Creating "Criminals": Homelessness in the Sunshine State

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Criminalizing homelessness and poverty is an American tradition. So-called "vagrancy laws," which prohibited "vagrants," "wander[ers,]" and "habitual loafers" from being in public, found their first big defeat in Papachristou v. City of Jacksonville*. In that case, the Supreme Court struck down such laws as unconstitutionally vague. To this day, unhoused plaintiffs continue to challenge vagrancy-type laws on vagueness grounds. However, this case study from Sarasota, Florida—which draws on litigation history, legislative revisions, and enforcement data—reveals that vagueness doctrine has had perverse consequences for defendants charged under modern-day vagrancy laws.*

This Note begins with vagueness doctrine's stated aims—reducing "arbitrary" police enforcement, reducing racial discrimination, and improving notice to defendants. Examining one jurisdiction in Florida, this Note shows that successful vagueness challenges have improved notice to possible defendants and constrained police ability to "arbitrarily" enforce the city's ordinance. However, vagueness challenges have also led to unexpected results related to police power, racial discrimination, and the severe punishment that defendants receive.

Vagueness challenges prompted Sarasota's local leaders to rewrite its statute with increasingly detailed language. This "tailoring" of the law helped to give police enormous power to decide who will be found guilty, fined, and incarcerated. This Note also argues that courts' use of vagueness doctrine to reduce racial discrimination is misplaced. Finally, the data show that the law was enforced almost entirely against unhoused people, whom it punished via substantial incarceration and fines. This Note reveals the aspirations of a doctrine and theorizes about its actual effects on both statutes and enforcement. It concludes that, in this jurisdiction, vagueness doctrine appears to accomplish some of its stated goals, but it also empowers police within a system that makes "criminals" of the region's most vulnerable residents.

Table of Contents

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Introduction

In the very early morning of October 9, 2017, Sam Johnson had pulled a white sheet around him in an attempt to ward off the chill.[1] When Officer Victor Charles noticed him at 1693 Main Street, Sarasota, Charles stopped.[2] Sarasota City Code 34-41 ("34-41") prohibits "unlawful lodging."[3] Officer Charles wrote: "Subject was seen sleeping at location. He was on top of a blanket and covering himself with a white sheet. Subject had personal belonging [sic] near him."[4] Mr. Johnson, a Black man, was given a citation and told to arrive in court on October 30th.[5] He got there late and almost received a failure to appear, which would have resulted in a warrant for his arrest.[6] He declined a defense attorney, and pled guilty. He was ordered to pay $378, which he did not have. The court later sold the right to collect on his debt.

In 2017, scenes like this played out hundreds of times in Sarasota, Florida. Data reveal that "vagrancy laws" criminalize survival behaviors in this region. Anti-lodging laws like 34-41—which ban sleeping, resting, or lying down in public areas—often go unnoticed and unstudied in cities despite their prevalence.[7] The purpose of these statutes, which have existed for centuries, has been to identify, sort, and remove "undesirable" people. Vague-

[1] Johnson Aff. ¶1 (on file with author) [hereinafter *Johnson Aff.*]. This affidavit and related case are not cited in full in order to protect the privacy of the individuals.

[2] *Id.*

[3] Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[4] *Johnson Aff.*, *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *See* Nat'l Law Ctr. on Homelessness & Poverty, No Safe Place: The Criminalization of Homelessness in U.S. Cities 7–8 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf, *archived at* https://perma.cc/R62Y-BCKZ [hereinafter No Safe Place].

ness doctrine has emerged as a winning legal strategy for advocates seeking to defeat vagrancy laws and, for a time, virtually eliminated them.[8]

Courts have held that a law is too vague when ambiguity in its text, because of nonspecific language or omissions, leaves defendants unaware that their conduct is illegal and gives police excessive discretion. The doctrine emerged in lawsuits against vagrancy statutes, where it challenged "a regime in which the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'"[9] Specifically, courts believed that this discretion would lead to greater racism in police enforcement.[10]

This Note tracks a series of successful legal challenges brought against the anti-lodging law in one location: Sarasota, Florida. It examines the way in which lawmakers rewrote the law in response to those challenges and posits that those changes are likely to have affected the mechanics of adjudication under the law. This Note also details enforcement of anti-homelessness laws by law enforcement in both the City and County of Sarasota in 2017. This Note compares the goals and aspirations of vagueness doctrine with the legal and enforcement realities to show how anti-lodging laws are weaponized against unhoused people.[11] It concludes that while the doctrine may have succeeded in its goals of increasing notice and reducing police discretion, the doctrine has altered *who* has the power to ensure convictions. Police now have enormous control over the effective determination of guilt. The data is inconclusive about the doctrine's effectiveness in reducing racial disproportionality in enforcement. Nevertheless, courts have often stated that

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[8] *See generally* RISA L. GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s (2017). Goluboff's excellent history of vagrancy laws and the social, legal, and political groundswell against them is essential reading for understanding the windup to the *Papachristou* decision. In particular, Goluboff discusses the shift in public understanding of "the boundaries between behavior (or status) that should be proscribed and behavior (status) that should be tolerated as part of a plural society." Email from Risa L. Goluboff, Professor of Law, Univ. of Va. Sch. Of L., to author (Nov. 26, 2018 17:24 EST) (on file with author).

[9] Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (quoting *Shuttlesworth v. Birmingham,* 382 U.S. 87, 90 (1965)).

[10] *Id.* at 170.

[11] *See* NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 (2006), https://www.nationalhomeless.org/publications/crimreport/report.pdf, *archived at* https://perma.cc/W4YN-P8AM [hereinafter A DREAM DENIED]. I use the term "unhoused" to describe the lack of shelter and to recognize that individuals create homes despite shelter. However, I use the terms "criminalization of homelessness" and "policies targeting homelessness" to describe an institutional attitude and to recognize a widespread set of policies that target houseless individuals. Since the genesis of the word "homeless" in the late 1800s, it connoted itinerancy and has drawn derision from both academia and legal sources. When used as a descriptor for individuals, it does not reflect the multi-faceted and complex nature of being without a home. For more on the term "homeless," and the experiences of people living without shelter, *see* NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS App. B (2018), https://www.ncbi.nlm.nih.gov/books/NBK519584/, *archived at* https://perma.cc/4QGY-YW8G.

vagueness doctrine can actively curb excessive police discretion, which would in turn curb police *racial discrimination*. The data do not support this position. This Note illustrates two facets of vagrancy laws' particular carceral scheme: its enforcement and its evolution in response to legal attacks.[12]

Part I details the history of vagrancy laws and vagueness doctrine. For hundreds of years, local statutes have criminalized "vagrants" and "vagabonds."[13] Then, in 1972, *Papachristou v. City of Jacksonville*[14] established new legal protections for people living on the streets.[15] First, the Court held that the Jacksonville vagrancy law did not adequately notify the public of which activities were illegal.[16] Second, the Court held that the law was unconstitutionally vague because the law gave police excessive discretion.[17] This discretion violated the Fourteenth Amendment Due Process Clause because the statute did not provide guidance specific enough to restrict the defendants, whom police could plausibly arrest, leaving the police with unwarranted decision-making authority.[18] Vagueness doctrine "permit[ted] and encourage[d] discriminatory enforcement of the law."[19] However, *Papachristou* did not prevent vagrancy laws from proliferating, and litigation efforts against vagrancy laws continue to raise vagueness challenges.[20]

Part II examines the legal battle over one anti-lodging law in Sarasota.[21] First, it argues that through the passage and re-passage of the statutes in response to vagueness challenges, vagueness doctrine has effectively increased notice of prohibited conduct and constrained police enforcement to unhoused people. Second, it argues that the law contributes to a new model of heightened police power, which contributes to the erosion of the adjudicative process.[22]

Part III presents the methods and results of empirical research into enforcement of the Sarasota anti-lodging law and similar laws in the City and County of Sarasota.[23] The County of Sarasota has a population of less than

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[12] *See* Christopher Agee, *From the Vagrancy Law Regime to the Carceral State*, 43 LAW & SOC. INQUIRY 1658, 1666 (2018).

[13] In Supreme Court doctrine, the term "vagrancy" has described laws that criminalize "vagrants" and "vagabonds" as, for example, "persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers." Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972). *See also* Risa L. Goluboff, *Writing Vagrant Nation*, 43 LAW & SOC. INQUIRY 1686, 1687 (2018).

[14] 405 U.S. 156 (1972).

[15] *Id.* at 156.

[16] *Id.* at 162.

[17] *Id.* at 165.

[18] *Id.*

[19] *Id.* at 170.

[20] *See* NO SAFE PLACE, *supra* note 7, at 8.

[21] The law was passed, struck down on vagueness grounds, and re-passed several times.

[22] This Note defines police power to mean the authority to make, what are in effect, final determinations of a defendant's guilt.

[23] *See* A DREAM DENIED, *supra* note 11, at 10. Although the analysis of litigation and vagueness doctrine applies only to one ordinance, the anti-lodging ordinance passed by the

500,000 residents[24] and has a large population of unhoused people: nearly 900.[25] These laws make it a misdemeanor, punishable by up to a year in jail, to lodge or camp in public.[26] Data collection focused on a particular law is possible because the County's clerk of court database is searchable by statute.[27] The harsh penalties under these laws, the substantial population of unhoused people, and the availability of data make this region a potent case study.[28]

Part IV applies the data to the theory developed in Part II and examines how enforcement of the City of Sarasota's anti-lodging law stacks up against the aims of vagueness doctrine. This part describes the way in which the narrowing of the anti-lodging laws helps to negate prosecutors' roles in choosing which cases to charge, and shifts that function to police. Due to the increasingly narrow tailoring of the proscribed conduct, guilt is a foregone conclusion once the police arrest or cite an individual for lodging. This enforcement defies traditional roles of police, prosecutors, and compresses several mechanics of the criminal legal system. In place of a traditional process in which police make arrests and district attorneys screen for prosecution, "adjudication" occurs virtually within the moment a police officer decides that someone is lodging. In short, vagueness challenges may diminish police discretion about which persons to charge, but in this case they strengthen police power to decide guilt or innocence. Part IV also argues that *creating criminals* and harshly punishing them, as the County of Sarasota does, should matter to courts, advocates, and lawmakers.

City of Sarasota, the County prosecutes violations of this law. Since other laws also penalize persons who are unhoused, a complete picture of the criminalization of homelessness requires presentation of prosecution under other statutes as well.

[24] *Sarasota County, Florida; 2017: ACS 1-Year Estimates Data Profile*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=Sarasota,%20Florida&g=0500000US12115&hidePreview=false&tid=ACSDP1Y2017.DP05&vintage=2018&layer=VT_2018_050_00_PY_D1&cid=DP05_0001E, *archived at* https://perma.cc/7G8E-9QU5 [hereinafter *Sarasota County*].

[25] The estimated County population of unhoused people was 877. News Release, Suncoast Partnership to End Homelessness (Apr. 26, 2019) https://www.gulfcoastcf.org/sites/default/files/2019%20Point%20in%20Time%20Press%20Release%20-%204-26-19.pdf, *archived at* https://perma.cc/8AHJ-FF3G [hereinafter *News Release*]. However, conventional measures of counting homelessness wildly underrepresent true homeless population figures. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA (2017), https://www.nlchp.org/HUD-PIT-report2017, *archived at* https://perma.cc/Z2J7-GQ7Y [hereinafter *Don't Count on It*].

[26] *See, e.g.*, Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005). For Florida's statutory provision governing incarceration, see Fla. Stat. Ann. § 775.082 (2019).

[27] *See Clerk of the Circuit Court and County Comptroller Karen E. Rushing,* CLERKNET, https://secure.sarasotaclerk.com/, *archived at* https://perma.cc/Q3Z3-P4EF. Many county court databases are searchable by case number only.

[28] *See* NO SAFE PLACE, *supra* note 7, at 8; *see also* A DREAM DENIED, *supra* note 11, at 10 (naming Sarasota as the United States' "meanest city" for its harsh laws criminalizing unhoused people).

While the legal literature on vagueness doctrine is extensive,[29] to my knowledge, there are neither quantitative studies on the enforcement of anti-lodging laws in Florida nor the effect of successful vagueness challenges on the laws and their effects on unhoused persons. A separate body of literature documents criminalization of homelessness: Researchers have catalogued the rise of vagrancy-type statutes,[30] rich descriptions of changing police practices,[31] and accounts of unhoused persons' experience with enforcement.[32] Homelessness affects, traumatizes, and debilitates more than half a million people nationwide.[33] Statutes criminalizing homelessness are on the

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[29] *See generally* GOLUBOFF, VAGRANT NATION, *supra* note 8; *see also* Agee, *supra* note 12, at 1668; Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1687; Tracey Meares, *This Land is My Land?*, 130 HARV. L. REV. 1877, 1880 (2017); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 781 (1999) (citing Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 229–30 (1998)); Karen Tani, *Constitutionalization as Statecraft: Vagrant Nation and the Modern American State*, 43 LAW & SOC. INQUIRY 1646, 1646 (2018); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–76 (1960).

[30] *See* NO SAFE PLACE, *supra* note 7, at 8 (detailing the rise of laws criminalizing sleeping, camping, and resting in U.S. cities since the 1990s); *see also* Justin Olson & Scott MacDonald, *Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances*, SEATTLE UNIVERSITY SCHOOL OF LAW RESEARCH PAPER NO. 15–19 (2015), http://dx.doi.org/10.2139/ssrn.2602318, *archived at* https://perma.cc/25TK-69V4; POLICY ADVOCACY CLINIC OF BERKELEY LAW, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 3, 4–5 (2016), https://wraphome.org/wp-content/uploads/2016/06/NVL-Update-2016_Final.pdf, *archived at* https://perma.cc/Z6XY-S5KE (finding that "[i]n California's 58 most populous cities, [there are] 592 laws restricting and criminalizing," camping, sleeping, and resting, "or an average of more than 10 laws per city . . . . [T]he enactment of anti-homeless laws has grown significantly since the 1950s. If current trends continue, the California cities in our study will collectively enact 97 new anti-homeless codes between 2010 and 2019.").

[31] *See generally* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019) (detailing the punishment of anti-homeless laws and arguing for Housing First solutions); Forrest Stuart, *From 'Rabble Management' to 'Recovery Management': Policing Homelessness in Marginal Urban Space*, 59 URB. STUD. 1909 (2014); Forrest Stuart, *On the Streets, Under Arrest: Policing Homelessness in the 21st Century*, 9 SOC. COMPASS 940 (2015). *See also* Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFF. REV. 41, 58 (2017) ("More than a quarter of tickets issued to homeless persons were for one of three common crimes of homelessness: park curfew violation (1,705 tickets), panhandling (950 tickets), or sleeping/sitting in public (211 tickets). Many others were for crimes such as being on the roadway median, erecting a tent, or sleeping in a private business alcove.").

[32] *See* S.F. COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO (2015), http://www.cohsf.org/Punishing.pdf, *archived at* https://perma.cc/ZUQ8-4RJB; *see also* WESTERN REGIONAL ADVOCACY PROJECT, NATIONAL CIVIL RIGHTS OUTREACH FACT SHEET (2015), https://wraphome.org/wp-content/uploads/2015/12/NationalCivilRightsFactSheetDecember2015.pdf, *archived at* https://perma.cc/XET5-22MP.

[33] *See* NAT'L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS IN AMERICA, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/, *archived at* https://perma.cc/WST6-PHNG (finding that nationwide homelessness increased by 0.3% from 2017–18, the second year of increases in homelessness after ten years of declining rates of homelessness); *see also* GILL LENG, LOCAL GOVERNMENT ASSOCIATION, THE IMPACT ON HEALTH OF HOMELESSNESS: A GUIDE FOR LOCAL AUTHORITIES (2017), https://

rise.[34] Homelessness is associated with much higher rates of involvement in foster care and juvenile legal systems as well as systematic racism and severe homophobia.[35] Unhoused people often lose housing because of structural factors that fuel the U.S. criminal legal system.[36] Even as these ordinances are increasingly prevalent, "we know little about how these 'quality of life' laws are enforced on the ground."[37] Understanding data is necessary for an honest confrontation with the legal and human consequences of criminalization.

This Note presents enforcement data from anti-homelessness laws in one location during one year. Sarasota City and County's anti-homelessness laws are enforced in the shadow of vagueness doctrine's successes. While this Note focuses attention on the realities of enforcement and the unforeseen effects of vagueness doctrine, it also reveals the City of Sarasota's anti-lodging ordinance as a multi-institutional project of courts, lawmakers, advocates, and police to perpetuate severe punishment against unhoused people who live outside.

Judges, policymakers, and perhaps advocates are liable to throw up their hands and ask: What can a city do about homelessness?[38] This Note

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www.feantsa.org/download/22-7-health-and-homelessness_v07_web-00230351259515 38681212.pdf, *archived at* https://perma.cc/CEC8-4KPG.

[34] *See* NO SAFE PLACE, *supra* note 7, at 16–29.

[35] *See* Lisa Goodman et al., *Homelessness as Psychological Trauma: Broadening Perspectives*, 46 AM. PSYCHOLOGIST 1219, 1219–25 (1991); *see also* CHAPLIN HALL, MISSED OPPORTUNITIES: PATHWAYS FROM FOSTER CARE TO YOUTH HOMELESSNESS IN AMERICA 8 (2019), https://www.chapinhall.org/wp-content/uploads/Chapin-Hall_VoYC_Child-Welfare-Brief_2019-FINAL.pdf, *archived at* https://perma.cc/ZYM3-W3ZX (reporting that 29% of unhoused youth had been in the foster care system compared to 6% of youth in the general population and that 61% of unhoused youth who had been a part of the foster care system had also been involved in the criminal legal system compared to 46% of unhoused youth who had not been part of the foster care system); *see also* CHAPLIN HALL, MISSED OPPORTUNITIES: LGBTQ YOUTH HOMELESSNESS IN AMERICA 2–3 (2018), https://voicesofyouthcount.org/wp-content/uploads/2018/05/VoYC-LGBTQ-Brief-Chapin-Hall-2018.pdf, *archived* at https://perma.cc/66V7-Z985 (describing the intersectional effects of racism, homophobia, transphobia on youth experiencing homelessness). According to Chaplin Hall, LGBTQ+ young adults 18-25 are 20-40% of the population of youth experiencing homelessness, meaning that they experience homelessness at twice the rate of their heterosexual peers. *Id*. at 7. *See also* Joy Moses, DEMOGRAPHIC DATA PROJECT: RACE, ETHNICITY, AND HOMELESSNESS (2018) 3, https://endhomelessness.org/wp-content/uploads/2019/07/3rd-Demo-Brief-Race.pdf ("Among the nation's racial and ethnic groups, Black Americans have the highest rate of homelessness. Fifty-four out of every 10,000 Black people in the United States were homeless during the 2018 point-in-time count.").

[36] *See, e.g.*, L.A. HOMELESS SERVS. AUTH., REPORT AND RECOMMENDATIONS OF THE AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS 5 (2018), https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness, *archived at* https://perma.cc/88P3-CSAM ("The impact of institutional and structural racism in education, criminal justice, housing, employment, health care, and access to opportunities cannot be denied: homelessness is a by-product of racism in America.").

[37] *See* Robinson, *supra* note 31, at 2.

[38] The causes of homelessness are not mysterious. The National Law Center on Homelessness and Poverty concludes that the primary drivers of homelessness are poverty and a decrease in affordable rental housing. *See generally*, NAT'L COAL. FOR THE HOMELESS, WHY ARE

assumes that cities have an interest in regulating their public spaces, but catalogues the harms of enforcing vagrancy statutes in order to reckon with these harms. Ultimately, this Note argues that anti-vagrancy laws are tools of violence that do not belong in the criminal law.

I. Vagrancy Laws and Vagueness Doctrine

A. Papachristou

Vagueness doctrine emerged because of vagrancy laws.[39] Throughout most of the 19th and 20th centuries, courts embraced ordinances banning "vagrants,"[40] which barred various activities but generally prohibited unemployed persons from being in public.[41] Given the "entrenched legal regime" and commonplace nature of these laws, their defeat in *Papachristou v. City of Jacksonville*[42] was an outcome that seemed unlikely.[43]

Many states enforced vagrancy laws against the unemployed poor[44] and courts regularly upheld those laws on the grounds that it prevented criminal

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People Homeless? (2006), http://www.nationalhomeless.org/publications/facts/Why.pdf, *archived at* https://perma.cc/3KMC-H42J; *see also* U.S. Conf. of Mayors, A Status Report on Hunger and Homelessness in America's Cities: A 24-City Survey 42 (2005), http://www.ncdsv.org/images/USCM_Hunger-homelessness-Survey-in-America%27s-Cities_12%202005.pdf, *archived at* https://perma.cc/2XQ9-J3A7 [hereinafter Status Report 2005]. However, experts disagree as to the proper remedies. Some argue that the solution to this problem, which implicates unrestricted competition in housing markets as well as the development that fuels it, is not necessarily one that can be solved at the municipal or county level. *See generally* Maria Foscarinis et al., *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 7 Geo. J. on Poverty L. & Pol'y 145 (1999) (describing the ways in which cities are truly unable to "solve" homelessness); Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug's City Making*, 56 Stan. L. Rev. 231, 246–47 (2003). Still, many expert organizations have recommended local-level best practices for addressing homelessness. *See, e.g.*, Foscarinis et al. at 160–63 (describing local-level homeless outreach teams, day labor centers, and taxes used to fund shelters). Any given city may be fundamentally limited in its ability to end homelessness. *See generally* Glenn Thrush, *With Market Hot, Landlords Slam Door on Section Eight Tenants*, N.Y. Times (Oct. 12, 2018), https://www.nytimes.com/2018/10/12/us/politics/section-8-housing-vouchers-landlords.html, *archived at* https://perma.cc/EGU5-6W67.

[39] *See generally* Goluboff, Vagrant Nation, *supra* note 8.

[40] *See* Goluboff, *Writing Vagrant Nation*, *supra* note 7, at 1687.

[41] Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 Tul. L. Rev. 631, 640 n.56 (1992) ("Vagrancy legislation varied from state to state but contained one common element: vagrancy laws punished idle persons without visible means of support who, although able to work, failed to do so.").

[42] 405 U.S. 156 (1972).

[43] *See* Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1687 ("[A]s late as the 1950s law enforcement officers used apparently constitutionally unproblematic vagrancy laws everywhere and all the time, and . . . twenty years later, the Supreme Court . . . declared those laws unconstitutional.").

[44] Simon, *supra* note 41, at 640 n.56; *see also* Goluboff, Vagrant Nation, *supra* note 13, at 640.

behavior.[45] In *Mayor of New York v. Miln*,[46] the Supreme Court approved a New York law that denied entry to impoverished people arriving by ship: It is "as competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence."[47] In the early- to mid-century, enforcement of these laws was widespread and quotidian: In 1958, approximately 88,000 vagrancy arrests were made nationwide.[48] By 1968, annual arrests had increased to 99,000 and, by 1972, to 101,000.[49]

Almost 100 years after *Miln*, courts still routinely upheld vagrancy laws, reasoning that vagrancy led to criminal behavior. In the decades that followed, challenges to these laws grew, eventually amassing opponents from divergent political and social groups.[50] Risa Goluboff and Karen Tani argue that the mobilization against vagrancy laws challenged the "conceptual links between poverty and morality" and would fundamentally alter policing in the United States.[51] One proponent of this change was Justice William O. Douglas. In 1960, while serving on the Supreme Court, he published a law review article railing against the injustices of vagrancy laws.[52] In the late 1960s, courts began to strike down vagrancy laws on the grounds that they were "invidious discrimination against the poor."[53] Nevertheless

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[45] In District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947), for example, the D.C. Circuit held: "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life."

[46] 36 U.S. 102 (1837).

[47] *Id.* at 142–43.

[48] Simon, *supra* note 41, at 640 n.55 (citing William O. Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1, 10 (1960)).

[49] Moreover, these arrests occurred at a rate of approximately seventy arrests per 100,000 people. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 n.15 (1972). See *infra* Part III for a comparison to Sarasota enforcement rates.

[50] Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1686–90.

[51] *Id.* at 1688 (quoting Tani, *supra* note 29, at 1652). Karen Tani describes vagrancy laws as "rights were always subordinate to a localized understanding of the public good and placed few limits on the substance of governmental regulation." Tani, *supra* note 29, at 1648. Karen Tani and Christopher Agee explain the fall of vagrancy laws as part of a structural shift in American jurisprudence and law enforcement. Tani, *supra* note 29 and Agee, *supra* note 12, at 1668. Goluboff points out that vagrancy laws had been enforced against African Americans "who refused agricultural work" in order to maintain a system of indentured servitude, as well as against "prostitutes, sexual minorities, Beats, hippies, Vietnam War protestors, and others," but that the 1960s involve a "discrediting of victimless crimes." Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1689–90. Goluboff, Tani, and Agee appear to agree that vagrancy laws were a potent and important tool of the British and American criminal law for hundreds of years; their demise represented a transformation of American criminal law, not merely a change in the Supreme Court's jurisprudence. *See id.* at 1687, 1690 (concurring with Tani, *supra* note 29 and Agee, *supra* note 12).

[52] *See* Douglas, *supra* note 48, at 10–11.

[53] Simon, *supra* note 41, at 642 n.72 (citing *Goldman v. Knecht*, 295 F. Supp. 897, 907 n.29 (D. Colo. 1969) (finding that a vagrancy statute invited selective enforcement against "moneyless, rootless citizens" and drew unconstitutional classifications based on poverty)); *see also* Wheeler v. Goodman, 306 F. Supp. 58, 62 (W.D.N.C. 1969) (noting that the Equal Protection Clause "does not permit the unreasonable classifications made by this statute: idleness and poverty, without fault, cannot be made the elements of a crime . . ."), *vacated*, 401 U.S. 987 (1971); Smith v. Hill, 285 F. Supp. 556, 560 (E.D.N.C. 1968) (noting that the fact

vagrancy statutes survived in large part until *Papachristou* (a Justice Douglas opinion).[54]

The facts of *Papachristou* are straightforward. Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were arrested early on a Sunday morning while Papachristou drove the four from a restaurant where they had eaten together.[55] The men were Black and the women white. Police quickly pulled them over and arrested them for "vagrancy—'prowling by auto.'"[56] Co-plaintiff Jimmy Lee Smith, also a Black man, was arrested separately for standing on the street in Jacksonville on a weekday morning.[57] Smith was waiting on the sidewalk for a friend so that Smith could apply for a job.[58] Police arrested him for "vagrancy—'vagabonds.'"[59] The plaintiffs challenged the law on a number of substantive and procedural due process grounds, but the winning argument would be based in procedural due process.

The Court found Jacksonville's statute void for vagueness, emphasizing the need for constitutional protections against lack of notice and arbitrary enforcement (including racist enforcement).[60] Writing for the majority, Justice Douglas excoriated the amorphous ordinance for "increas[ing] the arsenal" of police authority to arrest.[61] He quoted Justice Frankfurter's dissent from a prior case, saying, "Definiteness is designedly avoided so as to . . . enable men to be caught who are vaguely undesirable in the eyes of police and prosecution."[62] He continued quoting Justice Frankfurter, noting that the alleged crimes themselves "are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."[63]

Papachristou and its progeny aspire to: (1) require specific notice of the illegal behavior; and (2) constrain arbitrary (and racist) enforcement.[64] Lack of notice in the Jacksonville statute constituted a "fail[ure] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[65] Jacksonville lawmakers failed to "fence[] in" the stat-

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that the class of citizens affected by vagrancy statutes are the "flotsam and jetsam" of society "strengthens their cause, for the mighty and the powerful seldom find need for the protections of the Constitution").

[54] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 (1972).

[55] *Id.* at 158.

[56] *Id.*

[57] *Id.* at 159.

[58] *Id.*

[59] *Id.* at 158.

[60] *See Papachristou*, 405 U.S at 156, 166–68.

[61] *Id.* at 165.

[62] *Id.* at 166 (quoting *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)).

[63] *Id.* (quoting *Winters*, 333 U.S. at 540).

[64] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 490, 498–99 (1982); Smith v. Goguen, 415 U.S. 566, 572–73 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108–09, 112 (1972).

[65] *Papachristou*, 405 U.S. at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

ute's text "so as to give notice of conduct to be avoided."[66] Justice Douglas reasoned that a vague statute encourages arbitrary arrests and convictions: "Another aspect of the ordinance's vagueness appears when we focus . . . on the effect of the unfettered discretion it places in the hands of the Jacksonville police."[67] He worried that "the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'"[68] The Court's concern about arbitrariness encapsulated its worry about the "*discriminatory* enforcement of the law."[69]

As part of the discrimination prong, the opinion strongly criticized the Florida vagrancy law for allowing pretextual arrests that would amount to criminalizing people for poverty or non-conformity alone. Because the law had no standards, "[t]hose generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police."[70] In dicta, the opinion doubles down on concern for poor victims of the ordinance. It quotes President Franklin Roosevelt who vetoed a proposed vagrancy law in Washington D.C., and stated that "a person without lawful means of support" should not be subject to such a vague law merely because they are poor.[71] The Court decries "the existence of the House of Correction as an easy and convenient dumping-ground for problems that appear to have no other immediate solution."[72]

Beyond its test, the opinion calls for limitations on the reach of criminalization. In dicta, the decision makes spirited reference to a uniquely American notion of freedom. Characterizing this as freedom from criminalization for innocent conduct, the opinion protects rights "not mentioned in the Constitution" but "historically part of the amenities of life as we have known them."[73] These "unwritten amenities . . . have been in part responsible for giving our people the feeling of independence."[74] Thus the decision grounds itself in principles of fairness and protection for defendants, not simply in procedural due process.

In a note he wrote as a law student, Professor Anthony Amsterdam concludes that protection against the two evils that *Papachristou* names—notice and arbitrary enforcement—does not "fully explain the court's use of

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[66] *Id.* at 166 (quoting *Winters*, 333 U.S. at 540).
[67] *Id.* at 168.
[68] *Id.* at 170 (quoting *Shuttlesworth v. Birmingham,* 382 U.S. 87, 90 (1965)).
[69] *Id.* (emphasis added).
[70] *Id*.
[71] *Papachristou*, 405 U.S. at 167 n.10 (quoting H.R. Doc. No. 77-392, at 2 (1941) ("It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.")).
[72] *Id.* at 167–68 (citing Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 631 (1956)).
[73] *Id.* at 164.
[74] *Id*.

the doctrine" in dismantling vagrancy laws.[75] Instead, Amsterdam argues that *Papachristou* also relies on a sense that vagrancy laws empower police to wield criminal law against innocent and highly vulnerable individuals, an inappropriate use of the criminal law.[76] This is a straightforward reading of *Papachristou*: "Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables."[77] The opinion continues, "[T]he rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible," particularly with respect to "[racial] minorities."[78] Amsterdam argues that *Papachristou* also asserts that vagrancy laws are fundamentally unfair because police can impose whatever standard of decency stirs an individual officer.[79]

Other scholars agree that the stated concern for the "twin evils" of insufficient notice and arbitrary enforcement does not account for how courts have applied vagueness doctrine.[80] Now-Judge Debra Livingston

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[75] Meares, *supra* note 29, at 1881–82 (citing Note, *supra* note 29, at 75–76); *see also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 601–08 (1997); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 491–92 (1994) (suggesting that vagueness doctrine is less about the degree of specificity with which legal rules are drafted for purposes of either constraining discretion of enforcers or providing notice to individuals about prohibited conduct, than about prohibiting enforcers or drafters from imposing certain lifestyle choices on segments of the population).

[76] *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 288 (2003) ("The danger of arbitrary enforcement first appeared as a component of vagueness analysis equal in prominence to the threat of lack of notice in 1972 in Papachristou v. City of Jacksonville.").

[77] *Papachristou*, 405 U.S. at 171.

[78] *Id.* at 171.

[79] Meares, *supra* note 29, at 1881–82 (citing Note, *supra* note 29, 75–76); *see also Papachristou*, 405 U.S. at 164–65; Livingston, *supra* note 75, at 601–08; Post, *supra* note 75, at 491–92 (suggesting that the vagueness doctrine is less about the degree of specificity with which legal rules are drafted—for purposes of either constraining discretion of enforcers or providing notice to individuals about prohibited conduct—than it is about evaluating the appropriateness of lawmakers from imposing certain lifestyle choices on segments of the population).

[80] *See* Goldsmith, *supra* note 76; *see also* Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1693. Goluboff's deep exploration of the opinion leads her to the conclusion that "using the void for vagueness standard enabled the justices to continue the lawyers' approach of avoiding which of the two concerns"— notice or arbitrary/discriminatory policing — "was the more problematic or pressing." *Id.* at 1694. Goluboff suggests that the diversity of challenges allowed for a diversity of arguments: the hippies, the civil rights activists, and impoverished Black Americans all had different legal thrusts, with challenges brought under the Fourteenth Amendment's Due Process Clause, the Eighth and Thirteenth Amendments, the First Amendment, and the Fourth and Fifth Amendments. *Id.* Goluboff has written that the *Papachristou* decision did not "choose" a single path but continued to emphasize the core points of other constitutional challenges, including substantive due process. *Id.* at 1694 ("[Justice Douglas's] opinion, like the briefs in the case . . . drew on numerous and distinct doctrinal arguments . . . . Because the individual and loosely networked lawyers of the vagrancy law challenge never coalesced around a single doctrinal theory . . . the lawyers unnecessarily ceded doctrinal control to judges.").

notes that the cases employing vagueness doctrine that immediately preceded *Papachristou* were concerned with racism and bigotry flourishing in the shadows of criminal law.[81] Goluboff agrees: "Vindicating the rights of African Americans was often the crucial reason lawyers, judges, and policy makers undermined vagrancy laws and other abusive police practices."[82]

Even if *Papachristou* hedged somewhat on this point, modern courts have emphasized that vagueness doctrine aims to protect defendants from racial discrimination.[83] The most prominent cases to revive and interpret vagueness doctrine in recent years have been *Kolender v. Lawson*[84] in 1983 and *City of Chicago v. Morales*[85] in 1999. In *Kolender*, the plaintiff challenged a California law that allowed officers to require anyone loitering or wandering in public to give a "'credible and reliable' identification."[86] At oral argument in the Court of Appeals for the Ninth Circuit, "the appellants confirmed that a suspect violates [the ordinance] unless 'the officer [is] satisfied that the identification is reliable.'"[87] Since this law does not provide officers with cognizable guidelines for determining compliance with the law, "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest."[88] Limiting police discretion is a central concern in the opinion and racism is a not-so-subtle specter driving the opinion.

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[81] Livingston, *supra* note 75, at 607–08 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (striking down ordinance making it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.")) The *Coates* case further references the National Advisory Commission on Civil Disorders report for the proposition that "alleged discriminatory enforcement of this ordinance figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967." *Coates*, 402 U.S. at 616 n.6 (citing Report of the National Advisory Commission on Civil Disorders 26-27 (1968)). *But cf.* Agee, *supra* note 12, at 1658–68 ("Cosmopolitan liberals" who supported the vagrancy law challenges "tended toward the view that the state should curb police discretion over the cultural and sexual expression of whites while maintaining broadly sanctioned police supervision over black life.").

[82] Goluboff, *Writing Vagrant Nation*, *supra* note 13, at 1692. Goluboff also argues that that vagueness doctrine represented a belief growing throughout the 1960s that difference—in the sense of people of color appearing "out of place" to white residents—was not necessarily dangerous and that people of color should not be viewed with suspicion for being in locations where they were considered "different." *Id*.

[83] Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'") (quoting *Smith v. Goguen*, 415 U.S. 566, 566 (1974)). Nevertheless, the doctrine has retained concern for the individuals likely to be caught up in the arbitrary enforcement of a vague law, the focus of the first prong. *But cf.* Livingston, *supra* note 75, at 558 (noting that there is "confusion in the courts about the role of facial invalidation in constraining the potential for arbitrary police enforcement").

[84] 461 U.S. 352 (1983).

[85] 527 U.S. 41 (1999).

[86] *Kolender*, 461 U.S. at 355–57.

[87] *Id.* at 360 (quoting Tr. of Oral Arg. at 6).

[88] *Id.* at 358.

In 1999, the Supreme Court re-emphasized vagueness doctrine's role in reducing police discretion and thereby racial discrimination.[89] In *Morales*, the Court struck down a Chicago ordinance that prohibited "criminal street gang members" from loitering in public.[90] Under the statute, if officers saw persons they "reasonably believed" to be gang members, the officers could order them to disperse and arrest them for failing to do so "promptly."[91] Anxiety about racial discrimination appears in Justice Stevens's reasoning about excessive police discretion:

> [V]agrancy laws were used after the Civil War to keep former slaves in a state of quasi-slavery. In 1865 . . . Alabama broadened its vagrancy statute to include 'any runaway stubborn servant or child' and 'laborer or servant who loiters away his time, or refuses to comply with a contract for a term of service.'[92]

The opinion's emphasis on vagrancy laws' enforcement against Black people shows that concern for racial discrimination continues to motivate courts as they apply vagueness doctrine.

Livingston details the ways in which courts center a concern for policing practices in vagueness analysis. "[T]he invalidation of some public order laws," she writes, "may best be understood not in terms of the statutory clarity" of providing notice to the public, "but as an implicit substantive judgment that certain norms 'are not a constitutionally acceptable basis for ordering the relationship between police and citizen.'"[93] In striking down these statutes, modern courts expressly emphasize the role of racially motivated enforcement and criminalization of the poor.[94] Laws are to be finely

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[89] *Morales*, 527 U.S. at 53 (citing *Williams v. Fears*, 179 U.S. 270 (1900)). *See also* Roberts, *supra* note 29, at 780 ("The Supreme Court held that the Chicago gang-loitering ordinance violated the due process clause of the Constitution because it was an excessively vague impairment of citizens' personal liberty to move freely on the street."). Linda Greenhouse, writing in the New York Times, noted that this case was the Supreme Court's "clearest chance in 25 years to revisit a precedent that sent once-common anti-loitering laws into eclipse." Linda Greenhouse, *Supreme Court Roundup; Anti-Loitering Laws Will Be Revisited,* N.Y. TIMES (Apr. 21, 1998), https://www.nytimes.com/1998/04/21/us/supreme-court-roundup-anti-loitering-laws-will-be-revisited.html, archived at https://perma.cc/RH8D-XR9Q.

[90] *Morales*, 527 U.S. at 47 (internal citation omitted). Justice Stevens wrote for the majority that the ordinance's definition of loitering as "remain[ing] in any one place with no apparent purpose" does not give adequate notice of proscribed and permitted activity. The law was "vague and standardless" and if the "loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty." *Id.* at 58; *see also id.* at 42 ("It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an 'apparent purpose.'").

[91] *Id.* at 65.

[92] *Id.* at 53–54 n.20 (citing THEODORE BRANTNER WILSON, BLACK CODES OF THE SOUTH 76 (1965), and noting that this history does not "persuade[ ] us that the right to engage in loitering . . . is not a part of liberty protected by the Due Process Clause.").

[93] Livingston, *supra* note 75, at 618–19 (citing Post, *supra* note 72, at 498).

[94] As evidence of this, Livingston points out that the courts overall have been especially willing to go after local "street-cleaning statutes," those "local ordinances directed against some form of public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties." *Id*. at 608 (citing John Calvin Jeffries,

wrought, constrain police behavior, control against racial bias, and protect poor people on the streets from criminalization.[95]

B. Challenging Sarasota's Anti-Lodging Ordinance

Florida state courts relied heavily on *Papachristou* in striking down two versions of Sarasota's anti-camping law. After trial courts invalidated the first two Sarasota ordinances banning camping, local leaders immediately re-passed the law, tailoring it to proscribe the behavior of unhoused people living on the street.

In 2004, Sarasota passed its first anti-camping law, Sarasota City Code § 34-40 ("first ordinance").[96] The first ordinance outlawed camping on private or public land between dusk and dawn. Plaintiffs, unhoused individuals who were prosecuted under the ordinance, challenged it on multiple legal theories. They alleged that the law was void for vagueness, that it violated substantive due process, and that it was overbroad because it penalized innocent conduct.[97] A local judge ultimately struck down the first ordinance, ruling that it was "too vague" and that it "punished innocent conduct."[98]

Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 277 (1985)). *But cf.* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1415 (2001) ("Importantly, neither the Court nor the legion of commentators has expressed concern over the significant basic power of localities to enact criminal" statutes banning camping and sleeping.).

[95] Nevertheless, the Supreme Court's practice of excusing police violence and racial discrimination is too glaring to be overlooked. For instance, Justice Sonia Sotomayor has recently pointed out that the Supreme Court is happy—if not eager—to excuse excessive police discretion in the realm of pure enforcement. *See* Utah v. Streiff, 136 S. Ct. 2056, 2069 (2016) ("This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.") (Sotomayor, J., dissenting).

[96] City of Sarasota v. Nipper, et al., 12 Fla. L. Weekly Supp. 878a, n.2 (Fla. Cir. Ct. 2005) (quoting *Day v. State*, 12 Fla. L. Weekly Supp. 120a (Fla. Cir. Ct. 2004)). *Nipper* notes that the City's first ordinance, Ordinance No. 02-4370, stated in pertinent part:

> Sec. 34-40. Camping prohibited; exceptions. (a) For the purpose of this section, camping is defined as: (1) Sleeping or otherwise being a temporary shelter or tent out-of-doors; or (2) Sleeping out-of-doors inside sleeping bags or atop and/or covered by materials (i.e. Bedroll, cardboard, newspapers); or . . . (b) Camping is prohibited on all public or private property in the city at any time after sunset and before sunrise, except on permit from the city manager or with the permission and consent of the property owner. The violation of the ordinance is punishable by up to sixty days in the county jail, a fine of $500.00, and other fees and costs. See § 1-11, Sarasota City Code.

Id. Naming conventions for these ordinances result in two different identifiers, one referring to the section of the code and one the ordinance (which often *amended* the code). This convention creates confusion; therefore I use "first ordinance," "second ordinance," and "third ordinance," where possible. Where this is not possible, I refer to ordinances by the section of the code.

[97] *Nipper*, 12 Fla. L. Weekly Supp. at 878a.

[98] *See* City of Sarasota v. Tillman, 907 So.2d 524 (Table) (Fla. Dist. Ct. App. June 15, 2005). The Florida Court of Appeals for the Second Circuit declined to review the trial court's decision.

However, before the order could be enforced, the City of Sarasota withdrew the first ordinance and passed Ordinance No. 05-4600 ("second ordinance"), laying out the criminal penalties for those convicted of lodging.[99] This 2005 ordinance also required police to offer shelter to an individual before citing them for a violation of the law.[100] Evidence of a violation included "being in a tent, hut, lean-to . . . or being asleep atop or covered by materials in a public place or private place out-of-doors without the permission and consent of the property owner." However, the ordinance required additional evidence to prove "lodging," including finding "numerous items" of "personal belongings" or observing that the person is "asleep" and, once awakened, "states that he or she has no other place to live."[101]

City officials hoped the law would: (1) improve the aesthetics of the downtown area; (2) improve access to shelter; and (3) improve safety.[102] Specifically, it was intended to target people lodging semi-permanently.[103] Police Chief Peter Abbott stated, "We believe in helping people, we believe in rehabilitation, . . . [b]ut at a certain point, some tough love has to come in."[104] City Commissioner Danny Bilyeu said, "I realize this ordinance is not going to cure homelessness . . . [but] I think this is going to be a valuable tool."[105]

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[99] Lisa Rab, *Sarasota Drafts New No-Lodging Ordinance*, HERALD-TRIBUNE (Feb. 8, 2005), https://www.heraldtribune.com/article/LK/20050208/News/605210046/SH/, *archived at* https://perma.cc/EH4C-LHQ5. The text of Ordinance No. 05-4600 read, in pertinent part:

> §34-41 Lodging out-of-doors prohibited. (b) For purposes of this section, lodging out-of-doors shall have occurred when it reasonably appears, in light of all the circumstances, that private or public property is being used for living accommodation purposes. The following activities which shall be considered in making this determination shall include, but shall not necessarily be limited to the following . . . : (1) Erecting, using or being in any tent, hut, lean-to, shack or temporary shelter for sleeping activities. (2) The laying down of bedding, such as a blanket or sleeping bag or similar material for the purpose of sleeping. (3) The nature and extent to which personal belongings are present. (4) Carrying on any cooking activities. (5) Making a fire. (6) Doing any digging or earth breaking activities. (7) The length of time the person has been at the same location. (8) Statements made by the person using the public or private property regarding his or her intent. (9) Statements of any other person or persons relating to their observations of the use of the public or private property.

Nipper, 12 Fla. L. Weekly Supp. at 878a, n.3; *see also* Sarasota, Fla., Ordinance No. 05-4600 (May 6, 2005).

[100] *Id.*

[101] *Id.* at (c).

[102] Rab, *supra* note 100. *Cf.* Nat'l Coalition for the Homeless, *20 Meanest Cities: Narrative of Florida's Meanest Cities*, HOMELESS VOICE 7, http://www.homelessvoice.org/cover/paperpdf/0802HomelessManBeatenByBat4Web.pdf, *archived at* https://perma.cc/NK4D-QZ5A.

[103] In 2005, City Attorney Mark Singer said that "[t]he new rule applies 24 hours a day and is aimed more at camping than sleeping on a bench." Rab, *supra* note 99.

[104] Rab, *supra* note 99.

[105] *Id.* In a 2011 newspaper article on the same ordinance, "[p]olice said they were tasked with changing the culture downtown to make it more friendly, more inviting and more vibrant. Working together, [Police Lt. Randy] Boyd said, has been the key with getting all parties to come to a common goal, *making downtown a better place*." William Mansell, *Police: Outdoor*

Plaintiffs brought suit against the second ordinance in June of 2005.[106] Advocates argued that the law still violated substantive due process (punishing otherwise innocent conduct) and that it gave officers excessive discretion.[107] The court agreed:

> The court is mindful that in seeking to prohibit unsanitary and potentially harmful conditions, the new ordinance attempts to better define camping or as referred to in the current ordinance 'lodging out-of-doors.' However, these 'guidelines' by which the police are to determine whether a person has violated § 34-41 are still subject to nothing more than the police officer's individual preferences.[108]

In its decision, the court notes that the ruling does not give individuals a "right to sleep outside," and finds "the intent behind the ordinance is valid," but "the means used to enforce the law are" not.[109] Moreover, the court stresses that the ruling "should *not* be read as prohibiting the City of Sarasota from drafting and enforcing an ordinance preventing persons from 'squatting,' 'camping' or 'lodging,' on public property or private property."[110] Vagueness doctrine, as applied here, defeats the statute, but the court also concludes, without explanation, that the law was *not* "subject to arbitrary enforcement."[111]

The *Nipper* court issued its opinion in June 2005, but on August 15, 2005, Sarasota lawmakers passed yet another new ordinance, Ordinance No. 05-4640 ("third ordinance") in response to the court's ruling.[112] The Ameri-

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Lodging Ordinance Working, SARASOTA PATCH (July 13, 2011) (emphasis added), https://patch.com/florida/sarasota/police-outdoor-lodging-ordinance-working, *archived at* https://perma.cc/RK57-HU7X. "'Businesses are coming back and our homeowners are staying [downtown] . . . We don't want to ever lose sight of the fact that we have a whole lot of successes [with the ordinance] and can't think of a whole lot of failure,' [Police Lt. Randy] Boyd said." *Id.*

[106] City of Sarasota v. Nipper, et al., 12 Fla. L. Weekly Supp. 878a (Fla. Cir. Ct. 2005).

[107] *See id.*

[108] *Id.* (citing City of Sarasota v. Tillman, 907 So.2d 524 (Table) (Fla. Dist. Ct. App. June 15, 2005)).

[109] *Nipper*, 12 Fla. L. Weekly Supp. at 878a (citing *Joel v. City of Orlando,* 232 F.3d 1353 (11th Cir. 2003)).

[110] *Nipper*, 12 Fla. L. Weekly Supp. at 878a.

[111] *Id.*

[112] Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005). This ordinance amends Chapter 34, Article V, Section 34-41 (Lodging Out-of-Doors: Prohibiting the Use of Public or Private Places) to read as follows:

> Sec. 34-41 Unlawful lodging out-of-doors prohibited. (a) The following words and phrases, when used in this section, shall have the following meanings: (1) Lodging out-of-doors means using public or private property for *living accommodation purposes* by the erection, use or occupation of any tent, hut, lean-to, shack or temporary shelter for sleeping purposes or the laying down of bedding, such as a blanket or sleeping bag or similar material for the purpose of sleeping. (2) Living accommodation purposes means to remain living, to dwell or to reside at a place for a period of time for the purpose of using such place as a home. (b) It shall be unlawful for any person to use any public or private property in the city out-of-doors for lodging except with the permission and consent of the City Manager or the property owner.

can Civil Liberties Union quickly brought suit, alleging that the third ordinance was still unconstitutionally vague. In *City of Sarasota v. McGinnis*,[113] decided at the end of 2005, the court disagreed, crediting the city's good-faith efforts in pursuit of its aesthetic, sanitation, and health policy goals.[114] The court held that a person of "ordinary intelligence" could understand what the law prohibits and further finds that defendants failed to present any facts suggesting that the ordinance causes "arbitrary and capricious application by the city police officers."[115]

The court ruled against the plaintiffs on their other argument, that the law violates substantive due process (by punishing otherwise innocent conduct such as sleeping).[116] *McGinnis* reasoned that since the statute defined lodging as "using public or private property for living accommodation purposes," the law criminalized voluntary actual conduct, not one's mere existence.[117] *McGinnis* also found "conduct" to be sufficiently definite given the

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(c) Being in a tent, hut, lean-to, shack or in a temporary shelter or being asleep atop or covered by materials in a public place or private place out-of-doors without the permission and consent of the City Manager or the property owner may be evidence of a violation but is not alone sufficient to constitute a violation of this section. One or more of the following must also exist before a law enforcement officer can find probable cause to issue a summons or to make an arrest: (1) Numerous items of personal belongings are present; (2) The person is engaged in cooking activities; (3) The person has built or is maintaining a fire; (4) The person has engaged in digging or earth breaking activities; (5) The person is asleep and when awakened states that he or she has no other place to live. (d) Except as provided for in subsection (e), whenever a law enforcement officer has probable cause to believe that a violation of this section has occurred, he or she shall advise the person of the violation and afford the person an opportunity to be transported by a law enforcement officer to a public shelter. The law enforcement officer shall advise the person that all of his or her personal property which is not taken to the public shelter, except that which is of no apparent utility or which is in an unsanitary condition, shall be inventoried and stored by the Sarasota Police Department for a maximum of sixty (60) days, until reclaimed. If the person elects to be transported to a public shelter the law enforcement officer shall make available such transportation as may be available for such purpose and the person making such election shall not be charged with a violation of this section. If the person refuses to be transported to a public shelter, then such person may be charged with a violation of this section. (e) Subsection (d) shall not apply to any person who can not be properly identified, or is intoxicated by alcohol or drugs or who, within the past year, was previously charged with a violation of this section or who elected to be transported to a public shelter. For purposes of this subsection, proper identification shall include, but not be limited to, a driver's license, a government or employment identity card with photograph or other form of identification, which would satisfy a reasonable law enforcement officer as to the identity of the person. (f) Any personal property that was inventoried and stored by the Sarasota Police Department for a person transported to a shelter under the provisions of this section which has not been reclaimed within sixty (60) days of the date the personal property was inventoried and stored shall be deemed abandoned and disposed of according to Chapter 705, Florida Statutes.

[113] City of Sarasota v. McGinnis, 13 Fla. L. Weekly Supp. 371a (Fla. Cir. Ct. 2005).

[114] *Id.* at 371a.

[115] *Id.* The last point is unsurprising, considering that the law had been in place for less than six months.

[116] *Id.*

[117] *Id.* ("[T]he ordinance in the case at hand draws a distinction between conduct that is unlawful and mere sleeping, conduct which is essentially innocent."); *see also id.* at n.7 ("*Liv-*

elements that a prosecutor must establish for guilt to attach.[118] *McGinnis* affirmed that the City of Sarasota had finally written a constitutionally sound law.

II. Litigation and Legislation

A. The emergence of the tailored statute

In Sarasota, litigation resulted in a law that became more "tailored."[119] This tailored statute, in turn, plausibly helps to ensure widespread guilt among criminal defendants accused of violating the ordinance, by decreasing the "proof problem" that prosecutors must overcome to establish defendants' guilt. This tailoring resulted in an increase in the Sarasota police's effective power to "adjudicate" defendants' guilt.[120]

As the Sarasota lawmakers revised the law in response to litigation, its language narrowed. The first ordinance, passed in 2004, was quite broad: "Camping is prohibited on all public or private property in the city at any time after sunset and before sunrise . . . ."[121] The statute defined camping as "[s]leeping or otherwise being in a temporary shelter or tent out-of-doors[,] [or] [s]leeping out-of-doors inside sleeping bags or atop and/or covered by materials (i.e. [b]edroll, cardboard, newspapers)."[122] Another section of the code gave additional instruction on the law's intended enforcement: "The . . . activities which shall be considered in making this determination shall in-

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ing accommodation purposes is further defined as . . . ['*to remain living, to dwell or to reside at a place for a period of time for the purpose of using such place as a home*.']")

[118] "(1) Numerous items of personal belongings are present; (2) The person is engaged in cooking activities; (3) The person has built or is maintaining a fire; (4) The person has engaged in digging or earth breaking activities; [or] (5) The person is asleep and when awakened states that he or she has no other place to live." City of Sarasota v. McGinnis, 13 Fla. L. Weekly Supp. 371a (Fla. Cir. Ct. 2005). The court also rejected plaintiffs' contention that the statute violates Equal Protection. In determining whether the city has a valid interest in the goals of the ordinance and a rational basis for the mechanism for achieving them, the court confirmed earlier decisions' endorsements of the law's goals:

> The defendants do not challenge the City of Sarasota's claim that it is seeking to promote aesthetics, sanitation, public health, and safety by enacting an ordinance to prevent lodging out-of-doors on public property or private property without the city manager or owner's permission. As for the second step, a rational basis exists for believing that prohibiting lodging out-of-doors on public or private property would further public health, sanitation, safety and aesthetics.

Id.

[119] By tailored, I mean a heightened level of detail, such that the statute could describe only the actions of people who live on the street.

[120] Some may find the nearly ten years of litigation that led the City of Sarasota legislature to repeatedly edit its anti-camping law to be an example of the system working: Courts instruct lawmakers about infirmities in the criminal code and the lawmakers adjust to create constitutionally compliant laws. Others may view this sequence of events as a failure, since the advocates' goal was to remove the law from the books altogether. Either way, the lawsuits led to substantial changes in the anti-camping law.

[121] Sarasota, Fla., Ordinance No. 05-4600 (d) (May 6, 2005).

[122] *Id.*

clude, but shall not necessarily be limited to" a series of elements describing activities of camping.[123] Because it does not define camping to suggest permanent outdoor dwelling, this first ordinance's language swept in a number of activities: someone resting in a park after sunset, a child asleep under a shade structure, or friends enjoying a picnic. It also describes an unhoused person resting. As previously mentioned, the Circuit Court for Sarasota County in *Tillman* concluded that the law was excessively subject to enforcement at the whim of a police officer and struck it down as unconstitutionally vague.[124]

The ordinance became increasingly detailed as time passed. While the first ordinance, No. 05-4600, still allowed law enforcement (and ultimately the prosecution) to largely define the proscribed "camping,"[125] the Sarasota City Council quickly passed the second ordinance, with still more detail.[126] The third ordinance was even more detailed: It prohibited "using public or private property for living accommodation purposes *by* the erection, use or occupation of any tent, hut, lean-to, shack or temporary shelter for sleeping purposes or the laying down of bedding, such as a blanket or sleeping bag or similar material for the purpose of sleeping."[127] The statute defined "[l]iving accommodation purposes" to mean "to remain living, to dwell or to reside at a place for a period of time for the purpose of using such place as a home."[128]

The turning point for the City of Sarasota's legal case, however, comes when the City Council remakes the optional factors for police to "consider" into a checklist of behaviors, which define the "crime."[129] This corrects the constitutional infirmity: "Being in a tent, hut, lean-to, shack or in a temporary shelter or being asleep atop or covered by materials" may be evidence of camping but police are required to make an additional finding that the individual has "[n]umerous items" of personal belongings, is "engaged in cooking activities," is building or using fire, is "engaged in digging or earth breaking activities," *or* that the individual "is asleep and when awakened states that he or she has no other place to live."[130] This change explicitly

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[123] *Id.*

[124] *See* Tillman, et al. v. City of Sarasota, No. 2003 CA 15645 NC (Fla. Cir. Ct. 2004). Specifically, the court found that when charged as a criminal offense, the statute was unconstitutionally vague. The City of Sarasota appealed the *Tillman* decision to the Second District Court of Appeals. *See* Day v. State, 12 Fla. L. Weekly Supp. 120a (Fla. Cir. Ct. 2004). The Second District denied the City's petition for writ of certiorari per curiam without an opinion. *See* City of Sarasota v. Tillman, 907 So.2d 524 (Table) (Fla. Dist. Ct. App. June 15, 2005).

[125] *See* Sarasota, Fla., Ordinance No. 05-4600 (May 6, 2005).

[126] *See* Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[127] *Id.* (emphasis added).

[128] *Id.*

[129] Sarasota v. McGinnis, 13 Fla. L. Weekly Supp. 371a (Fla. Cir. Ct. 2005); *see also* Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[130] *See* Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005). Furthermore, officers are required to inform the party that they have the option of being transported to a shelter *unless* they have previously been cited, lack the "proper" identification, or are intoxicated. *Id.* at (d)-(e).

criminalizes the conduct of unhoused people with surgical precision: The word count of the pertinent sections of the third ordinance rose to 600 words,[131] up from 117 in the first ordinance.[132]

B. Tailored statutes and the certainty of guilt

The "tailoring" process of vagueness challenges on the anti-lodging law shapes the criminal legal process defendants face. Vague statutes are thought to be dangerous for criminal defendants because they leave the offense open to police interpretation. However, a vague statute may also result in legal *protections* to defendants: An ambiguous term or statute as a whole can increase the burden on the prosecution to prove a defendant's guilt beyond a reasonable doubt. Even a little ambiguity in a statute requires the prosecution to work harder to apply the law to individual defendants' conduct. This means a defendant is more likely to succeed at trial.[133] In contrast, the elements of a detailed and constitutionally compliant law might be easier for the prosecution to prove.

By way of illustration, apply several different anti-camping statutes to the following facts:

> At the location I came in contact with [Deborah Roberts] who was sleeping laying down on a blanket covering herself with another blanket. [Roberts] had several personal belongings next to her. Dispatch checked with Salvation Army and spoke to James who advised that there was 6 [shelter] beds available. I then asked [Roberts] if she wanted to go to Salvation Army she refused [sic] . . . [Roberts] was then arrested and transported to [Sarasota County] jail. . . .[134]

Assume that Statute A simply states, "No camping." In the City of Sarasota, where the municipal law applies, prosecutors would review this case, which police would have charged under Statute A. A prosecutor's job

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[131] Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[132] *See* Sarasota, Fla., Ordinance No. 02-4370 (May 6, 2002).

[133] Take, for example, the difference between laws banning any possession of narcotics and laws banning the possession *with intent to sell* those narcotics. The second class of law is more difficult to prove because the intent element requires additional evidence beyond the police report describing the weight of drugs found. However, there is a possibility that the specificity of the law is irrelevant. For a general discussion of the meaning and import of police discretion and statutory language, *see* Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 271 (2015) (citing Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 86 (2007)); *see also* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1071–73 (1999).

[134] A pseudonym has been used to preserve the individual's anonymity. Beskin Aff. ¶ 1 (on file with author). This individual's probable cause affidavit also discussed an outstanding warrant; it is therefore unclear whether the arrest would have proceeded without the warrant. Nevertheless, the defendant was ultimately charged under the anti-lodging statute.

would be to prove each element of the offense beyond a reasonable doubt. Therefore, they must first establish what "camping" is, and then argue that being covered by a blanket and having personal belongings constitutes "camping." The indefiniteness of Statute A creates opportunities for the defense. The defense might call the defendant to testify that they were not "camping," but merely resting. The defense might cross-examine the arresting police officer about the basis for their belief that the defendant was "camping"; a fact-finder would be presented with the question of whether using blankets is sufficient to constitute "camping."

What if Statute B governs? Statute B defines camping as "Sitting or lying down in public and possessing one of the following: personal belongings, newspapers, a shopping cart, or bedding." Now, the prosecutors offer the police report to prove that the defendant was resting outside and had bedding. Bedding was a delineated element, which the state needed to prove "camping" under Statute B. The defense would have no argument to make about the meaning of camping. Under the other affidavit discussed in the Introduction, including a description of Ms. Roberts sleeping or sitting in public with her personal belongings, the defense would face a similar challenge. Statute B would eliminate the opportunity to raise a defense and lessen the chance to convince a fact-finder of reasonable doubt. The anti-lodging law's vagueness could provide a legal defense because it makes the prosecution's burden of establishing guilt beyond a reasonable doubt, the "proof problem," more challenging to overcome.

The same reasoning applies to Sarasota's anti-lodging ordinance.[135] The first ordinance prohibits camping overnight "on all public or private property in the City."[136] The statute defines "camping" as "[s]leeping or otherwise being in a temporary shelter or tent out-of-doors [or] [s]leeping out-of-doors inside [a] sleeping bag or atop and/or covered by materials (i.e. [b]edroll, cardboard, newspapers)."[137] A prosecutor would find Ms. Robert's relevant behavior, namely "laying down on a blanket covering herself with another blanket," in the report. The statute states that being inside a sleeping bag, or bedroll, or otherwise "covered" by "materials" is enough for a violation.[138] However, the statute does not definitively state that any one of these elements is required. It allowed officers to make their own determinations after considering the definition provided. Here a defense attorney may be able to argue that being "covered" by materials could also sweep in a person who is covered by over-large clothing. This, the defense could argue, is not clearly "camping"; in other words, the statute does not sweep in Ms. Roberts's behavior. The defense could further argue that Ms. Roberts's behavior was not "camping" but resting and that the law did not prohibit her

[135] *See* Sarasota, Fla., Ordinance No. 02-4370 (May 6, 2002).
[136] *Id.*
[137] *Id.*
[138] *Id.*

conduct simply because she was "covered" by some fabric. Ms. Roberts's has some avenues for challenging whether her behavior was, in fact, "camping."

Fewer opportunities for challenge exist under the second ordinance. The second ordinance specifies factors that officers were to consider in assessing whether an individual is camping. The second ordinance had been revised to give more detailed descriptions of camping and introduced the idea that the defendant intended to use the "out-of-doors" for "living accommodations purposes."[139] The ordinance still did not require police to make any particular finding in determining this element. In Ms. Roberts's case, the affidavit notes three of the elements of the second ordinance: First, camping is "[t]he laying down of bedding, such as a blanket or sleeping bag or similar material for the purpose of sleeping."[140] Second, the presence of "personal belongings."[141] And third, the officer's obligation to offer a shelter bed to the defendant.[142] It is unclear how police officers or prosecutors would have determined Ms. Roberts's intention to sleep or a broader intention to use the out-of-doors as "living accommodations."[143] In fact, in *Nipper*, the court described a problematic scenario in which "[t]wo police officers faced with the same identical factual situation could reasonably take opposite actions."[144] If one of those officers decided to charge the offense, the defense could challenge the application of whatever elements the officer felt were dispositive of the defendant's intention to use the outdoors for "living accommodations purposes."[145] If the case went before a fact-finder, the defense could reasonably argue that the defendant lacked the intention to camp—and this issue of intent could provide reasonable doubt in a way that the existence or non-existence of a blanket cannot.[146] It creates a corresponding opportunity for the defense.[147] Ms. Roberts's guilt is not necessarily an open-and-shut case for the state.

Next, consider a prosecution under Sarasota's third anti-camping ordinance. The statute allows a finding that the lodging was done for the purpose

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[139] *See* City of Sarasota v. Nipper, et al., 12 Fla. L. Weekly Supp. 878a (Fla. Cir. Ct. 2005) (quoting SARASOTA, FLA., CODE § 34-41).

[140] *See* Sarasota, Fla., Ordinance No. 05-4600 (May 6, 2005).

[141] *See id.*

[142] *See id.*

[143] *Nipper*, 12 Fla. L. Weekly Supp. at 878a (quoting SARASOTA, FLA., CODE § 34-41).

[144] *Id.*

[145] SARASOTA CITY COMMISSION, MINUTES OF THE SARASOTA CITY COMMISSION WORKSHOP MEETING OF JULY 13, 2011 1 (2011), http://sarasota.granicus.com/DocumentViewer.php?file=sarasota_1a9d764969db3bab57b72a9770b28cd2.pdf, *archived at* https://perma.cc/33FY-842.

[146] *Cf.* Abigail Caplovitz, *Drafting Limits: Statute Text and the Police Discretion to Define Disorder*, 5 J. L. & SOC. CHALLENGES 93, 123 n.128 (2003) ("Quality of life statutes that encode an intent requirement are trying to make this distinction [between those who should be criminalized and those who should not be]. However, . . . intent in the quality of life context may be very difficult to prove. . . .").

[147] *See Nipper*, 12 Fla. L. Weekly Supp. at 878a (quoting SARASOTA, FLA., CODE § 34-41).

of living accommodations if one of the enumerated elements is met.[148] The third ordinance details the posture, position, physical objects, and even speech that can fulfill the elements of the statute.[149] Ms. Roberts was "laying down . . . [with] bedding," including "a blanket . . . for the purpose of sleeping," and had "several personal belongings" beside her.[150] The prosecutor can now establish the elements of the third ordinance with the police report alone. The previously available avenues for questioning the applicability of the law to the defendant's conduct have vanished.

The increased tailoring of the Sarasota anti-camping ordinance inoculates it from attack. By narrowing its target population from a wide swath, including picnickers, to solely unhoused people, the City Council diminishes defendants' ability to contest the charges. This Note does not attempt to ask whether the tailoring of the anti-lodging statute changed police behavior.[151] It would be almost impossible to measure, primarily because so many factors affect police enforcement.[152] Instead, this Note suggests that the practical effect of a tailored law is to allow prosecutors to more easily meet their burden to convict defendants under the third ordinance than under the first. The result is that the doctrine may have accomplished one of its goals—more exact notice to potential defendants—but it has also resulted in outcomes that entrench police power and harm unhoused individuals.

III. Methods

I used the following process to obtain data on enforcement of anti-lodging law in Sarasota. First, I chose a jurisdiction by speaking with advocates active in litigation and public defense to identify jurisdictions with relevant laws. Second, I gathered publicly available data on case outcomes, incarceration, fines, and demographics. Third, I compared Sarasota data to available national data on misdemeanor enforcement. In choosing a location to study, I considered the availability of data, quantity of laws criminalizing vagrancy-type behavior, the population of unhoused people, and reputation for harsh enforcement. I consulted extensively with national and regional experts and advocates.[153] Florida's unusually severe laws that criminalize

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[148] *See* Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[149] *Id.*

[150] Beskin Aff. ¶ 1 (on file with author), *supra* note 134.

[151] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (intending to engender "even-handed administration" which is required "as the great mucilage that holds society together").

[152] Confounding variables refer to the idea that while one figure—for example police behavior—may be potentially related to another—e.g., the wording of vagrancy statutes—many *other* phenomena also have the potential to have a relationship to the police behavior. Thus, if budget decisions, political goals, crime rates, and business association lobbying are all ongoing, it would be overreaching to argue that the changes to a statute did or would change police behavior.

[153] Telephone Interview with Tristia Bauman, Senior Att'y, Nat'l Ctr. on Homelessness and Poverty (Oct. 5, 2017); Telephone Interview with Matthew Barfield, Vice President, ACLU of

homelessness are largely passed at the municipal level.[154] Cities often charge vagrancy-type laws as infractions, making data collection difficult; these infractions do not appear in searchable, public databases.[155] In Sarasota, the clerks of court databases allow the public to search by statute and time period *in addition to* name or case number.[156] This feature made my research possible.

In order to gather this data set, I identified potential ordinances using the Sarasota County Clerk of Court data and filtering by "County Ordinance" and "Municipal Ordinance." I additionally filtered for periods of time, to reveal enforcement data for all for the local laws. Since the search function limits searches to thirty day periods, I searched for January 1, 2017 to January 30, and recorded case numbers for all cases of that were filed in that period. Next, I searched for February 1 to February 28, 2017, and so on, through December 31, 2017. Once I collected all case numbers for prosecutions under local ordinances in 2017, I eliminated those prosecutions under laws prohibiting alcohol and drug use and vehicle-related traffic violations. The statutes that remained were: Lodging Out of Doors (Sec. 34-41), Unlawful Activity Closed Public Park,[157] Obstructing Pedestrian or Vehicle Traffic,[158] Solicit Funds,[159] Solicitation and Distribution on Public Roads,[160] Pedestrian Activity in Median,[161] and Injure/Deface Trees, Shrubs, Flowers.[162]

After gathering all case numbers, each of which refers to an individual prosecution, I searched the Sarasota clerk of court site for details from each case. Most court documents, including complaints and documentation of

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Fla. (Nov. 15, 2017); Telephone Interview with Kirsten Anderson, Staff Att'y, Southern Legal Counsel (Oct. 24, 2017). It goes without saying that many other statutes can and likely are used against those without homes, perhaps to a disproportionate degree. An interesting project would be to expand a similar search to other low-level misdemeanors such as open container or drug possession, which might reveal that there is a broader ecosystem of laws used against the homeless.

[154] E-mail from Aaron Getty, Assistant Pub. Defender, Sarasota Cty, to author (April 6, 2018, 09:57 EST) (on file with author) ("Solicitation and Camping are both second-degree misdemeanors, punishable by up to 60 days in the county jail. Defendants in Florida are entitled to counsel if any amount of jail is a possible outcome.").

[155] *See* NO SAFE PLACE, *supra note* 7, at 50. This is true even when the statute *may* be charged as either a misdemeanor or a civil citation

[156] *See Clerk of the Circuit Court and County Comptroller Karen E. Rushing*, *supra* note 27.

[157] Sarasota, Fla., Ordinance No. 07-4714 (Jan. 2, 2007).

[158] This ordinance appears via the County Clerk records of prosecution as a basis for charging individuals with a misdemeanor but the ordinance itself appears to no longer exists in that form in the County or City ordinances.

[159] One individual was charged under "SOLICITATION WITHOUT REGISTRATION CERTIFICATE," which referred to a statute passed in 2006. The city formally abandoned the statute in 2013 after plaintiffs successfully challenged it. I have lumped this together with "SOLICIT FUNDS."

[160] Sarasota, Fla., Ordinance No. 13-5060 (April 23, 2013).

[161] Sarasota, Fla., Ordinance No. 14-5089, § 1 (May 5, 2014).

[162] Sarasota, Fla., Ordinance No. 21-42 (1971).

events in court, were available online.[163] I first looked for demographic data, which include race, gender, age, and housed/unhoused status. Not all police reports provide gender information. I determined housing status by the address given on the police probable cause affidavit or application for services to the public defender. Most often, individuals gave no address or the address of Sarasota's largest shelter. Others gave home addresses and, while these could have represented addresses where they had relatives or could receive mail but did not reside, I counted these individuals as "housed." This may suppress the estimate of unhoused status among defendants.

Court records appear in an electronic interface that shows some information, while other information appears only on scanned court documents. Overall, records generally consist of information on adjudication, case outcomes, and penalties. Adjudication include prosecutors' choice to pursue or to decline charges, the resolution of the case (guilty, not-guilty, dismissal by judge, later dismissal by prosecutors, or diversion), warrants issued, and the period of time from citation/arrest to adjudication. Legal dispositions of cases (e.g. no contest pleas, guilty pleas, acquittals, etc.) appear on the home page of individual case interfaces and I crosschecked those dispositions with the plea forms. I measured case durations by noting the dates on which charges were filed and the dates on which defendants entered pleas, or the date on which a case was dismissed or otherwise resolved.

Data on the consequences of each charge include the fines and fees for each case such as fines for public defender services as well as the city crime fund and other law enforcement and court funding. The periods of incarceration include all days that individuals spent in custody including the time prior to case resolution (either resulting from an arrest or because an arrest warrant issued), not just the post-sentencing period. The total days of incarceration (dating from appearance to release on bond or following plea, etc.) were not calculated by the court, so I approximated the in-custody time based upon court records. To do this, I examined documents from defendants' court appearances ("minute orders"). Each of these showed whether the defendant was (a) in custody at the time of their appearance in court, and therefore whether they were taken into custody upon arrest, (b) whether they were remanded into custody for failure to appear in court, (c) were remanded for other reasons, (d) arrested on a previously-executed warrant, or (e) sentenced to jail time. To determine the end date of defendants' time in custody, I searched the same documents for evidence that the defendant (a) was granted a release without a bond, (b) made a bond payment, or (c) entered into a plea agreement that indicated credit for time served (these result in immediately release).

The distinction between the City of Sarasota and the County of Sarasota warrants discussion. The litigation I discuss pertains to the anti-lodging law

[163] Some documents were password protected because of confidentiality, but all information for this study existed in accessible documents.

from the City of Sarasota. It is a *municipal* statute. However, the County has also passed ordinances and laws targeting unhoused residents. In an effort to describe this criminalization of homelessness in the region, I present data on all of these laws. Municipal statutes apply just within the City of Sarasota while the County statutes apply throughout the entire County (which includes the City).

However, the County of Sarasota prosecutes violations of the law. As a result, in order to compare the racial make-up of those prosecuted under a particular law to the total population of the relevant community, I had to decide what the relevant "base" community should be. The racial make-up of the unhoused population, which would have provided important insights into how enforcement of the ordinances compares to the unhoused population's racial demographics, is unavailable.[164]

In lieu of that, I have included a comparison of racial disparity under the County of Sarasota's racial demographics *and* the City of Sarasota's racial demographics. On one hand, the City data offer a desirable comparison because the law is a *City* ordinance. However, unhoused persons do not have a fixed address. Therefore, the racial make up of the entire County, as well as the City, is relevant to examining racial disproportionality in the enforcement of a City ordinance. In fact, since unhoused persons may move within the County (exiting and entering the City), County demographics may be the most appropriate comparison.

IV. Data

The data I display here captures every prosecution of all vagrancy laws in the City and County of Sarasota in 2017. The results of this research are represented as means of showing the scope and scale of such prosecutions; separately, I describe enforcement of the anti-lodging statute, which is the primary focus of this paper. It is worth noting the limitations on this survey. My inquiry does not track trends over time, control for particular variables, or assert causal relationships between variables. Instead it provides a description of enforcement with an eye to the details that greatly influence how individual people experience the criminal legal system under this region's anti-loitering statute and, for comparison, under all of the region's vagrancy statutes.

Data on the enforcement of all Sarasota vagrancy laws in 2017 shows: (a) nearly all individuals charged were unhoused, (b) prosecutors in these

[164] The racial demographics of the unhoused population in this area, and more generally, are ripe for additional research. *See News Release*, *supra* note 25 (documenting the total population but not the racial demographics of the County's unhoused population). It would be ideal to have the racial demographics *of the unhoused population* in the City and County of Sarasota, to evaluate for racial disproportionality in enforcement. However, current methods of gathering data about the unhoused population are generally inadequate. S*ee Don't Count on It, supra* note 25 (analyzing the "Point in Time" survey's limitations as a measure of unhoused populations).

jurisdictions nearly always pursued charges, (c) judges virtually never dismissed cases, (d) nearly all charges resulted in convictions, and (e) the vast majority of cases were resolved by guilty pleas (and rarely ended in any form of diversion).

Per-capita charging

First, data show the per capita charging rate for vagrancy offenses is extremely high compared with national levels. National levels come from a study by Megan Stevenson and Sandra Mayson in 2018, which examined enforcement data through 2016.[165] From 1980 to 2016, nation-wide enforcement per 100,000 residents declined from fifteen to nine.[166] In the County of Sarasota, however, the enforcement per 100,000 residents in 2017 was sixty-two.[167]

Demographics of defendants

All but eleven charges were brought against people who provided either the city shelter or another non-private residence as their address.[168] The County of Sarasota had a population of 419,119 in 2017.[169] That year, there were 877 homeless individuals residing in Sarasota County.[170]

Of the 261 charges in 2017 under the City of Sarasota's anti-camping law, the DA charged 181 unique individuals. This means that 30% of the charges brought were against someone *who had been charged at least once before*. Interestingly, just eleven of these citations involved custodial arrests at the time of the police contact; the remainder constituted legal arrests for which people received tickets to appear in court.

Ninety-six percent of charges under all laws, including those in the City and County, were brought against a person who listed no address or the address of the largest shelter in the area. Just four percent listed a separate residential address. (Even then, individuals may not reside at the listed address.)

In the County as a whole, those prosecuted under all the laws criminalizing behaviors of homelessness (including the anti-lodging law) were 76% male and 22% female.[171]

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[165] *See* Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 753 (2018) (source of data). This is an imperfect baseline, with which to compare the City of Sarasota's enforcement of vagrancy laws in 2017.

[166] *Id.*

[167] There were 261 charges in 2017 under the City of Sarasota's anti-camping law. The County population that year was 419,119. *Sarasota County*, *supra* note 23.

[168] Police citations and arrest affidavits reported a home address. In the vast majority of cases, this was listed as the shelter address in Sarasota: 507 Kumquat Ct., Sarasota, FL, 34236.

[169] *Sarasota County*, *supra* note 24.

[170] *News Release*, *supra* note 25, at 2.

[171] These figures do not add to 100. *See, supra* Methods.

Comparing enforcement by race to population by race, I measured charging rates against the racial demographics of the City of Sarasota and the County of Sarasota. In 2017, in Sarasota County, just 4.5% of the population was Black,[172] while 92.9% of residents were white and 9.1% were "Hispanic or Latino."[173] Thus enforcement showed some racial disproportionality in Sarasota County (4.5% by population compared to 14% of defendants). In one category of crime ("Unlawful Activity Closed Public Park"), Black defendants were 36% of those charged. However, the overall vagrancy arrests appear proportionate when compared to the demographics of the City of Sarasota: 13.9% Black (compared with 14% of defendants), 81.2% white, and 18.3% "Hispanic or Latino."[174]

Case dismissal

Of all 261 cases, just 5% of cases did not proceed (fourteen of 261); both judges and prosecutors dismissed a few. (Of those cases that did not proceed, two cases were diverted. In six, the person charged was found incompetent to stand trial. Two were dismissed or vacated. In three, the state declined to file or abandoned charges.) In 5% of charges the defendant participated in mental health or other alternative court.

These figures were similar to those under the anti-lodging statute alone. In 2017, police entered 112 charges under the anti-lodging statute alone.[175] The state dropped charges in just seven cases. Two charges were "dismissed" or "vacated." In three, the state abandoned charges. Two individuals were diverted. In six, the person charged was found incompetent to stand trial.

Convictions, bond, warrants, fines, and incarceration

Of all the 261 vagrancy-type charges, in 92% of cases (239 of 261), the defendant was convicted.[176] Most pled guilty or *nolo contendere*.[177] Warrants were issued in 23% of charges (sixty of 261) because of failures to appear in court; most of the time defendants were arrested on these warrants.[178] Bond

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[172] *Sarasota County*, *supra* note 24.

[173] *Sarasota County*, *supra* note 24.

[174] *Sarasota City, Florida; ACS Demographic and Housing Estimates; 2017: ACS 5-Year Estimates Data Profiles* (2017), U.S.Census Bureau, https://data.census.gov/cedsci/table?q=sarasota%20city,%20Florida%20Race%20and%20Ethnicity&g=1600000US1264175&tid=ACSDP5Y2017.DP05&t=race%20and%20Ethnicity&layer=VT_2018_160_00_PY_D1, *archived at* https://perma.cc/G2KA-95SV [hereinafter *Sarasota City*].

[175] All but one of these were filed under the third ordinance. However, one charge in 2017 was entered under a now-defunct statute, abbreviated as "Camping Prohibited."

[176] 2017 refers to the year of the offense; some convictions themselves took place after 2017 had ended.

[177] I did not track the type and number of pleas but since virtually no cases went to trial, pleas effectively account for virtually all guilty findings.

[178] This figure excluded those warrants issued but lifted prior to an arrest.

was set in 17% of charges (forty-six of 261), and amounts ranged from $50 to $5,000; the average amount was $1,813. (For comparison, one Florida study examining bond amounts in 2018 found that the average bond amount was $3,000 (but this included individuals charged with felonies as well as misdemeanors).)[179]

Average days spent in jail varied by *type* of alleged offense: 6.6 per offense for solicitation charges and 2.5 days for lodging charges, all pretrial. For comparison, another researcher studied 2017 pretrial detention in Florida and found, "Overall, two-thirds of the overall spent from between one and seven days in jail, while 56% of the sample spent between one and three days in pretrial confinement."[180]

Fines per defendant averaged just above $300 for defendants convicted of vagrancy crimes (this figure ranged from an average of $315 for solicitation charges to $300 for lodging type crimes). In eighteen percent of cases, the court referred defendants to debt collection on their fines. While the court assessed $81,723 during the year, it *recouped only $1,940*.

Case duration

The vast majority of prosecutions under the City of Sarasota's *anti-lodging law* resolved within the year; just nine cases were still open in January of 2018, at the time I gathered the data.[181] Of the cases that had resolved at the beginning of 2018, most had resolved in less than one month. Fifty-nine cases resolved in under one month, twelve cases resolved within the first two months, ten cases resolved in the first three months, and twenty resolved in more than three months; in eleven, the individual either died or the state declined to prosecute.

Punishment and multiple charges

One striking finding related to punishment that defendants received when they were prosecuted more than once. Charges against people who had had at least one prior prosecution accounted for approximately 30% of all prosecutions. Those individuals who were prosecuted more than once received more jail time with each subsequent prosecution. The time spent in jail increased from 6.6 days in jail on a "first offense," to *nine days* in jail (for those who were charged two or more times), to *thirteen days* in jail (for those charged three or more times).

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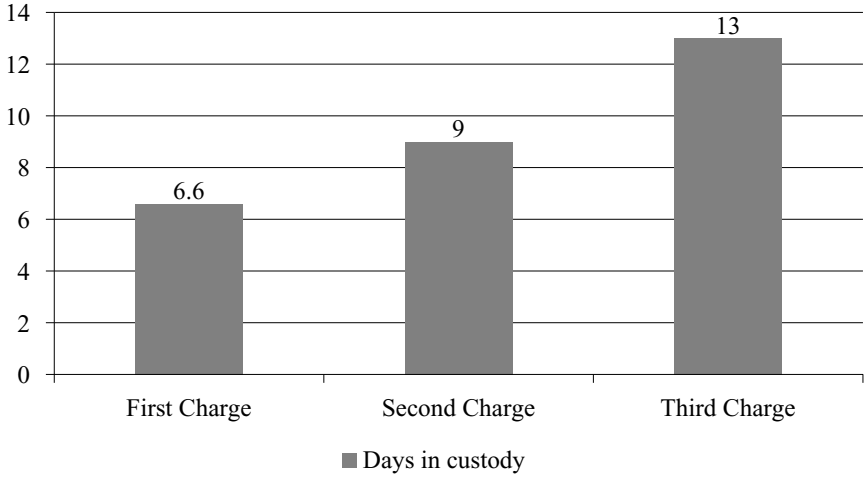
[179] David E. Krahl, Detaining or Releasing Defendants From Pretrial Confinement 16 (Feb. 25, 2019) (unpublished paper, University of Tampa), http://docplayer.net/131543758-David-e-krahl-ph-d-the-university-of-tampa-department-of-criminology-and-criminal-justice-february-25-2019.html, *archived at* https://perma.cc/XRR9-MTXM.

[180] *Id.* at 41.

[181] Research constraints prevented me from calculating the case duration of all City and County of Sarasota prosecutions under laws criminalizing homelessness.



Incarceration by number of prosecutions (2017)

V. Discussion

A. Vagueness doctrine, police discretion, and police power

"It is not as if," *Papachristou* brought about "the withdrawal of public power from the lives of vagrancy laws' targets," namely people of color and poor people.[182] Nor here. Sarasota leadership systematically refused to withdraw public power. By creating a surgically precise statute in response to litigation, a statute for which officers can memorialize *all* necessary elements in a report, the city likely enhanced the ability of police to ensure conviction by making the crime easier to prove.

This Note has presented enforcement data as a way of both asking whether vagueness doctrine has accomplished its goals and of describing the forms of public power that continue to operate. While litigation may have reduced so-called arbitrary enforcement in that it has constrained the individuals whom the police may cite under the statute, data suggest that the statute may have helped to create a new form of absolute power in police officers to ensure, merely by arresting them, that defendants will be convicted. This research suggests that defendants accused of violating this mod-

[182] *See* Tani, *supra* note 29, at 1653. Anna Lvovsky has identified other statutes that filled the gaps left by the stricken vagrancy laws after *Papachristou*. They include "loitering with intent to commit a specific crime; and second, loitering in any circumstances that threatened the public safety." Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1997, 2039 (2017) (citing *State v. Caez*, 195 A.2d 496, 497 (N.J. Super. Ct. App. Div. 1963); Henrichs v. Hildreth, 207 N.W.2d 805, 808 (Iowa 1973)). Both loitering laws that Lvovsky discusses contain a state of mind requirement, which makes these crimes much more nebulous and challenging for prosecutors to prove. In contrast, the specificity of the Sarasota statute requires the state to prove substantially less, because the proof needed is in the police report.

ern vagrancy law receive a swift guilty finding without meaningful opportunities to combat the charges against them. These results resonate with Christopher Agee's conclusion that "[t]he legal terms upon which the courts and legislatures dismantled the vagrancy law regime" actually "catalyzed the development of the carceral state."[183]

It is important to note that Florida procedures for initiating charges against defendants under municipal and county ordinances differ from the majority practice in other jurisdictions. Florida procedures give police a striking degree of power to charge crimes.[184] A prosecutor generally decides which, if any, crimes to charge based off of information that police have gathered.[185] In jurisdictions that do not utilize grand juries, prosecutors often write "informations," which summarize the alleged events, the offenses charged, and the legal bases for the charges.[186] However, Florida Rules of Criminal Procedure allow "prosecutions for misdemeanors, municipal ordinances, and county ordinances [to be made] by notice to appear."[187] The rule further provides, "[i]f a person is arrested for an offense declared to be a misdemeanor of the first or second degree or a violation, or is arrested for violation of a municipal or county ordinance" and "demand [by the defendant] to be taken before a judge is not made, notice to appear may be issued by the arresting officer."[188]

In contrast to the practice of felony criminal prosecutions, prosecutors play no role in *initial* charging decisions against defendants; the police write a report, which goes to the District Attorney. The officers separately provide defendants with a written notice to appear in court.[189] After a defendant appears in court, prosecutions under first- or second-degree misdemeanors proceed in the same manner as for other crimes: Prosecutors retain the power to drop charges. Defendants are offered the chance to accept or waive counsel and the chance to plead guilty, not guilty, or *nolo contendere*.[190] To the ex-

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[183] *See* Agee, *supra* note 12, at 1659 (internal quotations omitted).

[184] Alexandra Natapoff has shown that a significant majority of jurisdictions have deviated from conventional practice. She writes, "police officers can file criminal charges" without the approval or consent of prosecutors "[i]n hundreds of misdemeanor courts in at least 14 states." Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. Times (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html?, *archived at* https://perma.cc/YQ2X-FQY5. In misdemeanor cases, "charging often is complete upon a sworn declaration, usually called a probable cause statement, arrest report, or charging statement, made by the arresting officer"; therefore, "the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial." *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 22 (2000). It is common, if surprising, that police, not prosecutors, control the initiation of many criminal charges.

[185] David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473, 502–03 (2016).

[186] *See* Brady, *supra* note 184.

[187] Fla. R. Crim. P. 3.140.

[188] Fla. R. Crim. P. 3.125(b).

[189] *Id.*

[190] Fla. R. Crim. P. 3.125(k)(1).

tent that the police officers' decisions have greater potential to be final under a tailored statute, in Sarasota, this power is given to police who are already empowered to charge cases initially. The Sarasota phenomenon is consistent with the theory that effective police power over defendants' outcomes is extremely high under the third ordinance, which is the most tailored version of the statute.[191]

Enforcement of all laws criminalizing Sarasota vagrancy in different forms (anti-lodging as well as anti-solicitation ordinances, ordinances banning standing in the median, or being in parks after hours) suggests that police decisions will likely be upheld under any of these ordinances. The data do not prove that tailoring statutes to target unhoused people makes guilt under the laws easier to achieve. However, in Sarasota, the third ordinance may reify police's existing power to determine which defendants enter the system, and to thereby decide which defendants are found guilty, to a greater degree than the first ordinance.[192] Dorothy Roberts has pointed out, referencing *Morales*, that vagueness doctrine appeared to have protected against a "Chicago ordinance [that] simply codifie[d] a police practice . . . already prevalent in Black communities across America."[193] The Chicago

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[191] At least in the twenty-first century, law enforcement practices may be formulated such that vagueness doctrine never had a chance of limiting police discretion — the effective power of police overcharging was already too great. The *Papachristou* Court makes a foundational assumption that altering anti-vagrancy statutes affects police behavior. Under that assumption, a statute may constrain police's existing power. This assumption could be false: It could be that police power is drawn from a range of system-wide forces (such as internal policies, lack of oversight by prosecutors, delegation of charging authority by prosecutors to police). Therefore, rather than causing an increase in the effective power of the police to ensure the absolute guilt under the third anti-lodging ordinance, the revisions to the Sarasota statute might have simply fortified the enforcement power that police already possessed. *Cf.* Gerstein & Prescott, *supra* note 137, at 270. Gerstein and Prescott argue that the concern over relative breadth of the vagueness doctrine is moot in light of "process costs." Id. I argue that the statutory language is important, not because it does or does not cabin the class of people police may arrest, but because it makes police into more powerful decision-makers for the class of people they do choose to cite. Roberts notes that upholding the Chicago vagrancy law challenged in *Morales* "would have legitimated the already-prevalent practice of police harassment of Black people on city streets." Roberts, *supra* note 29, at 780.

[192] Other analyses have questioned litigation strategies against laws targeting unhoused people because it could—unintentionally—result in heightened focus on unhoused persons. In 2006, a law review article characterized the 2005 litigation strategy in Sarasota as a misplaced deployment of the Eighth Amendment. It argued that the litigation should not have focused on the distinction between involuntary and voluntary conduct but instead on protecting "innocent" conduct. The author believed that the strategy could cause further criminalization of homelessness: "[W]hile advocates may claim small victories from the successes of individual challenges insofar as their efforts prevent vague laws from being used to harass the homeless in the short term, such victories seem rather hollow in light of their long-term impact of incentivizing the creation of specifically anti-homeless laws . . . ." Elizabeth M. M. O'Connor, *The Cruel and Unusual Criminalization of Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. ON C.L. & C.R. 233, 246 (2006). The results suggest that the author of that paper might have been correct: the implications of confining an Eighth Amendment argument about innocent conduct, much like the arguments about vagueness, may have been to create laws specially tailored to target unhoused people.

[193] Roberts, *supra* note 29, at 800–01 (citing Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Meares and Kahan*,

ordinance sanctioned existing police practices. Similarly, the legal outcomes in Sarasota raise questions about the balance of power between police and prosecutors, and suggest that the result of lawsuits charging vagueness doctrine has been to shift power toward police.

By comparing the rate at which prosecutors declined to charge defendants under other associated statutes in the City and County of Sarasota, it is possible to see, at the very least, that prosecutors did not assert their power to curb the police's authority to initiate charges.[194] In total, local law enforcement issued 261 charges in 2017 (including prosecutions under Sec. 34-41). The vast majority (all but nine) of the cases resolved by the end of 2017, meaning that any opportunity for dismissal by prosecutors had passed. All in all, prosecutors declined to file or abandoned charges in just three cases. In an additional two, the prosecution dismissed or vacated. An additional two cases were diverted.[195] Including those cases that were resolved by dismissal, death, or diversion, in 92% of cases (239 of 261), defendants were convicted, largely by plea. As stated above, 96% of those charged were unhoused. While these statistics include all anti-homeless laws in the region in 2017, the anti-lodging statute was the most commonly charged; the charging pattern holds true for this statute as well.

The data echo other research, which shows prosecutors rarely decline to charge misdemeanor cases.[196] Alexandra Natapoff writes, "[i]n the world of petty offenses, the prosecutorial screening function is . . . weak[], in some realms nonexistent. Prosecutors often charge whatever petty offense the police report describes and back off, if at all, only later during plea negotiations."[197] In a study of prosecutorial declination, Joshua Bowers found prosecutors were much more likely to decline more serious crimes than to decline lower level crimes. In fact, among "public order" or other victimless crimes, the prosecutorial declination rate is very low.[198] Bowers found that Iowa prosecutors declined public order misdemeanors brought to them by

1998 U. CHI. LEGAL F. 215, 230 (1998)). However, Roberts believes that the employment of vagueness doctrine was appropriate to protect Black communities in Chicago. Roberts, *supra* note 29, at 780. I distinguish the Sarasota case primarily because Roberts does not allude to the Chicago City Council attempting to re-pass the ordinance overturned in *Morales* with greater specificity (perhaps detailing the known "gang colors" and "quintessential hoodies" that are associated with gangs and using that language to enable police to arrest individuals for their mere presence on the street). Roberts writes, "[t]his danger [of racial discrimination] is an important reason to preserve the constitutional prohibition against vague delegations of broad police discretion." *Id.*

[194] In comparison to Sec. 34-41, other laws criminalizing behavior associated with homelessness showed similar patterns in charging, racial discrimination, incarceration, and fines.

[195] In six, the person charged was found incompetent to stand trial. In three, the state declined to file or abandoned charges.

[196] *See* Alexandra Natapoff, *Misdemeanors*, 85 SO. CAL. L. REV. 1313, 1338 (2012) (pointing out that prosecutors often do not perform their screening function); *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 (2010).

[197] *Id.*

[198] *See* Bowers, *supra* note 196, at 1717.

police in just 1.31% of cases; the same group declined to charge felonies in 7.04% of cases.[199] Similarly, in New York City, prosecutors tended to maintain charges in the vast majority of low-level crimes while dropping felony charges at a higher rate.[200] This weak prosecutorial screening function is emblematic of the misdemeanor criminal process.

A more passive role for prosecutors enables the state to complete expedient prosecutions.[201] Natapoff has described this phenomenon as a part of "the oxymoron of aggregate criminal guilt" in which misdemeanor defendants are adjudicated guilty *en mass*, certainly without trial, and "without the robust checking mechanisms of the adversarial process."[202] A thinner adjudicative process may result in a greater risk of serious due process violations.[203] Florida law, which empowers police to directly charge defendants, worsens this erosion.[204]

Vagrancy offenses are creatures of the misdemeanor family and this Note echoes many scholars' findings on misdemeanors.[205] As Surell Brady has pointed out, "The most common, if not mundane, criminal cases are allowed to remain in the system without the application of prosecutorial discretion."[206] This lack of screening function by prosecutors characterizes the

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[199] *Id.*

[200] *See id.* at 1720. Prosecutors declined to charge fare evasion in merely 2.25% of cases and prostitution in just 2.26% of cases. *See id.* at 1720. In contrast, the "first core . . . crime to appear on the list" of offenses ranked by the rate at which prosecutors declined to charge "is larceny, which prosecutors declined approximately three times more frequently than turnstile hops or prostitution." *See id.* at 1719. In fact, "prosecutors even declined homicide at more than twice the rate (5.01%) that they declined turnstile hops or prostitution." *See id.* at 1719, n.311.

[201] *See id.* at 1719, n.311.

[202] Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 Fordham Urb. L.J. 1043, 1081 (2013); *see generally*, Natapoff, *supra* note 196, for a discussion of the ways in which misdemeanants receive minimal adjudicative process compared with their felony counterparts, to the extent that misdemeanor convictions come about virtually without a fact-checking mechanism. This "no-fault" regime of mass-processing characterizes the modern misdemeanor system.

[203] Compelling anecdotal evidence suggests that the repeated contact with the courts that these statutes create may trigger due process concerns as well. A public defender at the Sarasota Public Defender's office disclosed a *habeas corpus* petition he filed for one person whose name came up frequently among those charged in 2017. That individual continued to receive new citations into 2018. Upon initial appearance for his sixth charge, the judge ordered him incarcerated. The attorney reported that the judge's frustration was largely the reason for this outcome. E-mail from Aaron Getty, Assistant Pub. Defender, Cty. of Sarasota, to author (March 1, 2018, 09:14 EST) (on file with author). In his brief, he argued that the client, was never arrested, and, thus, he never had a 'first appearance' and as a result, he was never placed on a pretrial release that was subject to any conditions. The trial court also failed to make any findings of 'probable cause' as to any of the charges [on which] he was remanded into custody.

Petition for a Writ of Habeas Corpus, J.D. v. Thomas M. Knight, Sheriff of Sarasota Cty. (February 2, 2018) (on file with author, name omitted for anonymity).

[204] *See* Sarasota, Fla., Ordinance No. 05-4640 (Aug. 15, 2005).

[205] Livingston has also noted the limitations of vagueness doctrine in constraining police discretion. *See* Livingston, *supra* note 75, at 593.

[206] Brady, *supra* note 184, at 24.

Sarasota anti-lodging law.[207] Natapoff has pointed out that misdemeanor adjudication has, writ large, "effectively abandoned the individuated model of guilt and lost many of the essential characteristics of a classic 'criminal' system of legal judgment" because the system shepherds misdemeanor defendants toward guilt with "aggregating" practices that leave few markers of the criminal system.[208] In fact, former Florida Supreme Court Justice Gerald Kogan called Florida misdemeanor courts "mindless conviction mills."[209] The data from Sarasota reveal just how well the Sarasota vagrancy misdemeanor resembles its cousins.

Nevertheless, some characteristics of prosecutions under the City of Sarasota anti-lodging law diverge from generalizations about misdemeanors. Natapoff notes that a glaring problem with de-individuation in the misdemeanor system is that it becomes easier to convict innocent people.[210] The lawsuits charging vagueness doctrine, and the concomitant changes to the law have, however, made the police observations enough to establish all the law's elements. Factual innocence is unlikely, because the law criminalizes unhoused people's existence.

In line with Natapoff's critique, many attempted reforms of the criminal legal system include bolstering public defense offices to move aggressively and assert defendants' rights and to challenge more low-level cases.[211] The changes to the anti-lodging law may hinder the success of those efforts. Prosecutors' decisions to maintain charges hinge, at least in part, upon whether charges are defensible. More robust representation is unlikely to help defendants win their cases.[212] Making guilt easier to prove increases the likelihood that the power to ensure that guilt remains, for practical purposes,

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[207] Similarly, scholars have described the criminal legal system as anonymized and de-individuated. *See, e.g.*, Natapoff, *supra* note 202, at 1068 (analyzing modern misdemeanor criminal courts and the ways in which defendants are cited, charged, adjudicated, and sentenced as a group); Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, *in* THE FUTURES OF CRIMINOLOGY 173 (1994) (noting that predictive adjudication is "concerned with techniques for identifying, classifying and managing groups" in contrast to an "Old Penology," which "is rooted in a concern for individuals, and preoccupied with such concepts as guilt").

[208] Natapoff, *supra* note 202, at 1043.

[209] ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 8 (2011), https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf, *archived at* https://perma.cc/PL4Z-MSEW.

[210] *See* Natapoff, *supra* note 202, at 1078.

[211] In 1972, Justice Douglas found, in Argersinger v. Hamlin, that defendants charged with misdemeanors are entitled to counsel when they are subject to actual time in jail or prison. 407 U.S. 25, 25 (1972). Douglas wrote, "[t]he trial of vagrancy cases is illustrative" of the need for counsel even in cases of "petty" offenses: "While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions." *Id.* at 33 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 156 (1972)). Justice Douglas's main concern is that counsel provide a bulwark against the abuses of "assembly-line justice." *Argersinger*, 407 U.S. at 36.

[212] *Cf.* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1092–93 (2013) ("In misdemeanor cases . . . pleas happen quickly" because "[a]lmost no one

with police. This ease of proving cases suggests that misdemeanors may "stick," despite efforts to make prosecution more forgiving. The movement for progressive prosecutors, for example, has emphasized the need to use prosecutorial discretion to decline charges for many categories of crime.[213] However, under the Sarasota anti-lodging law, guilt or innocence is imminently clear from police reports. Prosecutors may not find it politically viable to dismiss charges under a perfectly clear law that the legislative body has clearly intended to be enforced. Even if the misdemeanor system were flooded with resources, prosecutors began vetting these cases thoroughly, and amply resourced defense attorneys began fighting them vehemently, these Sarasota cases would be incredibly easy to prove and guilt all but assured.

The City of Sarasota anti-lodging law contributes to shifting *effective* power from prosecutors to police, disrupting contemporary conceptions of the players in the criminal legal system. This represents another way in which criminal adjudication differs wildly between misdemeanors and felonies: Police, not prosecutors, play the critical gatekeeping role. In the felony system, prosecutors tend the entry to systems of formal punishment. As Andrew Crespo notes, prosecutors "are frequently 'the final adjudicators' of the criminal justice system—in practice, structurally empowered to determine through their charging leverage which cases" will be brought and which individuals will be convicted.[214] It is true that police who issue charging documents do not formally charge-bargain or plea-bargain and do not decide which charges "will be settled as opposed to litigated, and under what circumstances and terms."[215] Nevertheless, felony adjudication differs greatly from misdemeanor adjudication. The police's charging decisions in the misdemeanors I describe here led almost inexorably to a guilty plea. At least for low-level, "public order" misdemeanors,[216] the prototypical plea bargain and negotiation occurs at a bare minimum, if at all.[217] Among crimes of home-

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spends enough time screening, defending, and adjudicating misdemeanors . . . . Judges have been complicit, failing to dismiss weak cases.").

[213] *See, e.g.*, Chris Hayes, *Why Is This Happening? How Prosecutors Can Help End Mass Incarceration, with Larry Krasner*, NBC NEWS (July 10, 2018), https://www.nbcnews.com/think/opinion/how-prosecutors-can-help-end-mass-incarceration-larry-krasner-podcast-ncna890126, *archived at* https://perma.cc/ZC5Z-7VY4; *see also* Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/, *archived at* https://perma.cc/BV7D-BD3M; Alameda County Public Defenders, *Prosecutorial Accountability*, YOUTUBE (Apr. 23, 2018), https://youtu.be/4aVIEqmR1wE, *archived at* https://perma.cc/W5CH-EMW3.

[214] Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MIN. L. REV 1985, 2031 (2016) (quoting Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009)).

[215] *See* Crespo, *supra* note 214.

[216] *See* Bowers, *supra* note 196, at 1717; *see also* Natapoff, *supra* note 202 (discussing the prevalence of police-charged crimes and limited role for prosecutors).

[217] Crespo, *supra* note 214, at 2031.

lessness in Sarasota, police officers are more accurately described as the effective first and final adjudicators.

While the Supreme Court is concerned about the statute's notice and excessive discretion given to law enforcement, this study has revealed a different power that police wield. This power is troubling, not necessarily in the ways identified by the legal rule in *Papachristou*. These findings do, however, butt up against the opinion's hostility to criminalization of poverty. In fact, William Agee has argued that after *Papachristou*, states "re-implement[ed]" police authority "in ways that abided by the new legal focus on harmful conduct (rather than status)."[218] While loitering-type laws that emerged post-*Papachristou* were "harder" for police to use against any target disrupting public "order," these new statutes "produced a more intractable police power."[219] Under the new anti-lodging law, there is a strong possibility that every single individual charged would be found guilty because the law has been crafted to describe conduct solely attributable and necessary to the existence of someone living on the street. Regardless of whether the theory I propose can be proven empirically, it should unsettle lawyers, judges, and defendants to learn that courts and legislatures, in putatively complying with the Constitution, increase the likelihood that unhoused individuals will be quickly, effectively, and almost perfunctorily found guilty according to the enforcement decisions of individual police officers. This form of police power could be, but has not yet been, considered similar to the excessive police discretion that the Supreme Court labored to constrain in *Papachristou*.

My concerns about enforcement of Sarasota's vagrancy laws exist because of the population that the law affects, not the law's precision, per se. A speeding ordinance is a very precise law. It is also extremely easy to prove: The law specifies that the maximum speed is eighty-five miles per hour and the highway patrol clocks a defendant driving ninety-five miles per hour. This type of violation does not afford the defendant many legal avenues to avoid guilt. Anyone can be found guilty with data from a radar gun. In contrast, only unhoused people were found guilty of violating the anti-lodging ordinance. The anti-lodging statute that makes finding guilt extremely easy is troubling not because of its specificity but because it creates "criminals" out of the most vulnerable residents.

B. Racially disproportionate enforcement

The concern about excessive police discretion expressed in *Papachristou* and its lineage of cases actually implicates multiple anxieties. The first is that police enforcement is arbitrary and the second is that arbitrariness will

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[218] Agee, *supra* note 12 at 1664.
[219] *Id.*

enable police to enforce criminal laws in racially discriminatory ways.[220] Dorothy Roberts summarized the Court's concern succinctly. Since American

> society [is] characterized by racial inequality . . . the pernicious features of vague laws are likely to be imposed upon disempowered racial groups, and may not be experienced by privileged groups at all. This racial discrimination, then, is an integral part of the law's due process violation and a central reason for limiting police discretion.[221]

Having identified the ways in which the Sarasota enforcement scheme implicates police power to effectively make final decisions, the second issue to consider after the data presented above displays racial disparities in enforcement.

The data cannot confirm whether racial disproportionality in policing under the anti-lodging law exists.[222] Racial disproportionality depends on the comparison population. Without additional data on the racial make-up of the unhoused population,[223] I am limited to comparisons with the racial demographics of the City of Sarasota (14% of defendants were Black compared with 13.9% of the City of Sarasota in 2017)[224] and the County of Sarasota (14% of defendants were Black compared to 4.5% of residents in Sarasota County).[225] However, it is important to reiterate that unhoused people, by definition, do not "reside" in a particular part of the city or county. With this in mind, the population of the prosecuting authority, the County, is a relevant denominator, which would suggest disproportionality. On the other hand, the law applies to the City of Sarasota and that comparison would suggest proportional enforcement.

This Note cannot resolve the question of how the relative specificity of a law affects racial disproportionality in arrests and charging. Nevertheless, the issue is important to consider because courts should be clear-eyed about continuing to argue that more narrowly tailored laws can reduce discrimination. A recent nation-wide survey of misdemeanors found racial disproportionality was significant, particularly against Black individuals.[226] It also offers an important glimpse into whether more racially disparate enforcement occurs with respect to laws that are inherently more "discretionary" (including vagrancy laws). Megan T. Stevenson and Sandra G. Mayson aggregate longitudinal data on enforcement of misdemeanors for the first time

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[220] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).

[221] *Id.* (Noting that the court's "courts' condemnation of these laws . . . predate judicial concern with institutionalized racism. . . .")

[222] It is also important to note that the sample size for this analysis is small and cannot support statistically significant conclusions.

[223] *See News Release, supra* note 25 and discussion, *supra* note 164.

[224] *Sarasota City, supra* note 174.

[225] *Sarasota County, supra* note 24.

[226] Stevenson & Mayson, *supra* note 165, at 758–59.

in over a decade and measure racial disparity in enforcement, with a focus on the ratio of arrests against Black and white individuals.[227] They break down these rates by type of offense and track the data from 1980 to the present. The researchers find that the Black arrest rate for misdemeanors overall has "hovered" around 1.7 times that of the white arrest rate for most crimes[228]: "The black arrest rate is at least twice as high as the white arrest rate for disorderly conduct, drug possession, simple assault, theft, vagrancy, and vandalism."[229]

More surprisingly, the ratio of arrests against Black individuals and white individuals has remained virtually constant since 1980; vagrancy arrests are no exception. Racial disparity in arrests has been particularly stable for offenses that are usually thought to give officers greater enforcement discretion. In fact, vagrancy shows the fifth highest rate of racial disparity (after gambling, prostitution, disorderly conduct, and simple assault).[230] One explanation that researchers posit is that "offenses with high racial disparity are the most amorphously defined and entail the most discretion in enforcement, and therefore serve as the vehicle for racist policing."[231] However, Stevenson and Mayson do not link more discretionary statutes with *greater* racial disproportionality. Public drunkenness, which the researchers categorize as a nonspecific crime because it is "paradigmatic of the type of misdemeanor-classified behavior that only results in arrest if police are nearby and available to intervene," shows a low rate of racial disparity in enforcement.[232] "If the persistency of the ranking of racial disparities across offense types suggests deep structural patterns," they write, "those patterns were not immediately obvious to us."[233]

However, Sarasota findings suggest that courts have been misguided about the curative effects of vagueness doctrine on racial disparity in enforcement. Courts and advocates have historically agreed with Roberts's claim that the "danger" of racial bias in policing is an important reason to preserve the constitutional prohibition against vague delegations of broad police discretion.[234] Of course, the Sarasota data cannot prove that the

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[227] *Id.*

[228] *Id.*

[229] *Id.* at 759 ("The black-white arrest rate ratio is simply the arrest rate for black people divided by the arrest rate for white people.").

[230] *Id.* at 763.

[231] *Id.* at 770.

[232] Stevenson & Mayson, *supra* note 165, at 763. In 2014, public drunkenness showed a 1.14 ratio of black to white arrests. It was the fourth *least* disparate crime category. In contrast, vagrancy had a ratio of 2.55. Of course, their definition of laws that allow greater discretion could differ from mine. For instance, if the public drunkenness statute is extremely specific in its language (e.g., "It is unlawful to appear in public with an alcohol container and a blood alcohol level exceeding 0.05."), this would not parallel the type of vague anti-lodging law because it does not require police to use their own judgment to define a term such as "camping."

[233] *Id.* at 770.

[234] Roberts, *supra* note 29, at 780.

changes to the anti-lodging law made no difference in the Sarasota's of discriminatory policing. Stevenson and Mayson's study suggests that more definite laws do not correlate with the disproportionate enforcement against Black individuals, but does not prove that vagueness doctrine *cannot* affect it. The troubling implication is that a more profound logic appears to be sustaining rates of racial disparity across time: "Such persistency" in racial discrimination "suggests deep structural patterns," according to Stevenson and Mayson.[235] It seems likely that courts are wrong to believe narrowing the text of statutes will diminish racial discrimination in their application.

When viewed alongside national enforcement data, the Sarasota enforcement data on racial discrimination present more questions than they answer. The data do suggest, first, that vagueness doctrine has increased police control over against whom and with what certainty the individuals cited will receive a conviction and associated punishment. Second, vagrancy laws' enforcement may be associated with racial disparities in policing. Overall, this Note suggests that the changes to Sec. 34-41 stemming from the Sarasota City Council's amendments to the law have buttressed police power over defendants' lives in the sense that any arrest or citation is virtually guaranteed to result in a guilty finding. To the extent that racial discrimination does persist, this represents a troubling "doubling down" on police power to target and harass Black individuals. In the misdemeanor paradigm, formal legal protections, putting prosecutors to their burdens, and robust adversarial processes are traded for bulk processing.[236] The implication of this is that formal law, including the text of the statutes that defendants allegedly violate, appears to matter very little with respect to enforcement, including the patterns of racial discrimination in enforcement.

C. Punishment

The formal and effective punishments associated with charges under the anti-lodging ordinance are part and parcel to understanding the "second-order" effects of vagueness doctrine. Punishment—fines and incarceration, among others—are the felt effects of the new power structure that vagueness doctrine has helped to create. As Melissa Murray has noted, the role of courts large and small is to care about the real life impacts of their decisions, particularly where statutes themselves are imprecise.[237] Although defendants in this case study suffered primarily pretrial incarceration, I characterize this

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[235] *Id.*

[236] *See id.* at 71–96.

[237] Melissa Murray, *Real-Life Effects of Laws Should Matter as Well as the Law*, N.Y. TIMES (Jan. 26, 2015), https://www.nytimes.com/roomfordebate/2015/01/26/the-supreme-court-meets-the-real-world/real-life-effects-of-court-rulings-should-matter-as-well-as-the-law, *archived at* https://perma.cc/LA38-T68N ("In many cases, constitutional and statutory text is imprecise or opaque, admitting multiple interpretations. In such cases, judges consider many variables, including the real-world consequences of their decisions.").

as "punishment" because, as the classic critique of the criminal legal system says, the "process is the punishment."[238] Plus, this modern, narrower statute affords—*de facto*—fewer possibilities to check police's work. Therefore, courts should still be concerned about the consequences of enforcement. Punitive outcomes under the anti-lodging law are important to study, first, because of what they say about the on-the-ground reality of this vagrancy law, and, second, because for defendants, punitive outcomes represent the most relevant consequences of the modern criminal vagrancy regime: It reveals the realities of the police's "order maintenance."[239]

The degree of punishment associated with charges under the anti-lodging law makes any increase in effective police power more worrisome. The likely increase in effective police power to ensure guilt should concern the legal community because (1) courts already defer to officers in many situations, including probable cause[240] and factual determinations necessary for finding guilt[241]; (2) police reports err more frequently with respect to low-level crimes than with any other type of crime[242]; and (3) police are accountable to almost no one.[243] When police charge crimes and prosecutors exer-

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[238] *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (documenting insufficient representation and process in Connecticut misdemeanor courts); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122 (2008).

[239] In addition, at least some scholars have proposed that "collateral consequences be considered when determining what procedural safeguards must be afforded defendants" because the "longstanding approach" of determining right to counsel by the *potential sentence* of incarceration "fails to reflect an important new reality: that severe penalties in the form of collateral consequences are no longer reserved for felony convictions but are now triggered by misdemeanor convictions as well." *See, e.g.*, Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 781–82 (2016).

[240] Lvovsky, *supra* note 182, at 2058 (arguing that the modern "judicial understandings of policing [is] as a task based on and producing systematic insight into crime").

[241] *Id.* at 2056 ("The courts' acknowledgment that police officers may harbor 'expert' knowledge . . . [arose] in the realm of evidence," where as early as the 1950s judges recast officers as professional authorities on criminal patterns — even regarding matters previously admitted as lay testimony or left to scientific professionals.").

[242] Stanley Fisher, *Just the Facts, Ma'am: Lying and the Omission of the Exculpatory Evidence in the Police Reports*, 28 NEW ENG. L. REV. 1, 14 (1993) ("Another feature of police work that fosters lying . . . is pressure on patrol officers to produce 'activity' (such as arrests, traffic stops, or parking tickets) that will demonstrate to the public that the department is 'doing something' about crime.").

[243] *See generally* DAVID SKLANSKY, DEMOCRACY AND THE POLICE (2007). In a sense, the police's enhanced power comes *from* prosecutors (and perhaps also from defendants). The data are consistent with this theory. If prosecutors often dropped charges under these tailored laws, it would be more likely that prosecutors' intervening decisions would make the difference. Similarly, if cases went to trial more often, then a prosecutor's active negotiation "in the shadow of trial" would be more meaningful to case outcomes. Since these misdemeanors rarely went to trial and since prosecutors effectively never declined to charge cases, this example complicates a widespread theory in criminal law, which is that prosecutors have ultimate discretion and therefore ultimate power. Prosecutors do, of course, have formal power, but these charging practices reveal that police are the most controlling and often most outcome-determinative decision makers.

cise discretion, police act with almost total power to ensure that guilt will be found against unhoused people.[244]

The criminalization of lodging, camping, panhandling, and other behaviors of homelessness generate important questions about the uses of punishment and criminal law.[245] Judges evaluating these laws in Sarasota state that cities deserve deference to their chosen regulation of their public spaces.[246] One problem with this deference is that it has been blind: judges have not had reliable information about the laws' effect on unhoused people. To date, no study that I am aware of has done the labor-intensive work of cataloguing the enforcement data of Florida laws similar to those in Sarasota City and County. Therefore, judges' decisions have not weighed harm to defendants. Actors in the criminal legal system should care about defendants because of their vulnerability and because only those people "about whom the system cares" will receive the basic due process guarantees.[247] This study shows that severe punishment and certain guilt are part and parcel of criminal process under the anti-lodging law. This punishment should be considered in light of police power, although this is not currently an element of vagueness in the *Papachristou* analysis.[248]

Conclusion

The Sarasota anti-lodging statute provides a window into the messy and unpredictable nature of America's decentralized criminal legal system. It reveals the import of community pressures on the passage and re-passage of certain laws, and shows the extent to which local governments will go to protect laws that local leaders believe are important. The inter-institutional

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[244] Roberts, *supra* note 29, at 803 (discussing *City of Chicago v. Morales*, 527 U.S. 119 (1999)).

[245] The Supreme Court has rejected the notion that "low level" crimes should evade scrutiny. Discussing mootness in Sibron v. New York, 392 U.S. 40, 52–53 (1968), the Court held that,

> "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct."

[246] *See, e.g.,* Sarasota v. McGinnis, 13 Fla. L. Weekly Supp. 371a (Fla. Cir. Ct. 2005).

[247] *See* Alexandra Natapoff, *The Penal Pyramid*, *in* The New Criminal Justice Thinking 92 (S. Dolovich & A. Natapoff eds., 2017).

[248] *See, e.g.*, Alex Swoyer, *Homeless People in L.A. File Lawsuit Against 2016 Cleanup Ordinance to Protect Private Property*, Wash. Times (July 30, 2019), https://www.washingtontimes.com/news/2019/jul/30/homeless-people-in-la-file-lawsuit-against-2016-cl/, *archived at* https://perma.cc/6EFD-9SUT (reporting on an ongoing claim by unhoused plaintiffs that a Los Angeles "cleanup" law, which allowed "sweeps" of unhoused people's belongings, was impermissibly vague); Andrew Johnson, *Timeline of San Diego's Ban on Sleeping in Cars*, NBC 7 San Diego (May 14, 2019), https://www.nbcsandiego.com/news/local/Timeline-of-San-Diegos-Ban-on-Sleeping-in-Cars-509920591.html, *archived at* https://perma.cc/J546-N7Y7 (describing arguments by plaintiffs that San Diego's ban on sleeping in cars was unconstitutionally vague).

process of creating these laws is both "hallmark" of the lowest tier of the American criminal system and a window into the production of classifying, surveilling, and punishing a disproportionately Black subset of the population that has been forced onto the streets.[249] This case study adds to a growing discussion about the lower 80% of all criminal charges in the United States.[250]

In 1972, *Papachristou* blew a "gaping hole" in local criminal codes around the country.[251] This enforcement study helps to reveal what came next: the rise of modern vagrancy laws. This study also reveals what the *Papachristou* Court did and did not achieve. According to the plain language of *Papachristou*, vagueness doctrine was intended to protect against arbitrary police action that would lead to discrimination.[252] Was this aspiration successful, at least in part? This study suggests that the doctrine has not diminished police authority to maintain order in service of racial hierarchies and economic power structures.[253] The Sarasota data does not suggest that the twin aims of vagueness doctrine have failed. Police discretion is formally reduced and racial disparities are impossible to causally track. Instead, the data reveal a new and deeply tailored method of exerting power over poor residents, including people of color.[254]

This Sarasota data along with statutory changes and litigation history shape our understanding of how one facet of the misdemeanor system developed. Enforcement under the Sarasota anti-lodging law generally resembles the misdemeanors that others have conceived of as a massive system in which individualized justice matters very little.[255] In the case of the Sarasota law, the narrowing of the anti-lodging laws almost completely negated prosecutorial discretion, and shifted this discretionary function to police. Because the anti-lodging law is so narrowly tailored to behavior only engaged in by people living on the streets, the law essentially targets the very existence of the individual charged with the offense.[256] The law's increased specificity means that more power rests with officer's initial choice to cite an unhoused person. Once cited, guilt is a foregone conclusion. This mechanism short-circuits the traditional roles and functions of police, prosecutors, and the criminal justice system as a whole. Rather than a process of charging

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[249] Daniel Richman, *Disaggregating the Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 58 (S. Dolovich & A. Natapoff eds., 2017); *see also* Moses *supra* note 35 and L.A. Homeless Servs. Auth., *supra* note 36.

[250] Natapoff, *The Penal Pyramid*, *supra* note 247, at 80.

[251] GOLUBOFF, VAGRANT NATION, *supra* note 8, at 341. *See also* Linda Greenhouse, *Supreme Court Roundup; Anti-Loitering Laws Will Be Revisited*, N.Y. TIMES (Apr. 21, 1998), https://www.nytimes.com/1998/04/21/us/supreme-court-roundup-anti-loitering-laws-will-be-revisited.html, *archived at* https://perma.cc/RH8D-XR9Q.

[252] *See supra* Papachristou.

[253] *See* Stevenson and Mayson, *supra* note 165.

[254] *Id.* at 1665.

[255] *See generally* Natapoff, *The Penal Pyramid*, *supra* note 247, at 71–98.

[256] *See* Sarasota, Fla., Ordinance No. 02-4370 (May 6, 2002).

and referral for prosecution, adjudication is compressed into the moment when police make contact with the individual and determine the person has engaged in the proscribed conduct.

Tillman, *Nipper* and *McGinnis* show that cities and counties will persevere in their efforts to rid the streets of unhoused individuals.[257] Enforcement of the anti-lodging law stand in sharp contrast to the Supreme Court's 1941 declaration: "[W]e do not think that it will now be seriously contended that because" people are poor, they "constitute[ ] a 'moral pestilence.' "[258] To the contrary, impoverishment and homelessness do, in fact, make someone a "criminal."

[257] *See* Tillman, et al. v. City of Sarasota, No. 2003 CA 15645 NC (Fla. Cir. Ct. 2004); City of Sarasota v. Nipper, et al., 12 Fla. L. Weekly Supp. 878a, n.2 (Fla. Cir. Ct. 2005); Sarasota v. McGinnis, 13 Fla. L. Weekly Supp. 371a (Fla. Cir. Ct. 2005).

[258] *Edwards v. California*, 314 U.S. 160, 177 (1941).