939)).

157. *See Morales*, 527 U.S. at 41 (finding the Chicago loitering ordinance, which defined loitering as "to remain in any one place with no apparent purpose," gave officers absolute discretion to determine what activities constituted loitering).

158. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.80 (2005). Loitering

enforcement, "a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."[159] Evidence clearly suggests that Minneapolis police officers perform just such standardless and discriminatory sweeps. In 2001, Black people accounted for seventy-five percent (75%) of total lurking arrests,[160] and in 2006 they accounted for eighty-four percent (84%) of lurking charges.[161] Moreover, the difference between the number of arrests and actual convictions demonstrates that police use section 385.80 to prevent crime by removing "undesirable persons"—usually minorities and the homeless—from the streets without a strong case.[162] The lack of minimal guidelines in the ordinance itself and the arbitrary enforcement history of section 385.80 demonstrate that the ordinance also fails the second prong of the void-for-vagueness doctrine.

B. Overbreadth

The vagueness of the lurking law contributes to its overbreadth. Section 385.80 is unconstitutionally overbroad because the broad language of the ordinance allows law enforcement and courts to reach and criminalize constitutionally protected behavior. The lurking law reaches rights protected by the First Amendment, including association, assembly, and thought. Section 385.80 also essentially prohibits loitering, a constitutionally protected right deserving protection under the overbreadth doctrine.[163] Section 385.80 is similar to loitering laws, which prohibit loitering with intent to commit a specific crime,

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itself is not a crime and is in fact a liberty interest protected under the Due Process Clause. Therefore, mere loitering is an insufficient act from which to determine criminal intent. *Morales*, 527 U.S. at 53.

159. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)).

160. *See* COUNCIL ON CRIME AND JUSTICE, *supra* note 120, at 26, (showing that there were 1,317 Black population citations and 354 White population citations for loitering in 2001, compared with 116 Black population citations and 30 White population citations for lurking in 2001).

161. Email from Lynn White, Assistant to City Attorney, Minneapolis City Attorney's Office, to Sarah Corris Riskin, Editor-in-Chief, Law and Inequality: A Journal of Theory and Practice (May 27, 2008, 13:18 CST) (on file with author and journal) (citing statistics from the Minneapolis Police Department CAPRS database that, in 2006, 46 of 55 "homeless" individuals cited for lurking were Black).

162. *See* Williams, *supra* note 125 (discussing the disparity between arrests and convictions and the concern that laws like the loitering law are being used discriminatorily).

163. *See supra* notes 85–90 and accompanying text.

such as prostitution,[164] in that it prohibits lurking with the general intent to commit a crime.[165] However, section 385.80 is even broader than specific intent loitering statutes like those at issue in *Coleman*[166] and *Farber*[167] because it allows police officers to arrest for lurking anyone whom they suspect of having the intent to commit *any* crime.[168] Like the ordinance in *Coleman*, section 385.80 may chill freedom of expression and association rights if police arrest those whom they believe to be lurking with intent to commit the crime of soliciting prostitution.[169] Or, police may use the ordinance to deny the right to assembly, particularly in disfavored areas, similar to the Chicago ordinance struck down in *Farber*.[170] This, in fact, happens as attested to by Minneapolis resident Lance Handy, whom police appear to have arrested merely for his presence in an area known for drug-dealing.[171] Such arrests for lurking may unduly chill the exercise of the First Amendment rights of expression, association, and assembly by Minneapolis residents, particularly in neighborhoods with statistically higher rates of crime.[172]

Additionally, section 385.80 is overbroad in that it infringes upon the constitutionally protected freedom of thought. Section 385.50 allows punishment for mere thoughts because it requires no actus reus beyond the act of lurking itself.[173] Because "[l]oitering, wandering, idling, and lurking are not, by themselves unlawful, despite attempts of many municipalities to make them so,"[174] lurking alone cannot serve as the unequivocal act upon which to base a mens rea of intent to commit a crime.[175] A law that gives police absolute discretion to determine who intends to commit a crime is overbroad because it infringes upon an individual's freedom of thought and encourages arbitrary and discriminatory enforcement.[176]

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164. *See, e.g.*, Coleman v. City of Richmond, 364 S.E.2d 239, 242–43 (Va. Ct. App. 1988) (prohibiting loitering with intent to solicit prostitution).

165. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.80 (2005).

166. *Coleman*, 364 S.E.2d at 239.

167. Farber v. Rochford, 407 F. Supp. 529, 529 (N.D. Ill. 1975).

168. § 385.80.

169. *Coleman*, 364 S.E.2d at 239.

170. *Farber*, 407 F. Supp. at 529.

171. *See* Mosedale, *supra* note 2, at 13 (detailing the arrest of Lance Hardy).

172. Williams, *supra* note 125 (noting a high number of arrests of Black men in North Minneapolis for livability crimes like loitering).

173. § 385.80.

174. *Coleman*, 364 S.E.2d at 242.

175. *See supra* notes 81–84 and accompanying text.

176. *See* City of Houston v. Hill, 482 U.S. 451, 464 (1987) (holding that a law

Finally, Supreme Court precedent recognizes a constitutionally protected right to loiter.[177] The Minnesota Supreme Court recognizes that "'lurking' is not significantly different from 'loitering,'"[178] and it follows that the Constitution also protects lurking. To the extent that courts apply overbreadth principles and analysis to the protection of rights outside of the First Amendment,[179] a court may well find section 385.80 overbroad for infringing upon a constitutionally protected liberty interest.

While the overbreadth doctrine is "strong medicine,"[180] courts do not hesitate to use overbreadth in overturning laws that substantially interfere with constitutionally protected rights. Loitering and lurking laws like section 385.80 infringe upon the First Amendment rights of assembly, association, and thought and upon the liberty interest of loitering.[181] A court reviewing the constitutionality of section 385.80 should find the prohibition against lurking overbroad because it reaches these constitutionally protected activities.

C. *Fourth Amendment*

In the context of loitering laws, Fourth Amendment analysis closely mirrors vagueness analysis.[182] A vague loitering statute, such as section 385.80, may fail to satisfy the Fourth Amendment probable cause requirement because it encourages arbitrary and discriminatory enforcement.[183] Applying the balancing test from *Terry*, in which an officer may conduct a search only if he or she has a reasonable suspicion based on articulable facts,[184] arrests made pursuant to section 385.80 are unconstitutional due to the lack of arrest criteria contained within the statute itself.[185]

The vague proscriptions of section 385.80 violate the Fourth Amendment because they allow police to arrest individuals for

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giving police absolute discretion to arrest those who use "harassing" language to a police officer is overbroad and encourages discriminatory enforcement).

177. *See* City of Chicago v. Morales, 527 U.S. 41, 52–53 (1999); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

178. State v. Armstrong, 162 N.W.2d 357, 360 (Minn. 1968).

179. *See supra* Part I.B.2 (detailing the court's use of the overbreadth doctrine).

180. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (stating that application of the overbreadth doctrine to strike down a law is "strong medicine").

181. *See* Decker, *supra* note 77, at 65–79.

182. *Papachristou*, 405 U.S. at 168–69.

183. *Id.*

184. Terry v. Ohio, 392 U.S. 1, 13 (1968).

185. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.80 (2005).

suspected conduct rather than for observable conduct.[186] In *Newsome v. Malcolm*, the court found that the statute, which prohibited loitering in "circumstances which justify suspicion that (a person) may be engaged or about to engage in crime,"[187] allowed arrests based on the whim of the policeman rather than upon the conduct of the individual.[188] Similarly, by allowing the police unfettered discretion to arrest those whom they believe to be lurking "with intent to commit a crime,"[189] section 385.80 essentially allows police to arrest anyone whom they find suspicious. As noted by the Court in *Papachristou*, "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[190] Section 385.80, which contains no definition or examples of prohibited conduct, violates the Fourth Amendment because it is so vague that it provides no criteria upon which law enforcement officers may base their suspicion and arrests.

D. Section 385.50: An Alternative to Section 385.80?

The city of Minneapolis should repeal section 385.80 for a number of reasons, primarily because it is unconstitutionally vague, overbroad, and violates the Fourth Amendment.[191] Moreover, the lurking law is an ineffective policing tool that consumes officers' time, wastes taxpayer dollars, and harms community-police relations.[192] Finally, the lurking law is redundant. As previously noted, the Minnesota Supreme Court found that the terms "lurking" and "loitering" are not significantly different.[193] While section 385.80 prohibits lurking with the intent to commit a crime,[194] section 385.50 also prohibits loitering with intent to commit any act prohibited by law,[195] rendering the

186. *See* Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974); Farber v. Rochford, 407 F. Supp. 529 (N.D. Ill. 1975).

187. *Newsome*, 492 F.2d at 1173.

188. *Id.*

189. § 385.80.

190. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972) (citing People v. Moss, 309 N.Y. 429, 430 (1956)).

191. *See supra* Parts II.A–C (discussing the constitutional deficiencies of § 385.80).

192. *See supra* Part I.C.2 (illustrating problems of uneven enforcement and undue cost).

193. State v. Armstrong, 162 N.W.2d 357, 360 (Minn. 1968).

194. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.80 (2005).

195. § 385.50.

lurking ordinance unnecessary and duplicative. If the loitering ordinance already serves a similar function and can be used in place of the lurking law, the question becomes: is the loitering ordinance constitutional?

While loitering laws in general raise a myriad of constitutional issues, some loitering laws have been found constitutional.[196] Unlike the lurking law, which suffers from a number of constitutional deficiencies,[197] section 385.50, the Minneapolis loitering ordinance, is a carefully constructed law likely to pass constitutional muster. Due to its more detailed nature, section 385.50 may not be unconstitutionally vague. Section 385.50 targets more than mere loitering; it targets loitering with the intent to commit a specified criminal act, namely soliciting for prostitution or drug-related crimes.[198] Additionally, like the ordinance upheld in *Howard*, section 385.50 requires specific intent and contains a list of overt acts to consider in making an arrest.[199] The acts and circumstances that law enforcement officers may consider in determining intent include: repeatedly beckoning passersby, asking whether a potential patron is a police officer, and transferring small objects in a furtive fashion.[200]

Still, even loitering laws that require intent and give examples of prohibited conduct have been found unconstitutional.[201] In *Coleman*, the court found the law overbroad if the acts alone were sufficient to demonstrate intent, whereas the law was vague if the acts were insufficient by themselves because it no longer required an intent element.[202] While all loitering laws run the risk of violating constitutionally protected rights,[203] loitering laws like section 385.50 that require intent and give examples of prohibited conduct are much more likely to survive a constitutional attack on vagueness grounds because the level of detail provided gives citizens notice of prohibited conduct and

196. *See supra* note 30 and accompanying text.

197. *See supra* Parts II.A–C.

198. § 385.50.

199. City of Cleveland v. Howard, 532 N.E.2d 1325, 1330 (Ohio Mun. Ct. 1987); *see also* City of Tacoma v. Luvene, 827 P.2d 1374, 1386 (Wash. 1992); *see also* § 385.50.

200. § 385.50(d).

201. *See* sources cited *supra* note 31.

202. Coleman v. City of Richmond, 364 S.E.2d 239, 244 (1988). See *supra* Part I.B.1 for more discussion on *Coleman*.

203. *See* Berns, *supra* note 37, at 717 (arguing that loitering laws must be sufficiently detailed to be constitutional).

limits police discretion in making arrests.[204]

The level of detail provided by section 385.50 also diminishes the likelihood of a successful challenge based on overbreadth. Courts have found some loitering statutes similar to section 385.50 unconstitutionally overbroad. In *Coleman*, for example, the court found a statute prohibiting loitering with the intent to engage in prostitution chilled the First Amendment freedoms of expression and association.[205] However, because the overbreadth doctrine is "strong medicine," courts are loath to use the overbreadth doctrine to invalidate a statute unless there is no possible saving construction.[206] The Supreme Court is particularly deferential to any saving interpretations provided by a state supreme court.[207] The Minnesota Supreme Court interprets the loitering law to require proof of intent for conviction of loitering.[208] The intent element, combined with the list of delineated acts, sufficiently narrows section 385.50 and prevents the ordinance from impermissibly reaching activity protected by the First Amendment.

Finally, section 385.50 provides a list of circumstances police may consider in determining intent to loiter,[209] allowing officers to comply with the strictures of the Fourth Amendment. Unlike section 385.80 and the statutes in *Newsome*[210] and *Papachristou*,[211] section 385.50 limits police discretion by requiring police to make arrests based on probable cause as articulated in the list of conduct provided in the statute.[212] By providing a list of conduct, section 385.50 allows law enforcement to base arrests on observable conduct rather than upon mere suspicion of future criminality.[213]

The detailed nature of section 385.80 suggests that the loitering ordinance may be a suitable, indeed superior, substitute for the lurking law. The ordinance's coverage area already overlaps sufficiently to make section 385.80 superfluous.

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204. *See* cases cited *supra* note 30.

205. *Coleman*, 364 S.E.2d at 244.

206. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

207. *See* City of Chicago v. Morales, 527 U.S. 41, 43 (1999) ("This Court, however, cannot impose a limiting construction that a state supreme court has failed to adopt.").

208. State v. Duggan, 192 N.W.2d 185, 185 (Minn. 1971).

209. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.50(c) (2005).

210. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974).

211. Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

212. § 385.50(c).

213. *See Newsome*, 492 F.2d at 1173 (finding a loitering statute that did not provide clear guidance for police enforcement violated the Fourth Amendment).

Moreover, the loitering law is more likely to withstand constitutional attacks based on vagueness, overbreadth, and the Fourth Amendment.

Conclusion

While community members are justifiably concerned with crime rates and with keeping neighborhoods safe, Minneapolis cannot sacrifice the constitutional rights of its citizens in order to keep sweeping criminal statutes on its books. Although the Minnesota Supreme Court upheld the lurking ordinance in 1968, in light of subsequent Supreme Court precedent, the Minnesota Supreme Court should find section 385.80 unconstitutional today. Potential challenges include vagueness, overbreadth, and Fourth Amendment violations.[214] The vague wording of section 385.80 fails to give citizens notice of prohibited conduct and encourages arbitrary and discriminatory enforcement.[215] Further, section 385.80 is overbroad in allowing the ordinance to reach conduct protected by the First Amendment.[216] Finally, use of the law by law enforcement violates the Fourth Amendment by encouraging arrests not based on probable cause.[217]

In addition to the constitutional deficiencies of section 385.80, the existence of section 385.50, Minneapolis's carefully constructed and detailed loitering ordinance, renders the lurking law unnecessary and superfluous.[218] The loitering law not only overlaps with the coverage area of the lurking law,[219] but it is also a more effective policing tool that is used more frequently by law enforcement and results in higher conviction rates.[220] More importantly, the detailed language of section 385.50 avoids the constitutional pitfalls of the lurking ordinance by requiring intent and providing a list of examples of prohibited conduct.[221] The Minneapolis City Council should repeal section 385.80 because of

214. *See supra* Part II.A–C (analyzing possible legal challenges to the lurking law).

215. *See supra* Part II.A (reviewing vagueness jurisprudence and examples of arbitrary enforcement of the lurking statute).

216. *See supra* notes 77–87 (quoting sources linking the First Amendment freedom of thought to the right to loiter).

217. *See supra* Part II.C (providing constitutional analysis of lurking law and finding that the law violates the Fourth Amendment).

218. *See supra* Part II.D (detailing the constitutional advantages of the loitering statute).

219. *See supra* Part II.D (discussing overlap between the loitering law and the lurking law).

220. COUNCIL ON CRIME AND JUSTICE, *supra* note 120, at 26.

221. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.50 (2005).

its unconstitutionality, its ineffectiveness, and its overlaps with other applicable ordinances. Rather than subject the city to a potentially lengthy and costly legal battle it is likely to lose, Minneapolis should repeal section 385.80, removing this lurking unconstitutional ordinance from its books.