
THIS LAND IS MY LAND?

VAGRANT NATION. By Risa Goluboff. New York, N.Y.: Oxford University Press. 2016. Pp. vii, 471. \$29.95.

*Reviewed by Tracey Meares**

Almost twenty years ago, I wrote in a piece with Professor Dan Kahan that one of the central features of modern criminal procedure was its unrelenting hostility toward institutionalized racism.¹ Specifically, we argued that the Supreme Court in a series of cases such as *Mapp v. Ohio*,² *Miranda v. Arizona*,³ *Gideon v. Wainwright*,⁴ and *Papachristou v. City of Jacksonville*,⁵ all decided in about a decade from 1961 to 1972, voiced a deep concern on the Court's part about the machinery of ordinary criminal justice in a context of very little federal oversight, especially in the South.⁶ Before the so-called Warren Court revolution, federal court oversight of state criminal justice was sporadic and shallow, advanced through case-by-case consideration of state criminal court adjudications as opposed to oversight and review of the police investigations that generated those convictions.⁷ The Warren Court's cases created what Kahan and I called a "muscular" doctrine⁸ designed to address the fact that, in a context in which African Americans were systematically disenfranchised and despised, it was impossible to expect the communities in which they resided to apply criminal laws to them evenhandedly.⁹

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¹ Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998).

² 367 U.S. 643 (1961).

³ 384 U.S. 436 (1966).

⁴ 372 U.S. 335 (1963).

⁵ 405 U.S. 156 (1972).

⁶ See Kahan & Meares, *supra* note 1, at 1155.

⁷ Understanding the transition from a constitutional criminal procedure centered in an interpretation of "fundamental fairness" guaranteed by the Due Process Clause of the Fourteenth Amendment to one centered upon incorporation of the relevant amendments in the Bill of Rights, as well as the centrality of the civil rights revolution to this transition, should be, in my view, a centerpiece of every criminal procedure course focusing on investigations. Tracey L. Meares, *Burying the Lede: Why Teaching the Due Process Cases is Critical to Investigations in Criminal Procedure*, 60 ST. LOUIS U. L.J. 497, 497-501 (2016).

⁸ Kahan & Meares, *supra* note 1, at 1155.

⁹ See *id.* at 1157.

In arguing that the consequences of racial discrimination were central to the development of modern criminal procedure, Kahan and I reserved special attention — and praise — for Justice Douglas, who in 1960 wrote what we believed then to be a prescient law review article railing against loitering and vagrancy laws for the specific reason we identified in our essay: that arrests under these laws tended to land on minority groups with insufficient political clout to protect themselves from the vast discretion of local law enforcers.¹⁰ And we noted that when the Court finally deemed a traditionally worded¹¹ loitering law from Jacksonville, Florida to be unconstitutionally vague, Justice Douglas wrote the opinion for the Court.¹² To sum up, we wrote that the golden thread that ran through the Warren Court's great criminal procedure cases was a concern about "community distrust" and "discretion skepticism" in the context of the distorting influence of institutionalized racism on the operation of local criminal justice.¹³

After reading Dean Risa Goluboff's *Vagrant Nation*, I am still very committed to the story that I penned with Kahan regarding the relationship between constitutional criminal procedure and racial justice, but as one grows older, one hopes also to grow wiser. I learned a great deal from reading Goluboff's book. One surprise was the destabilization of my prior belief about the centrality of the civil rights movement to the demise of vagrancy and loitering laws. Do not mistake me here. Civil rights movement actors and the litigators supporting them certainly put substantial pressure on the constitutionality of vagrancy laws in the South, and nothing in *Vagrant Nation* says otherwise. Moreover, Goluboff makes clear that racial justice is a golden thread that weaved through and connected the different components of the

¹⁰ See William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 1, 10-11 (1960).

¹¹ Jacksonville Ordinance Code § 26-57 provided at the time of these arrests and convictions as follows:

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

Papachristou v. Jacksonville, 405 U.S. 156, 156-57 (1972) (quoting JACKSONVILLE, FLA. ORDINANCE CODE § 26-57 (1965)).

¹² See Kahan & Meares, *supra* note 1, at 1157.

¹³ See *id.* at 1153, 1156-59; see also Tracey L. Meares & Dan M. Kahan, *The Wages of Anti-quoted Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 205-06.

litigation challenging vagrancy laws. But the book's primary achievement is its delineation of several movements in addition to the well-known civil rights movement of the sixties, notably movements around sexual freedom and nonconformist hippies, and, preceding both of these, cultural shifts featuring the Beats¹⁴ and the Wobblies,¹⁵ all of which were represented in litigation around vagrancy law — some 250 cases in all¹⁶ — that played a role in reshaping our understanding of the relationship between constitutional law and our own lifestyle pursuits.

Goluboff attempts a unifying history in *Vagrant Nation*. She introduces the topic by noting that, “[t]elling the history of vagrancy laws’ demise thus means telling a legal history of the 1960s writ large” (p. 5). More typical legal histories of the sixties, she claims, tend to focus on the particularized legal changes pertaining to racial equality, sexual freedom, and the like. Her worry is that a focus on particularities necessarily produces “narrative and analytical isolation” (p. 335). Thus, in *Vagrant Nation*, Goluboff takes a different approach. She argues and then backs up the claim that:

Vagrancy law made an enormous legal bulls-eye in the center of the sixties dartboard. It provided a unifying target, forum, language, and set of institutional arrangements and personnel against which the movement of movements fought What the vagrancy law challenge shows is that the law’s role in the hierarchies and inequalities of pre-1960s America was neither episodic nor limited to particular arenas of repression. Law — not just any law, but the coercive and always implicitly violent power of the criminal law — was ubiquitous. (pp. 335–36)

Vagrant Nation is a meticulous accounting of the various strands of litigation around vagrancy, including, representing each strand, the recovered histories of the many folks who were subject to these laws and the passionate advocates who represented them. Perhaps the most compelling aspect of the story for lawyers is the revelation that the mechanisms the Court considered in multiple attempts over two decades to dismantle vagrancy and loitering laws intriguingly included substantive constitutional limitations as well as procedural ones. It is difficult to see this simply from reading the cases even if one reads them all together. A backstory to the litigation is required. And so, to

¹⁴ By “Beats” I am not referring to the Dr. Dre headphones, but rather to the shortened form of the “Beat Generation,” a post–World War II counterculture movement that originated in New York City near Columbia University and celebrated anticapitalist ideology and sexual freedom. In Goluboff’s words, “[t]he Beats understood themselves as inheriting both the physical and spiritual mantle of hoboes, bums, and the wandering life” (p. 52).

¹⁵ The “Wobblies” is a common term for the Industrial Workers of the World (IWW). The IWW is an international labor union formed in Chicago.

¹⁶ As Goluboff explains, these cases spanned a roughly twenty-year period beginning with *Edelman v. California*, 344 U.S. 357 (1953), and ending with *Papachristou*, 405 U.S. 156 (p. 7).

make sense of the complex interactions among the cases, litigants, and the Court, Goluboff walks us through two decades of vagrancy litigation and shows us how these cases, brick by brick, built a bulwark upon which the big gun — *Papachristou* — could be mounted to finally blow these ordinances and statutes away.

In this Book Review, I will provide an overview of this dense book. It is difficult to understand its upshot without some understanding of the sprawling and oftentimes amazing tale Goluboff tells here. Along the way, I will highlight some key points. For example, I found particularly interesting the parts of the history that presage the civil rights strand of vagrancy challenges. Perhaps the most important highlight of this book, though, at least to criminal procedure scholars, is the relationship Goluboff traces between the challenge to — and subsequent demise of — vagrancy law enforcement on the one hand, and the rise and legitimation of the practice of stop and frisk on the other. Goluboff makes a very strong case that there was a tradeoff between these two law enforcement tactics when the Court considered two important cases during the 1967 Term. That tradeoff had important consequences with which we continue to live today.

In the back end of this Review, I will provide some thoughts about a possible disagreement with Goluboff. My reading of *Vagrant Nation* is that Goluboff appears to lament the Court's inability to strike down vagrancy laws on the basis of substantive due process or something like it as opposed to the procedural path the Court took, focusing on provision of notice and restraints on discretion. I want to emphasize here that my assessment of this takeaway message may not be Goluboff's intention, as she does not ever explicitly say she is telling a "what-if" story. To the extent that my reading is correct, however, I am less sanguine than Goluboff seems to be about the notion that policing policy today would be in a better place had the Court struck down vagrancy laws on the basis of protecting some kind of substantive right to nonconformity. It seems to me that nothing about prohibiting vagrancy laws on this basis would prevent or divert us from the world we find ourselves in today. That world is one in which many, many people of color are policed on the basis of suspicion of criminal involvement pursuant to a tactic sanctioned by the Supreme Court around the same time that use of generalized vagrancy laws was becoming less popular, or are arrested under very *specific* public order or traffic offenses that clearly do not run afoul of constitutional prohibitions on vagueness.¹⁷ Thus, while it is possible to characterize today's

¹⁷ And the reason why this particular combination — short seizures based on suspicion of crime or arrests based on very specific but "low-level" crime — is effective is because of a trio of cases decided in 1968. See *infra* pp. 1891–92; see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L.

policing as regulation of people who are “out of place,” to use Goluboff’s term, the goal of policing “out of place” people today, at least as a formal matter, is crime reduction and not norm conformity *per se*. Policing agencies across the country engage in proactive policing that resembles, at least in terms of the experiences that private actors have with law enforcers, the policing of the past under vagrancy and loitering regimes. But it is fundamentally different in that whatever contestation there was in the past over norms-management aspects of vagrancy policing, the notion that police should be involved in crime control never was contested. The extent to which there is acceptance of crime control as a legitimate goal for policing — often by any means necessary — complicates Goluboff’s *Vagrant Nation* and illustrates, I think, the limitations of a fundamental rights approach to constraining police power.

I. BACKSTORY TO THE STORY

Before turning to the fascinating tale that is *Vagrant Nation*, we must set a foundation. As best I can tell, the source of Goluboff’s *Vagrant Nation* is a sort of detective story. In 2010, Goluboff published an essay entitled *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*.¹⁸ In the piece, she presents some intriguing archival research. She analyzes and reproduces for the reader three pieces of evidence: “(1) portions of an early draft of . . . [Justice] Douglas’s opinion in the 1972 vagrancy case of *Papachristou v. City of Jacksonville*; (2) memoranda between Justice Douglas and Justices [Brennan and] Stewart about that opinion; and (3) a memo from [Justice] Brennan to [Justice] Douglas about *Roe v. Wade*.”¹⁹ What could a vagrancy case have to do with the conceptualization of fundamental rights, you ask? The answer is found in a seed Anthony Amsterdam planted in a student Note, wherein he argues that the two concerns to which scholars have long pointed in the Court’s void-for-vagueness doctrine (lack of notice on the one hand and inadequate cabining of discretion on the other) do not fully explain the Court’s use

REV. 125, 151–56 (2017) (discussing traffic law enforcement); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487–91 (2016) (listing numerous public order offenses and describing a phenomenon he denotes “mass criminalization” that allows police officers through exercise of their discretion to “almost always find a justification to investigate an African-American for some crime,” *id.* at 1490).

¹⁸ Risa L. Goluboff, Essay, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361 (2010).

¹⁹ *Id.* at 1362 (footnotes omitted) (citations omitted).

of the doctrine.²⁰ Amsterdam did not disagree with the settled consensus around these twin concerns, but he did think that something else was going on. He suggested, almost fifty years ago, that the extra ingredient was the Court's use of the doctrine to create a "buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."²¹

In *Dispatch*, Goluboff demonstrates that when writing for the Court in *Papachristou*, Justice Douglas relied on the two hallmarks of void-for-vagueness doctrine Amsterdam referenced in his piece (failure to give adequate notice and failure to limit arbitrary discretion),²² but Justice Douglas also discussed at length the importance of activities such as loafing, wandering, and nightwalking,²³ along with the centrality of these activities to an individual's life of "independence . . . self-confidence . . . [and] the feeling of creativity."²⁴ His language has motivated scholars to speculate that *Papachristou* contains a substantive constitutional component in addition to procedural constraints on legislators and law enforcers, albeit one that is not fully articulated.²⁵ In a deft presentation of correspondence between the Justices during the period that *Papachristou* was being decided, Goluboff highlights in *Vagrant Nation* portions of Justice Douglas's draft opinions to demonstrate how he grasped for constitutional language and text in which to ground protection of what he called "lifestyle" choices (pp. 320–22, 329).²⁶ When vagrancy laws, with their emphasis on cabining off certain categories of people for inclusion in, or exclusion from, the polity and their effective grant of vast discretion to law enforcers to police

²⁰ See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–76 (1960). A typical citation for explaining the void-for-vagueness doctrine is John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

²¹ Note, *supra* note 20, at 75.

²² Goluboff, *supra* note 18, at 1364.

²³ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163–64 (1972).

²⁴ *Id.* at 164.

²⁵ See, e.g., 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) (making this argument); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1262–63, 1263 n.15, 1283–97 (1990) (arguing that in a series of criminal procedure cases the Supreme Court compromised severely a "right of locomotion" embedded in a collection of mostly Fourth Amendment cases, but also *Papachristou*); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 491–92 (1994) (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 about prohibiting enforcers or drafters from imposing certain lifestyle choices on segments of the population).

²⁶ After reading *Vagrant Nation*, I came to the conclusion that Justice Douglas was all but obsessed with the idea of "lifestyle" and its protection through the Constitution, going so far as to link the general category of lifestyle protection to racial justice, sexual freedom, and the highway Rambler (pp. 329–30).

people who were “out of place,” were challenged, they presented to Justice Douglas the perfect vehicle for his attempts to articulate an expansive vision of a right to nonconformity.

So, Goluboff’s *Dispatch* essay shows us what was going on behind the curtain in *Papachristou*. The question, then, becomes what did the journey to Oz look like? That’s where *Vagrant Nation* begins.

II. STORY

Nine chapters comprise Goluboff’s opus — there is a lot of material here! The bulk of the action is in Chapters Two through Eight. In these chapters, Goluboff provides detailed portraits of the litigants and their lawyers to motivate her discussion of the important constitutional challenges (or in one important case an “almost challenge”) to vagrancy laws in the U.S. Supreme Court from the 1950s until 1972, what she calls the “long 1960s” (p. 10). For example, Ernest Besig, a California lawyer whose “vagrancy” file contained challenges to San Francisco’s policing of gay men through “vag lewd” arrests along with Jack Kerouac’s Beats, who often frequented North Beach,²⁷ is the star of Chapter Two. We learn at the end of this chapter that California ultimately repealed its 100-year-old vagrancy law as a result of Besig’s eight years of steady and stubborn work, but his ultimate victory remained elusive because disorderly conduct and suspicious loitering laws — laws that Governor Edmund “Pat” Brown insisted were necessary for crime control — took their place (p. 71). The potential for police to address crime through loitering and vagrancy laws is a recurring theme in many of the cases Goluboff documents in her book, so this aspect of Chapter Two is a preview for bigger battles to come and also for more consequential tradeoffs. The salience of arguments around the need for crime control and the correlative need for empowerment of police to effect it arose at a critical moment just before the Court ultimately dealt the death blow to vagrancy laws in *Papachristou*. More on this below.

In Chapter Three we meet “Shuffling Sam” Thompson and his lawyer, the great Louis Lusky. Lusky is best known for being the law clerk to Justice Stone who wrote the first draft of footnote four in *United States v. Carolene Products Co.*²⁸ The late Columbia Law School professor and successor to Thurgood Marshall at the NAACP Legal Defense Fund, Jack Greenberg, took pains in a memorial to

²⁷ “The press viewed the Beats as so foreign that North Beach was often referred to in the news as ‘Beatland,’ ‘Beatnikstan,’ or ‘Beatnikland’” (p. 52).

²⁸ 304 U.S. 144, 152 n.4 (1938). Professor Lusky was initially hesitant to claim credit for the footnote, but other authors have noted his contribution. See, e.g., Albert J. Rosenthal, In Memoriam, *Louis Lusky — An Outstanding Scholar and a Dedicated Crusader for Justice*, 101 COLUM. L. REV. 986, 987 (2001).

Lusky to point out that Lusky's work in *Thompson v. City of Louisville*²⁹ was the foundation of challenges to arrests of sit-in demonstrators during the civil rights movement.³⁰ The details of how Thompson's case ended up in the U.S. Supreme Court make for some of the most fascinating reading in this book. After Sam Thompson was convicted of loitering and disorderly conduct and received two ten-dollar fines, Lusky petitioned the Supreme Court of the United States for a writ of certiorari to the police court of Louisville, Kentucky, which was the court that had imposed the fines (pp. 92–97). This seemingly implausible move was possible because a federal statute at the time authorized federal review of judgments from the highest state court where judgment could be had. In this case, the Louisville police court was both the highest and lowest court (p. 96)! Lusky could have chosen a lower federal court, but he was intent upon bringing a vagrancy challenge all the way to Washington.

Ultimately, Lusky was successful in overturning Thompson's convictions by arguing that the Louisville police simply had no evidence of Thompson's guilt under the ordinance — a clear failure of due process — rather than by attacking the ordinance itself. Because Lusky left the Louisville vagrancy law intact, his victory appeared to be a limited one-off applicable only to its facts. Interestingly, however, *Thompson* ended up being a critical tool for activists in the civil rights movement even though the case clearly was not litigated as such (p. 110).³¹ Perhaps even more notable is the fact that just days before *Thompson* came down, Justice Douglas published his *Yale Law Journal* piece on vagrancy laws where he articulated a much more expansive argument for overturning vagrancy and loitering laws than *Thompson* itself offered.³² As I explained at the outset of this Book Review, a centerpiece of that argument was a worry about the ability of politically marginalized citizens to hold law enforcers with great discretion accountable.³³ This worry, of course, was a motivator of the civil rights movement, the subject of Chapter Four.

Chapter Four presents material relating to the legal challenge of vagrancy and loitering laws that is the most familiar to me and perhaps many readers. This chapter describes in detail the connection between civil rights crusaders and loitering and vagrancy laws, which Southern law enforcers famously used as tools to disrupt sit-ins and

²⁹ 362 U.S. 199 (1960).

³⁰ See Jack Greenberg, In Memoriam, *Louis Lusky*, 101 COLUM. L. REV. 977, 977 (2001).

³¹ "None of the drivers of *Thompson* meant it to be a race or civil rights case, then, but that is what it became. . . . One white southerner sent Justice Black a *Richmond Times Dispatch* editorial entitled, 'Precedent for Sitdowns?'" (p. 110).

³² See Douglas, *supra* note 10.

³³ *Id.* at 13.

protests by, for example, arresting individuals who refused to leave lunch counters when ordered to by police. Goluboff writes, “[t]hose who engaged in marches, parades, sit-ins, stand-ins, swim-ins, read-ins, pray-ins, and lay-ins often violated one law or another. . . . An Amnesty International Report estimated that officials arrested 20,000 people for civil rights activities in 1963 alone” (p. 118). These arrests became a focal point for civil rights organizing because of their perceived illegitimacy, and related fundraising also provided resources for legal challenges. *Shuttlesworth v. City of Birmingham*,³⁴ which Goluboff spotlights in Chapter Four, is one of those cases.

Shuttlesworth is notable because of its backstory. Reverends Frederick Shuttlesworth, Martin Luther King, Jr., and Ralph Abernathy were arrested after leading a large group of protestors on a march through Birmingham, Alabama, on Good Friday of 1963, in violation of a court order forbidding them from doing so.³⁵ The leaders had attempted to obtain a parade permit from the city prior to the march, but they were denied.³⁶ After denying their application, the city obtained an injunction to prevent the march from taking place on Good Friday, but, given the significance of the date and the urgency of their cause, Shuttlesworth, King, and Abernathy marched anyway. While he was jailed in solitary, Reverend King was given a copy of a newspaper containing an open letter written by eight Birmingham religious leaders criticizing the protests as well as King, who was not specifically named but who was an obvious target, personally as an outside agitator.³⁷ In response, King penned his famous “Letter from a Birmingham Jail.”³⁸ King’s conviction for violating the court injunction was upheld by a sharply divided Court in *Walker v. City of Birmingham*,³⁹ in which Justice Stewart stated that King and the other leaders should have challenged the injunction in court through a lengthy appeals process — the very point against which King argued in his “Letter.”⁴⁰ Notwithstanding this loss, the ordinance upon which King’s conviction was based was subsequently overturned 8–0 in

³⁴ 394 U.S. 147 (1969).

³⁵ *Shuttlesworth v. City of Birmingham*, 180 So. 2d 114, 141 (Ala. Ct. App. 1965) (Johnson, J., dissenting), *rev’d*, *Shuttlesworth v. City of Birmingham*, 206 So. 2d 348 (Ala. 1967), *rev’d*, *Shuttlesworth*, 394 U.S. at 147.

³⁶ *Shuttlesworth*, 394 U.S. at 157.

³⁷ See Statement by Eight Alabama Clergymen (Apr. 12, 1963), in *White Clergymen Urge Local Negroes to Withdraw from Demonstrations*, BIRMINGHAM NEWS, Apr. 13, 1963, <http://bplonline.cdmhost.com/cdm/singleitem/collection/p4017coll2/746/rec1>[<https://perma.cc/3BJS-2BEX>].

³⁸ See MARTIN LUTHER KING, JR., Letter from Birmingham Jail (Apr. 16, 1963), in *WHY WE CAN’T WAIT* 77 (1964).

³⁹ 388 U.S. 307 (1967).

⁴⁰ *Id.* at 320–21.

Shuttlesworth.⁴¹ As she lays out the story of the *Shuttlesworth* litigation, Goluboff features as a central character Anthony Amsterdam, the law professor who outlined an intellectual foundation to challenge the constitutionality of vagrancy ordinances as a law student and who later became a volunteer civil rights lawyer while a law professor. Professor Amsterdam wrote the NAACP Legal Defense Fund brief in *Shuttlesworth* (p. 137).

To highlight the intimate connection between the struggle for racial justice and the attempts by mostly Southern white political leaders to use criminal justice apparatus to quash the movement, Goluboff notes that the Court heard oral argument in sixty-five cases involving sit-ins and protests between 1958 and 1966 (p. 139). As is well known, the Court relied upon various constitutional law doctrines to decide these cases in favor of the protestors, including chipping away at vagrancy law, but rarely did it touch the underlying issue of racial segregation, which was, of course, the reason for the protests.⁴² Goluboff shows in *Vagrant Nation* that the pursuit of racial justice is all over the vagrancy challenges, and not just with respect to the civil rights movement cases described in Chapter Four. For example, in Chapter Two we learned that the San Francisco police were incensed by the Beats in part because of their penchant for hanging out in racially mixed groups (p. 54). And, it is also worth noting that Sam Thompson himself was an African American man arrested over fifty times by white police officers before Louis Lusky took his case (p. 87).

The civil rights aspect of the constitutional challenges to vagrancy and loitering laws as presented in Chapter Four is so very prominent, so the cases discussed in Chapter Five present, in my view, a surprising break. This chapter focuses on policing the “female vagrant,” “vag lewd” prosecutions of homosexuals, and the criminalization of poverty through enforcement of vagrancy laws. Cases in this section are not as well known as the cases that preceded them (*Thompson* and *Shuttlesworth*) and the big case that followed them (*Papachristou*), but Goluboff makes a compelling case that they are absolutely critical pieces of the bulwark on which *Papachristou* was mounted. Goluboff brilliantly weaves together tales of three types of prosecutions — prosecutions of “female vagrants” (often prostitutes); prosecutions of the idle poor; and prosecutions and policing of gay men and drug users — to illustrate the cultural upheavals that occurred in the mid-sixties around sex equality and sexuality at the same time that poverty

⁴¹ *Shuttlesworth*, 394 U.S. at 159.

⁴² See Kahan & Meares, *supra* note 1, at 1157–58. See generally HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

was beginning to be decoupled from immorality (pp. 179–80).⁴³ In describing the court challenges to these prosecutions, Goluboff writes:

[The i]nvalidations made clear that courts now found vagrancy laws problematic not only because they were improperly used for crime control or harassing civil rights activists, Beats, or communists. They were problematic because their very purpose was inimical to the modern welfare state. Contemporary ideas about poverty, unemployment, and autonomy required new interpretations of the Constitution. (pp. 184–85)

Chapter Five ends with the suggestion that constitutional challenges across social contexts would make the case for the invalidation of vagrancy laws on substantive grounds inevitable, but the next chapter calls the strength of that convergence into question.

The focal point of Chapter Six is *Wainwright v. City of New Orleans*,⁴⁴ a case that Goluboff tells the reader was once described as a candidate for the “most significant criminal case of the year” (p. 189).⁴⁵ It is also a case that no law student likely has ever read. That is because the writ of certiorari was dismissed as improvidently granted (DIG’d). Understanding why a case that many considered the most important criminal case of the Term was DIG’d, when that Term included *Terry v. Ohio*,⁴⁶ is an extraordinary story that should fundamentally change the way criminal procedure scholars teach *Terry* and stop and frisk. Moreover, understanding the relationship between *Wainwright*’s disappearance and the policing policy we live with today is also important. I will, therefore, provide a more detailed explication of this chapter than other chapters in the book.

Stephen Wainwright was a Tulane law student who was out walking about New Orleans around midnight when he was picked up on suspicion of being a murder suspect.⁴⁷ The officers who stopped Wainwright believed he fit the description of the suspect, but they had no further evidence of his involvement in the crime.⁴⁸ Because the officers had reason to believe that the murder suspect had a tattoo on his left arm, they asked Wainwright to remove his jacket so that they could inspect his arm when they stopped him.⁴⁹ When he refused and walked away, the officers arrested him on a “vagrancy by loitering”

⁴³ “In one successful case, the Court self-consciously rejected earlier attitudes about the relationship between poverty and morality. ‘Federal [public] welfare policy now rests on a basis considerably more sophisticated and enlightened than the “worthy-person” concept of earlier times’” (p. 179) (quoting *King v. Smith*, 392 U.S. 309, 324–25 (1968)).

⁴⁴ 392 U.S. 598 (1968).

⁴⁵ The author quotes *Supreme Court Begins New Term*, CONG. Q. WKLY. REP., Sept. 29, 1967, at 1963.

⁴⁶ 392 U.S. 1 (1968).

⁴⁷ *Wainwright*, 392 U.S. at 600 (Warren, C.J., dissenting).

⁴⁸ *See id.*

⁴⁹ *Id.*

charge and frisked him.⁵⁰ Wainwright was then taken to the station for booking on the charge where he continued to refuse to remove his jacket.⁵¹ In the end, police forced him to remove his jacket and discovered he had no tattoo.⁵² That could (should?) have been the end of the matter, but Wainwright's case on the vagrancy charge was postponed and continued for eight months. Finally, he was charged with disturbing the peace and resisting an officer — the vagrancy charge having mysteriously evaporated.⁵³ By the time a trial was set, Wainwright had graduated from law school and moved to Boston, but he refused to let the matter lie. He wrote his own petition to the Supreme Court, but he did not focus on vagrancy law. The formal question presented in the case was whether a person who was unconstitutionally arrested had to submit to a search of his person "highlighting the injustice of the arrest and the indignity of the demand that he remove his jacket in public" (p. 191). Foundationally, however, *Wainwright* was about the extent to which police could legitimately use loitering and vagrancy as pretext for investigating other serious crimes.

The Court faced a pragmatic problem in addressing this issue, as there were several paths to finding for Wainwright. The Court could condemn the police questioning of Wainwright and prohibit the search as Wainwright asked. Or, the Court could condemn the arrest while legitimating the ordinance itself, taking a *Thompson*-like approach. Or, the Court could invalidate the arrest by invalidating the vagrancy law itself. Goluboff reports that one (outraged) columnist presented the issue in *Wainwright* as basic: "Can police arrest a man on a rigged 'vagrancy' charge, take him to headquarters and force him to disrobe because he resembles a composite drawing of the man they are looking for?" (p. 191).⁵⁴ One suspects that commentator believed the answer to be obvious.

It might seem odd today to think that the police believed they needed a tool like an arrest for vagrancy in order to investigate a person they suspected of committing some other more serious crime, but it is important to remember that *Terry* had not yet been decided. As I noted above, the Court considered *Terry* and *Wainwright* during the same Term. In a world in which police were not officially sanctioned to stop people on the basis of their reasonable suspicion that the person had committed or was about to commit a crime, it is perhaps not surprising that police regularly relied on arresting people under expan-

⁵⁰ *Id.* at 601.

⁵¹ *Id.*

⁵² *Id.* at 602.

⁵³ *See id.*

⁵⁴ The author quotes John P. Mackenzie, *Court Studies Police Powers Vs. Individual*, WASH. POST, Oct. 12, 1967, at G5.

sive and vague loitering and vagrancy statutes to reach the same outcome. In fact, it is easy to see why law enforcers might even prefer to use arrests under broad vagrancy laws rather than the more procedurally precarious “field interrogation,” a seizure that clearly fell short of a full arrest for which there may or may not be probable cause.⁵⁵ One thing was clear, though — police were being pressured to use more tools to address crime, which was skyrocketing. Goluboff documents statistics compiled by the FBI indicating that violent crime doubled between 1960 and 1969 (p. 187). In this world, would the Supreme Court be willing to overturn vagrancy laws altogether so long as police groups claimed these laws were critical tools in their arsenal to combat crime? Echoes of Governor Edmund Brown’s insistence on police retaining such power in California during Besig’s challenge to vagrancy laws there come to mind.⁵⁶

To understand the choice before the Court, it is useful to rehearse the facts of *Terry*. In that case, Officer Martin McFadden, a thirty-nine-year veteran of the Cleveland police force, observed John Terry and a companion walking back and forth on the sidewalk outside a store for about ten to twelve minutes, and at one point engaging in conversation with a third man.⁵⁷ McFadden suspected that the men were “casing a job” in preparation for a robbery, so he also suspected that they were armed.⁵⁸ He approached the men, identified himself, and asked for their names.⁵⁹ Receiving a mumbled response, McFadden grabbed Terry, spun him around, and then patted down his outer clothing.⁶⁰ McFadden found a pistol inside Terry’s coat pocket.⁶¹ The question that the Court addressed was whether McFadden’s action was justified even though he did not have probable cause to arrest Terry and his confederates.⁶² Unlike the officers in *Wainwright*, Officer McFadden did not even consider arresting Terry and his colleagues for loitering; rather, he simply used the well-worn field interrogation.

Terry, then, was about whether or not to officially sanction police power to briefly detain individuals on less than probable cause — potentially expanding police power on the streets in the process — while *Wainwright* presented, in contrast, the very real possibility of limiting police power by prohibiting officers from arresting individuals on the

⁵⁵ See O.W. WILSON & ROY CLINTON MCLAREN, *POLICE ADMINISTRATION* 347 (4th ed. 1977) (explaining the field interrogation).

⁵⁶ See *supra* p. 1883.

⁵⁷ *Terry v. Ohio*, 392 U.S. 1, 5–6 (1968).

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 6–7.

⁶⁰ *Id.* at 7.

⁶¹ *Id.*

⁶² *Id.* at 15.

basis of probable cause for violations of outdated and unduly broad vagrancy statutes whose scope was dictated on the spot by law enforcers. Critically, during this period police used *both* vagrancy arrests and field interrogations to harass people of color and to regulate marginal groups. And police used both tools to intervene in serious crime before it occurred. The problem was that the street cops engaging in these activities did not cleanly distinguish their crime-fighting activities from their harassing ones, making it impossible for courts to confidently make these distinctions upon review. Additionally, racial injustice in the administration of criminal justice, both in the courts and on the streets, continued to loom large. Even the most cursory review of the 1968 Kerner Commission's Report on urban riots reveals that public confrontations between law enforcement personnel and residents of segregated urban neighborhoods sparked many riots.⁶³ Those incidents of social unrest were fueled by arrest practices pursuant to vagrancy and loitering laws as well as stop and frisk practices. For example, in its amicus brief in *Terry* the NAACP Legal Defense Fund wrote: "We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk."⁶⁴ Chapter Six comes to a quite remarkable conclusion. Police got a win in *Terry*, and the civil libertarian groups who were so confident about a win in *Wainwright* got pushed off to fight vagrancy laws another day. Here is how it went down. The *Terry* Court decided, over Justice Douglas's lone dissent, to uphold Officer McFadden's stop and frisk of John Terry.⁶⁵ To legitimate the stop and frisk, the Court first had to determine that the action was a search for purposes of the Fourth Amendment, contrary to the respondent's argument, which contended that a limited pat down was not a search for purposes of the Fourth Amendment.⁶⁶ Second, the Court had to prescribe a way to justify the search because Officer McFadden clearly did not possess probable

⁶³ See OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 67-71, 80-82 (1968).

⁶⁴ See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 61-62, *Terry*, 392 U.S. 1 (Nos. 63, 74, 67), reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 565 (Philip B. Kurland & Gerhard Casper eds., 1975). Goluboff points out that Anthony Amsterdam wrote this brief assisted by James Nabrit III and Jack Greenberg (p. 206).

⁶⁵ *Terry*, 392 U.S. at 30-31.

⁶⁶ Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 336 (2014); see also *Terry*, 392 U.S. at 16 (rejecting the suggestion that such police conduct is neither search nor seizure).

cause for it.⁶⁷ *Terry* thus sanctioned field interrogations as a tool for police officers to engage in detentions of people on the street.

Stops and frisks are shallower and briefer detentions than arrests and full searches to be sure, but because the justification for them is not as stringent as the justification for a full arrest, it is reasonable to assume that sanctioning such encounters would make them more prevalent precisely *because* they are shallower and briefer.⁶⁸ That a stop is in any one instance less intrusive than a full arrest or full search is not to say that the consequences of stops and frisks are inconsequential. During a field interrogation or a stop, police officers will sometimes call in to determine whether the person stopped has an outstanding warrant. In many jurisdictions, this is standard operating procedure. If there is an outstanding warrant, the officer may legally arrest the person she has stopped, and, because constitutional law sanctions a search incident to arrest upon no additional suspicion that the person is carrying contraband or hiding evidence, the officer may carry out a full search of the body of the person she has just arrested.⁶⁹ Brief stops potentially open individuals up to much more invasive intrusions.⁷⁰

Importantly, the *Wainwright/Terry* tradeoff was not all the Term had in store for those concerned about police intrusions on individuals. In another stunner (at least to those who thought vagrancy laws finally would be vanquished) in this same Term, the Court in a 5–4 decision upheld the conviction of Leroy Powell against an Eighth Amendment challenge to a statute that made it a crime to be drunk in public.⁷¹ This outcome was a surprise, as many criminal procedure students know, since many expected *Powell* to follow *Robinson v. California*.⁷² *Robinson*, of course, struck down statutes that criminalized the status of drug addiction as prohibited under the Eighth Amendment.⁷³ To some, the distinction between being drunk in public and being criminalized for being an addict was nonexistent,⁷⁴ but the *Powell* Court in-

⁶⁷ Meares, *supra* note 66, at 336; *see also Terry*, 392 U.S. at 25–27 (rejecting *Terry*'s probable cause argument).

⁶⁸ Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 778 (2000) (explaining that “[a]llowing police to justify stops and frisks with less evidence than is required for arrests and full searches implicitly encourages police officers to prefer these lesser intrusive actions over more serious ones,” and that this less demanding standard also likely means there will be more encounters at the end of the day).

⁶⁹ *See Chimel v. California*, 395 U.S. 752, 762–63 (1969).

⁷⁰ For a fuller description of this phenomenon following an illegal stop, *see infra* pp. 1894–95.

⁷¹ *Powell v. Texas*, 392 U.S. 514, 535–37 (1968) (plurality opinion); *id.* at 554 (White, J., concurring in the result).

⁷² 370 U.S. 660 (1962).

⁷³ *Id.* at 667.

⁷⁴ *See Powell*, 392 U.S. at 559–65 (Fortas, J., dissenting).

roduced a status/conduct distinction that is the law today. Importantly, it is this distinction that gives municipalities and states ample room to regulate public conduct in the form of low-level crimes — laws that are foundational to broken windows policing.⁷⁵ And *Wainwright*? The “most significant criminal case of the year” fell into the dustbin of history, playing a role only as a silent counterpoint to *Terry*, the newly crowned “most important [case] in the field of criminal law” — at least according to the *Los Angeles Times* in June of 1968 (p. 218).⁷⁶

In the end, the Court fell prey to the sway of those concerned about crime control, deciding this trio of cases in a way that fundamentally hardwired the role constitutional law can play (or not) to potentially limit police enforcement of low-level criminal law on the street. Which, of course, brings us forty years forward to street policing in U.S. cities.

III. IMPLICATIONS

Taken together, *Terry* and *Papachristou*, theoretically, should have provided a stringent standard for street policing by requiring police officers to have suspicions of real crime (in *Terry* the crime was robbery) and preventing them from relying on probable cause to arrest someone for an offense that they could make up any time they wanted in order to investigate someone.⁷⁷ But the turn toward policing for crime reduction, a relatively new phenomenon in policing driven in part by social science methods that establish clean links between policing techniques and changes in crime rates, rather than simply bringing known offenders to justice, put pressure on law enforcement agencies to engage in proactive policing strategies that relied, at least in part, on tactics such as stop and frisk.⁷⁸ Stopping and frisking people — even many, many people — is a strategy that can theoretically be carried out in alignment with the law outlined in *Terry*, *Powell*, and *Papachristou*. But then there was *Floyd v. City of New York*.⁷⁹

When one reads or hears the words “stop and frisk” today, one likely thinks of policing in New York City.⁸⁰ That is because for several

⁷⁵ See generally Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell in and out of Love with Zimbardo*, 52 J. RES. CRIME & DELINQ. 609 (2015).

⁷⁶ The author quotes John H. Averill, *High Court Approves Parts of Police ‘Stop-and-Frisk’ Tactic*, L.A. TIMES, June 11, 1968, at 1.

⁷⁷ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 369 n.16 (2011).

⁷⁸ See Meares, *supra* note 66, at 336–37.

⁷⁹ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁸⁰ See, e.g., Carrie Johnson, *Clinton, Trump Clash over Stop and Frisk in First Debate*, NPR (Sept. 27, 2016, 4:34 PM), <http://www.npr.org/2016/09/27/495671364/clinton-trump-clash-over-stop-and-frisk-in-first-debate> [https://perma.cc/A6MV-USVW].

years between 2003 and 2011, the number of police stops of individuals (as distinct from the number of people stopped) in New York City increased from 160,851 in 2003 to a peak of 685,724 in 2011.⁸¹ The NYPD's "program" of stop and frisk was stopped in its tracks by Judge Shira Scheindlin in 2013.⁸² "Program" is the operative word here. The practice of a field interrogation accompanied by a brief pat down of a detained person's outer clothing on the basis of an officer's reasonable suspicion that the person was in the process of committing or had committed a crime and was armed was not itself held unconstitutional. *Terry v. Ohio* remains inviolate. Rather, the NYPD's systematic use of stop and frisk as a proactive crime reduction tool was called into question.⁸³

In many ways, the stories told by usually black and brown youth being policed programmatically in cities across the country echo the accounts of vagrancy policing Goluboff offers in her book. For example, Professors Jacinta Gau and Rod Brunson, two sociologists, interviewed youth in St. Louis, Missouri, in order to uncover their relationship with local police, and found that nearly seventy-eight percent of respondents reported being stopped at least once in their lives, with sixteen as the mean number of times stopped.⁸⁴ Gau and Brunson's respondents were particularly distressed about their perception that police targeted them as they engaged in lawful activities.⁸⁵ Similarly, qualitative research from New York reveals strained relationships between Latino youth and the NYPD, fueled by harsh treatment during routine stops and frisks without cause or explanation.⁸⁶ A recent study by Professors Jeffrey Fagan, Tom Tyler, and Amanda Geller provides a nice summary: "[B]eing repeatedly stopped by the police on the street

⁸¹ See *Stop-and-Frisk Data*, N.Y. C.L. UNION (2016), <http://www.nyclu.org/content/stop-and-frisk-data> [<https://perma.cc/2ZSU-6FYC>]; see also Report of Jeffrey Fagan, Ph.D. at 21 tbl.2, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 01034); *id.* at 22 tbl.3 (indicating that of the stops effected between 2004 and 2009, 89% of persons stopped were male, 49% were under the age of twenty-five, and 52% were African American).

⁸² Judge Scheindlin found that the NYPD had engaged in a pattern and practice of unconstitutional stops and frisks. *Floyd*, 959 F. Supp. 2d at 562. Judge Scheindlin found that the NYPD program violated thousands of individuals' rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.*

⁸³ See generally Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015) (explaining and criticizing programmatic stop and frisk).

⁸⁴ See Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 266 tbl.4 (2010).

⁸⁵ See *id.* at 267.

⁸⁶ See Carmen Solis, Edwardo L. Portillos & Rod K. Brunson, *Latino Youths' Experiences with and Perceptions of Involuntary Police Encounters*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2009, at 39, 41.

or in a car led people to experience their direct encounters with the police as both less fair and less lawful.”⁸⁷

This is the world that *Terry* beget. *Terry* legitimizes stops undertaken in the pursuit of crime control.⁸⁸ That is, so long as a police officer has a reasonable belief that the person he or she is about to detain is about to engage or has engaged in a crime, then the stop is constitutional even if the offense for which the officer seeks to detain the person is a very minor offense, unlike the suspected armed robbery in *Terry* itself. And the Court has adopted a number of bright-line rules in the context of stops that provide additional opportunities for the state to make further incursions into individual autonomy and privacy.⁸⁹ Serious criminal justice consequences can easily flow from these encounters even, incredibly, if the encounters are unconstitutional. Consider the Court’s recent decision in *Utah v. Strieff*.⁹⁰

In *Strieff* the Court upheld the conviction of a man based on fruits of a search following his arrest on an outstanding warrant for a traffic violation.⁹¹ Importantly, the warrant was discovered only because the officer had detained the man without reasonable suspicion in violation of the Fourth Amendment and had run a warrant check as a routine procedure.⁹² The Court declined to exclude the evidence as a fruit of an illegal stop⁹³ over vigorous dissents by Justice Kagan (joined by Justice Ginsburg)⁹⁴ and Justice Sotomayor (joined in part by Justice Ginsburg).⁹⁵ Justice Thomas, writing for the Court, claimed among other things that the warrant was “attenuated” from the illegal stop.⁹⁶ Noting a backlog of 180,000 misdemeanor warrants in Utah, Justice

⁸⁷ Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 776 (2014).

⁸⁸ As I explain in a recent article, a key plank of the professionalization of police in the 1960s and 1970s was the notion that officers should seek out offenders rather than wait for victims to report crime and that they should engage in systematic, preventive (rather than responsive) patrol. See Meares, *supra* note 66, at 336. Indeed, after *Terry* was decided, two major proponents of the police role in crime reduction, Professor James Q. Wilson and Barbara Boland, denominated this style of policing “legalistic.” See James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 LAW & SOC’Y REV. 367, 370–71 (1978).

⁸⁹ See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (allowing officer to require driver and passengers to exit their car once a stop is properly made); *Michigan v. Long*, 463 U.S. 1032, 1035 (1983) (allowing officer to search passenger compartment of car for weapons, once an officer has stopped a person and required her to exit her car); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam) (allowing officer to order an individual lawfully stopped for driving without a license plate out of his car).

⁹⁰ 136 S. Ct. 2056 (2016).

⁹¹ *Id.* at 2064.

⁹² *Id.* at 2060.

⁹³ *Id.* at 2064.

⁹⁴ *Id.* at 2071 (Kagan, J., dissenting).

⁹⁵ *Id.* at 2064 (Sotomayor, J., dissenting).

⁹⁶ *Id.* (majority opinion).

Sotomayor laid bare in her dissent how credulous one would have to be to believe that the search following Strieff's arrest was unrelated to Officer Fackrell's desire to investigate him for a drug violation.⁹⁷ Fackrell's sole reason for the search was "investigative,"⁹⁸ so to allow the officer to profit from his unconstitutional stop is deeply, deeply problematic. And the scale of this problem is huge. While clearly not the majority of stops, a not-insignificant number of police stops are unconstitutional.⁹⁹ There is also a documented backlog of outstanding warrants in many jurisdictions, mostly for minor offenses or very old ones.¹⁰⁰

Police claim these kinds of tactics support crime control efforts and therefore justify incursions on individual autonomy and privacy; however, data analyses carried out as part of the *Floyd* litigation undermine this claim. The analyses should motivate us to question the assumption that these tactics are being used to police crime, even in high-crime areas of New York — and, therefore, to question these tactics when they are used in other cities.¹⁰¹ Key to the *Floyd* litigation was the evaluation of the UF-250 forms that NYPD officers were required to complete every time they stopped someone. When filling out

⁹⁷ See *id.* at 2066 (Sotomayor, J., dissenting).

⁹⁸ *Id.*

⁹⁹ One study of 2.8 million stops carried out between 2004 and 2009 in New York City estimates that about 150,000 of them were unconstitutional and more than 500,000 others were questionable. See Report of Jeffrey Fagan, PhD., *supra* note 81, at 4, 18.

¹⁰⁰ For an example, in an amicus brief petitioning the Supreme Court for a writ of certiorari in *Faulkner v. United States*, 636 F.3d 1009 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011), on which I participated, we noted that "[i]n 2007, Pennsylvania had a backlog of approximately 1.4 million unserved warrants, enough to account for 11.3 percent of the state's population," and that "[i]n 2005, Kentucky had a backlog of approximately 265,000 to 385,000 unserved warrants" for mostly minor offenses, "a number that would account for as much as 9.5 percent of the state's population." Brief of Dr. Ian Ayres et al. as Amici Curiae in Support of Petitioner at 9, *Faulkner*, 636 F.3d 1009 (No. 11-235); see also *id.* at 12. "In spring 2011, more than half of approximately 50,000 unserved warrants in Prince George's County, Maryland were for vehicle infractions; only 642 were for serious felonies," *id.* at 11, and "[i]n 2007, 1.2 million of Pennsylvania's backlog of 1.4 million warrants were for lesser offenses, including traffic violations," *id.* at 12. Finally, in many states these outstanding warrants are for very old violations. For example, half of the warrants in Prince George's County we audited were for violations that were more than three years old, and in North Carolina an audit found thousands of warrants dating to the 1970s. *Id.* at 13.

¹⁰¹ Some data suggest there are cities with even higher stop rates than New York had at its highest level. For example, 2009 data indicate that the Philadelphia Police Department made 253,333 pedestrian stops. Robert Moran, *N.Y. Mayor Takes Shot at Philly over Stop-and-Frisk*, PHILA. INQUIRER (May 24, 2012), http://articles.philly.com/2012-05-25/news/31839461_1_homicide-rate-stop-and-frisk-program-homicide-count [https://perma.cc/J4C8-5FKG]. Given Philadelphia's population, these numbers yield an even higher per capita encounter rate than do New York City's. Along with New York and Philadelphia, Chicago is another city where stop and frisk practices have led to an undermining of trust in the community. See Wesley G. Skogan, *Stop-and-Frisk and Trust in Police in Chicago*, in POLICE-CITIZEN RELATIONS: A COMPARATIVE INVESTIGATION OF SOURCES AND IMPEDIMENTS OF LEGITIMACY AROUND THE WORLD (Dietrich Oberwittler & Sebastian Roché eds., forthcoming 2017).

UF-250s, NYPD officers are required to tick reasons for stopping a suspect, such as “casing a location,” “suspicious bulge,” “fits relevant description,” or “furtive movement.”¹⁰² Professor Jeffrey Fagan, an expert for the plaintiff, analyzed 2.8 million of the forms and found that over forty percent of them indicated “furtive movement” as a justification for a stop, and in a substantial subset of these, *only* “furtive movement” was checked off.¹⁰³ It is hard to imagine a scenario in which a person engaging in a “furtive movement” without any other indication of criminal activity could possibly, even if the suspect is moving in this way in a so-called high-crime area, support *Terry’s* clear requirement: “specific reasonable inferences” that criminal activity is afoot as opposed to an “inchoate and unparticularized suspicion or ‘hunch.’”¹⁰⁴

If indications of criminality do not adequately explain NYPD police activity, what does? Fagan’s expert report points to an answer: the racial composition of a neighborhood plus patrol strength allocation by place. Looking again to the UF-250 forms, Fagan compared the number of stops in an enforcement area and the race of the people stopped with the number of stops one would expect to occur in a given area based on crime rates, because if the City’s professed reason for the program was right — more stops in higher crime areas — then that’s what the analysis should reveal.¹⁰⁵ Fagan’s statistical tests showed, however, that crime rates did not explain the NYPD’s stop practices, controlling for population size and race of the relevant area’s population net of other factors such as poverty and education level. Instead, his findings consistently revealed that racial composition of an area predicted stop patterns over and above the contribution made by crime.¹⁰⁶ And in a big surprise, the level of violent crime in an area did not make *any* additional contribution to explain the level of stops in high-crime areas.¹⁰⁷ To summarize, although the NYPD claimed to engage in a strategy to deter gun crimes by deploying officers to places exhibiting the highest crime rates, statistical analysis indicates that the Department blanketed certain neighborhoods with patrols and directed those officers to “the right people,” justifying this policy choice by self-referential statistics indicating that large percentages of New Yorkers

¹⁰² *Floyd v. City of New York*, 959 F. Supp. 2d 668, 668 (S.D.N.Y. 2013).

¹⁰³ Report of Jeffrey Fagan, PhD., *supra* note 81, at 4, 18, 51.

¹⁰⁴ *Terry v. Ohio*, 392 U.S. 1, 27 (1968); see Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 51–88 (2015) (systematically analyzing how police construct their notion of suspicion during stops and calling into the question the possibility of constitutional constraint on these dynamics given structural work pressures).

¹⁰⁵ Report of Jeffrey Fagan, PhD., *supra* note 81, at 30.

¹⁰⁶ *Id.* at 32–34.

¹⁰⁷ *Id.* at 34.

arrested for gun crimes were black or Hispanic.¹⁰⁸ The policy amounted to stopping large numbers of people of color “in general” for the stated purpose of preventing crime.¹⁰⁹

“Stopping the right people” sounds an awful lot like policing “people out of place,” but it is difficult to see how a different path to vagrancy’s demise would have averted this end. Near the end of her book Goluboff says:

[T]he loss of vagrancy authority has made it harder to regulate all kinds of people: men whose children receive welfare because they do not provide for them; women and transwomen suspected of but not obviously engaged in prostitution; migrant farmworkers seeking legal or medical services; free speakers occupying public parks; day laborers gathering in public spaces in the hope of finding work; minority teens whose sartorial choices are found offensive and symbolically dangerous. (p. 342)

As I read this list and reflected on the categories given my experience studying policing in general and proactive policing in particular, I admit that I could not understand the conclusion that the demise of vagrancy has protected the specific groups of people listed here. In almost every case, I could think of, or point to, existing strategies or tactics sanctioned by *Terry* and low-level crime-making under *Powell* to which each of these groups could be or regularly is in fact subject. It is true that there is greater transparency regarding these practices, but I wonder whether that is as much a factor of police management practices as it is of clarity of the ordinances the officers utilize in their day-to-day work.

The negative consequences of this kind of policing carried out in the name of crime reduction are stark. As President Obama noted when he convened his Task Force on Twenty-First Century Policing in December of 2014 just after the social unrest that followed Eric Garner’s death at the hands of New York City police officers in Staten Island, “[w]hen any part of the American family does not feel like it is being treated fairly, that’s a problem for all of us It means [we’re] not as strong as a country as we can be. And when applied to the criminal justice system, it means we’re not as effective in fighting crime as we could be.”¹¹⁰ In making this statement, the President was relying on decades of social science research indicating that trust and perceptions of legitimacy of legal authorities are key factors in promoting law abidingness, cooperation and civic engagement.¹¹¹ We know

¹⁰⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 680 (S.D.N.Y. 2013).

¹⁰⁹ *Id.*

¹¹⁰ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 5 (2015), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf [https://perma.cc/S928-5UAB].

¹¹¹ See Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L.J.F.* 525, 529–48 (2014) (summarizing research); see also Tom R. Tyler &

from this research that people place much more weight on *how* authorities exercise their power than on the ends for which that power is exercised. Procedural justice turns out to be the key in determining whether the public will conclude that legal authorities behave fairly.¹¹² Four factors matter.¹¹³ First, participation and voice are critical. People report higher levels of satisfaction in encounters with authorities when they have an opportunity to explain their situation and perspective on that situation, and research makes clear this opportunity matters even when people are aware that their participation will not impact the outcome; they nonetheless want to be taken seriously and listened to. Second, people care a great deal about the fairness of decisionmaking by authorities. That is, they look to indicia of decisionmaker neutrality, objectivity and factuality of decisionmaking, consistency in decisionmaking, and transparency. It is important that, in an interaction with a member of the public, a legal authority take the time to explain what he or she is doing and why. Third, people care a great deal about how they are treated by legal authorities such as police officers. Specifically, people desire to be treated with dignity, with respect for their rights, and with politeness. Note, however, that procedural justice cannot simply be condensed into this one single factor.¹¹⁴ Fourth, in their interactions with authorities, people want to believe that authorities are acting out of a sense of benevolence toward them. That is, people attempt to discern why authorities are acting the way they do by assessing how they are acting. They want to trust that the motivations of the authorities are sincere, benevolent, and well intentioned. Basically, members of the public want to believe that the authority they are dealing with believes that they *count*. And the public makes this assessment by evaluating how the police officer treats them. These social psychological interpretations of fairness and digni-

Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 78–95 (2013).

¹¹² See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 115–24, 174–78 (2006); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 747–58 (2003).

¹¹³ For a summary of this research as it pertains to policing, see Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing — And Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013).

¹¹⁴ Too often police officials conflate the idea of simply being polite to citizens with pursuing procedural justice principles. So do scholars. See, e.g., CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 114–33 (2014) (arguing that Tyler’s theory of procedural justice is inadequate because African American drivers complained about interactions with police even when police acted politely during encounters). This assessment does not account for other factors of procedural justice in that Epp’s own findings can be interpreted to demonstrate that African American motorists can recognize the difference between being stopped for good reasons and bad (or no reason at all), an issue clearly consonant with the fair decisionmaking factor of procedural justice. See Meares, *supra* note 66, at 345–46.

ty are not referenced very much, at least explicitly, by constitutional criminal procedure. In a recent study, Tom Tyler, Jacob Gardener, and I show that the public does not define lawfulness or determine sanctioning through the same lens of legality that police and other legal authorities use. Instead they appear to rely on the determinants of procedural justice to come to conclusions about *perceived* legality that are actually disconnected from the way in which lawyers would make these judgments.¹¹⁵

Perhaps this disconnect drives my deep skepticism about Justice Douglas's commitments to an approach to promoting fundamental freedoms to pursue a nonconforming lifestyle as a way to regulate police encroachment. I find a misfit between his celebration of night-walking and railriding, and the social psychological research that emphasizes equality of respectful treatment and fair decisionmaking for all people whether or not they are nonconforming in the sense Justice Douglas seems to be especially interested in. How exactly does a celebration of hobo life lead the Court to an articulation of a constitutional doctrine that makes clear that all citizens deserve to be treated as if they count?

Justice Douglas's view is a prominent part of the last few chapters of *Vagrant Nation* that I have not yet summarized. Chapter Seven on "Hippies, Hippie Lawyers, and the Challenge of Nonconformity" turns from the Court's struggle with limiting police discretion to make up reasons to engage people through vagrancy law, while continuing to provide police with adequate tools for addressing rising crime that we saw in Chapter Six, to its anxiety about extending substantive due process under the "ghost of *Lochner*" in cases like *Griswold* (p. 247). Chapter Eight on antiwar protests highlights the Court's interest in free speech as it attempted to walk the line between allowing protests and making urban life livable. Goluboff writes that Justice Douglas had the opportunity to distill his ideas about what the 1960s meant in *Papachristou*:

To the very end of his life, Douglas believed that of all his opinions in thirty-six years on the Court, *Papachristou* best captured his view of the essence [of] the long 1960s, the American spirit, and his own constitutional vision. . . . When he died . . . Douglas left specific instructions for his funeral [that] included the singing of Woody Guthrie's "This Land Is Your Land" The Senate chaplain who eulogized Douglas quoted the justice's explanation for that choice: it represented "many of the freedoms that are explicit or implicit in the Constitution, such as the right to move from place to place In other words, it expressed the vagrancy issue

¹¹⁵ See generally Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful Or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 297-344 (2015).

as I have expressed it and as it has become *ingrained in the law*.” (p. 330)¹¹⁶

Even at the end of his life, Justice Douglas behaved as if he had won, but, sadly, his vision, while perhaps a limitation of the type of ordinance a legislative body might pass, seemingly is no real limitation on police power.

Does this mean there is little to the vision that Justice Douglas celebrates in Guthrie’s anthem? I had thought so until I had the opportunity to listen to the Sharon Jones and the Dap-Kings version of *This Land Is Your Land*.¹¹⁷ Jones and the Dap-Kings were a throwback soul revival group that used vintage instruments and recorded on tape and not digitally. Jones, who recently passed away after a battle with cancer, was the powerhouse frontwoman for the band. She was born in Georgia and migrated up to New York City with her parents and five siblings in 1960.¹¹⁸ Jones’s version of Guthrie’s tune has lyrics that reference welfare offices, Georgia, Mississippi, Houston, and Philadelphia — suggesting the travels of African Americans from the South to urban centers during the Great Migration. And, rather than asserting that this land was “made for you and me,” as Guthrie did in the original, Jones wonders:

One bright sunny morning, well, in the shadow of a steeple
Down by the Welfare office, I saw my people
You know, now, they stood hungry, I stood wondering
I was *wondering if* this land was made for you *and* me.¹¹⁹

Jones’s rendition captures, I think, not only my skepticism of Justice Douglas’s vision, but also his hope.

¹¹⁶ Emphasis has been added. The author quotes Rev. Edward L. R. Elson, S.T.D., In Memoriam, *Funeral Remarks in Tribute to William O. Douglas*, 29 AM. U. L. REV. 2, 3 (1980).

¹¹⁷ This is a uniquely moving rendition that must be heard to be appreciated. SHARON JONES & THE DAP-KINGS, *THIS LAND IS YOUR LAND* (Daptone Records 2005), <https://soundcloud.com/daptone-records/sharon-jones-the-dap-kings-this-land-is-your-land> [<https://perma.cc/CQ43-8YMD>].

¹¹⁸ See Jon Pareles, *Sharon Jones, Powerhouse Soul Singer, Dies at 60*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/20/arts/music/sharon-jones-dap-kings-dead.html> [<https://perma.cc/L5ZW-YQ3Z>].

¹¹⁹ *Sharon Jones and the Dap-Kings, This Land Is Your Land*, GENIUS (emphasis added), <http://genius.com/Sharon-jones-and-the-dap-kings-this-land-is-your-land-lyrics> [<https://perma.cc/A42J-ECCZ>]. Emphasis has been added here to highlight that Jones questions whether the song is really about American commitment to equality for everyone. Guthrie makes the tune a statement. Jones asks the question.