STATUTORY INTERPRETATION — VOID FOR VAGUENESS DOCTRINE — D.C. CIRCUIT HOLDS THAT D.C. STATUTE IS NOT UNCONSTITUTIONALLY VAGUE. — *Agnew v. Government of the District of Columbia*, 920 F.3d 49 (D.C. Cir. 2019).

Statutory language is often dense and difficult to decipher, particularly for those without legal training. The Supreme Court has stated that if a statute's text is too broad or vague, it may violate the Constitution.[1] This, of course, raises the question: What makes a statute too vague? There are two grounds on which courts can determine that a statute is unconstitutionally vague: first, if the statute does not give individuals adequate notice of the prohibited conduct, or second, if it grants too much discretion to law enforcement and is therefore susceptible to arbitrary and discriminatory enforcement.[2] Recently, in *Agnew v. Government of the District of Columbia*,[3] the D.C. Circuit upheld a District of Columbia statute prohibiting "crowd[ing], obstruct[ing], or incommod[ing]" public spaces against a challenge for vagueness.[4] The D.C. Circuit's analysis of the statute was flawed because it failed to consider the text in light of its practical potential for discriminatory enforcement, contrary to Supreme Court precedent. And, ironically, the court's purely textual analysis introduced a deeply normative and socially contingent standard for assessing proper use of public space, which may itself lead to discriminatory and arbitrary enforcement that has disproportionate effects on communities of color.

Alex Dennis, Daryl Agnew, and Rayneka Williamson were each arrested in three unrelated incidents for violating a D.C. statute that makes it illegal to obstruct a public space once a law enforcement officer has instructed that the person move on.[5] All three plaintiffs are black.[6] The statute, as amended in 2013, makes it unlawful for individuals to "crowd, obstruct, or incommode" any street, road, sidewalk, or other public way and to "continue or resume the crowding, obstructing, or incommoding" after being ordered by an officer to stop.[7] Under this

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[1] The Supreme Court set out the requirement that statutes not be unconstitutionally vague as early as the late nineteenth century. *See* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 268 (2010).

[2] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[3] 920 F.3d 49 (D.C. Cir. 2019).

[4] *Id.* at 56.

[5] *Id.* at 52–53.

[6] Second Amended Class Action Complaint at 5, Agnew v. Gov't of D.C., 263 F. Supp. 3d 89 (D.D.C. 2017) (No. 15-cv-340).

[7] D.C. CODE ANN. § 22-1307(a) (West 2020). The previous version of the statute was interpreted to apply only to groups of people who congregated and assembled for an unlawful purpose and to individuals who threatened the public peace. *See Agnew*, 920 F.3d at 52–53.

statute, individuals can be arrested only if they do not comply with the order.[8]

On November 26, 2014, Alex Dennis was preparing for a Thanksgiving celebration when he stepped out of his apartment on Buena Vista Terrace and onto a ramp for some air.[9] Police officer Vincent Norris drove up and yelled at Dennis and another man to leave; when Dennis refused to move, Norris arrested him, and he was later charged with violating the anti-obstruction statute.[10]

On Christmas Eve 2014, Daryl Agnew was standing outside a home on Buena Vista Terrace with the mother of his child and a friend, smoking a cigarette.[11] The same Officer Norris approached and ordered them to leave the area.[12] Agnew argued that he had the right to be there, but he was arrested for violating the anti-obstruction statute.[13] The police report alleged that Agnew and his friend "were standing in a manner that would cause a citizen or citizens trying to utilize the walkway to deviate from their path of walking."[14]

On February 4, 2015, Rayneka Williamson was standing on the sidewalk on Martin Luther King, Jr. Ave., S.E., when a police officer asked her to move because she was disrupting the flow of pedestrian traffic.[15] Approximately half an hour later, the officer arrested Williamson for violating the anti-obstruction statute after local merchants complained about her presence and after pedestrians allegedly had to maneuver around her on the sidewalk.[16]

The charges in all three cases were dismissed for want of prosecution.[17] The plaintiffs then brought suit under 42 U.S.C. § 1983 against the government of the District of Columbia, challenging the facial constitutionality of the statute.[18] The plaintiffs challenged the statute only "under the second prong of the vagueness doctrine," alleging that it was unconstitutionally vague because it "fail[ed] to guide enforcement discretion."[19]

The District of Columbia moved to dismiss the complaint for failure to state a claim.[20] The district court granted that motion, reasoning that

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[8] *Agnew*, 920 F.3d at 53.

[9] *Id.* at 53–54; *Agnew*, 263 F. Supp. 3d at 92–93.

[10] *See* Second Amended Class Action Complaint, *supra* note 6, at 23.

[11] *Agnew*, 263 F. Supp. 3d at 92; Second Amended Class Action Complaint, *supra* note 6, at 17.

[12] *See* Second Amended Class Action Complaint, *supra* note 6, at 17.

[13] *Agnew*, 263 F. Supp. 3d at 92.

[14] *Id.* (quoting Third Amended Complaint at 12, *Agnew*, 263 F. Supp. 3d 89 (No. 15-cv-340) (D.D.C. 2017)).

[15] *Id.* at 93.

[16] *Id.*

[17] *Agnew*, 920 F.3d at 53.

[18] *Id.* at 53–54.

[19] *Id.* at 54.

[20] *Agnew*, 263 F. Supp. 3d at 91, 98.

when a statute is challenged for vagueness on its face, the "critical factor" in determining unconstitutionality "is whether the statute is drafted in such a manner that it necessarily vests the determination of whether the law has been violated upon a purely subjective judgment."[21] The court found that the determination in this case was not purely subjective because under the language of the statute, deciding whether a violation occurred required only an objective judgment.[22] Having found no qualifying violations of the plaintiffs' constitutional rights, the court dismissed their § 1983 claims.[23]

The plaintiffs appealed to the D.C. Circuit, which affirmed in a decision written by Judge Pillard.[24] The court reasoned that under *Papachristou v. City of Jacksonville*,[25] a law invites arbitrary and discriminatory enforcement when it does not provide standards to govern law enforcement officers' discretion.[26] However, the court held that the language of the statute made it "readily apparent" that the statute prohibited "block[ing] or hinder[ing] other people's ability to pass through or use a common space."[27]

Judge Pillard began her analysis by using traditional tools of statutory construction. She pointed out that the word "incommode," despite having both a subjective and an objective meaning, did not render the statute vague, because when read in context with "crowd" and "obstruct," it was clear that the statute was directed at individuals hindering the passage of others.[28] The court cited both the *noscitur a sociis* canon and the Oxford English Dictionary definitions of "crowd" and "obstruct" to clarify the context in which the word "incommode" should be read.[29] Judge Pillard reasoned that the three words were "mutually reinforcing terms that together reach the kinds of blocking the [D.C.] Council deemed problematic."[30]

In the course of determining that the statute was not vague, the court found that it only punished conduct affecting other members of the public, and thus was violated only by "actual or imminent obstruction" of another individual.[31] It indicated that the statute, "read with a dose of common sense," was violated only if a person occupied more than their

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[21] *Id.* at 97.
[22] *See id.*
[23] *Id.* at 98.
[24] *Agnew*, 920 F.3d at 51–52. Judge Pillard was joined by Judges Tatel and Sentelle.
[25] 405 U.S. 156 (1972).
[26] *Agnew*, 920 F.3d at 55.
[27] *Id.* at 56–57.
[28] *See id.*
[29] *Id.*
[30] *Id.* at 57.
[31] *Id.* at 58.

"fair share" of a public space.[32] In response to allegations that the statute criminalized inadvertent conduct, the court observed an individual incurred liability only upon ignoring an officer's order.[33]

Judge Pillard then briefly disposed of three of the plaintiffs' arguments. The court first rejected plaintiffs' contentions that the statute was vague because it predicated liability on the subjective reactions of third parties, reasoning instead that an officer need only make objective determinations.[34] Second, addressing a claim that the move-on provision impermissibly enhanced discretion, the court recognized that a move-on order could not cure a facially vague statute because such orders would themselves represent an exercise of "unguided discretion."[35] However, this point was moot because the statute was not vague.[36] Finally, Judge Pillard responded to the plaintiffs' allegations that the anti-obstruction statute was being enforced in a racially discriminatory manner.[37] She stated that though the plaintiffs' behavior, "correctly understood," appeared to fall outside the scope of the anti-obstruction statute, the plaintiffs had not brought a claim of racially discriminatory prosecution.[38]

The court concluded by addressing whether the anti-obstruction statute was defective under the Due Process Clause for lack of a mens rea requirement.[39] It reasoned that the inclusion of a move-on provision ensured that "anyone arrested . . . has at least a reckless state of mind," and therefore the lack of an explicit mens rea requirement in the statute itself was not a deficiency.[40] Further, the court explained that public-welfare offenses, including those regarding public obstruction, do not always require mens rea.[41]

The D.C. Circuit's flawed application of the vagueness doctrine led the court to uphold the statute, leaving police officers with excessive discretion that may encourage arbitrary and discriminatory enforcement. The court's analysis employed traditional canons of interpretation, but failed to assess the statute's language in light of its potential for discriminatory enforcement, contrary to Supreme Court precedent. Even more troubling, the court's analysis introduced a subjective enforcement standard: whether an individual is occupying more than

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[32] *Id.*

[33] *See id.* at 58–59.

[34] *See id.* at 59.

[35] *Id.* at 60.

[36] *Id.* The court also dismissed the plaintiffs' argument that the statute was vague because it did not specify how far an individual must go when a law enforcement officer gives a move-on order. *Id.* Looking to the text of the statute, Judge Pillard noted that individuals need not "move on" at all, but instead must simply stop blocking the use of the public space. *Id.*

[37] *Id.*

[38] *Id.*

[39] *See id.* at 61.

[40] *Id.*

[41] *See id.* (citing Morissette v. United States, 342 U.S. 246, 254–56, 254 n.14 (1952)).

their "fair share" of space. This standard is particularly problematic because the facts of these cases, in combination with the demographics of the affected neighborhoods and individuals, give reason to believe that the law is enforced disproportionately against communities of color. Introducing a subjective standard for determining when the law has been violated may open the door to further discriminatory application.

The Supreme Court has made clear that the arbitrary and discriminatory enforcement prong of the vagueness doctrine is coequal with, if not more important than, the fair notice prong. On fair notice, the Court stated as early as 1876 that "[i]f the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."[42] Though members of the Court first raised the specter of arbitrary and discriminatory enforcement in the context of vagueness challenges in the mid-twentieth century,[43] the Court only began to consider it as coequal with the problem of fair notice in *Papachristou*.[44] Writing for the Court, Justice Douglas discussed the critical problem of arbitrary and discriminatory enforcement: a vague statute criminalizes activity that can easily be considered either innocent or suspect.[45] He illustrated the potentially disparate application of such a statute by showing that the statute at issue could easily be read to criminalize activity at "golf clubs and city clubs."[46] Furthermore, he argued that vague statutes become tools for the police to both punish assumed future criminality and target disfavored groups.[47] This was the case in *Papachristou*, in which the plaintiffs included two black men and two white women charged with vagrancy for "prowling by auto."[48] Subsequent Supreme Court cases

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[42] United States v. Reese, 92 U.S. 214, 220 (1876).

[43] *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 287–88 (2003).

[44] *See, e.g.*, *id.* at 288; Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 827 (2008).

[45] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 163–64, 170–71 (1972). Some scholars note that Justice Douglas initially planned to strike down the statute on substantive due process grounds because it implicated a fundamental right to "walk, stroll, or loaf." Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 92 (2014) (quoting 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, 1381 (2010)).

[46] *Papachristou*, 405 U.S. at 164.

[47] *See id.* at 170–71.

[48] *Id.* at 158.

have recognized that the arbitrary and discriminatory enforcement prong is the more important inquiry.[49]

In performing an analysis under the arbitrary and discriminatory enforcement prong, courts typically conduct not only a textual assessment of a law, but also a practical assessment of the amount of discretion that the law affords to police officers.[50] For example, in the second-prong analysis in *City of Chicago v. Morales*,[51] the Supreme Court first asked whether the statute "reach[ed] a substantial amount of innocent conduct."[52] After determining that it did, the Court looked to the language of the statute.[53] Unlike in *Agnew*, neither the Supreme Court nor the lower court conducted a dictionary analysis,[54] but instead asked whether criminalizing loitering with "no apparent purpose" granted police too much discretion because of the term's subjectivity.[55] These cases recognize that under the second prong of the vagueness doctrine, a proper textual analysis does not consider a law's language in isolation, but in light of its potential for discretionary and discriminatory enforcement.

In *Agnew*, the D.C. Circuit focused only on the specificity of the statutory text and precedents upholding similar statutes in deciding that the law was valid.[56] The court analyzed the three words describing the prohibited conduct using the Oxford English Dictionary, and discussed the potential shift or clarification of meaning when the words are read in context with each other.[57] As the court noted, statutes prohibiting similar activity, including ordinances prohibiting blocking sidewalks or obstructing traffic, have been upheld in the past.[58]

In focusing solely on the apparent specificity of the text, the court not only gave short shrift to the practical discretion that the statute grants to police officers — a consideration that cases like *Morales* appear to require — but also introduced a highly subjective enforcement standard. The D.C. Circuit found that the statute did not cover innocent conduct, but was violated only by "actual or imminent obstruction of

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[49] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("[T]he 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, 574 (1974))).

[50] *See, e.g.*, *id.* at 358–60; Lewis v. City of New Orleans, 415 U.S. 130, 135–36 (1974) (Powell, J., concurring in the result); *Smith*, 415 U.S. at 575 (holding that the phrase "treats contemptuously" had a wide enough range of interpretation that it was unconstitutionally vague).

[51] 527 U.S. 41 (1999).

[52] *Id.* at 60.

[53] *Id.*

[54] *See id.* at 60–64; City of Chicago v. Morales, 687 N.E.2d 53, 63–64 (Ill. 1997).

[55] *See Morales*, 527 U.S. at 62; *Morales*, 687 N.E.2d at 63.

[56] *See Agnew*, 920 F.3d at 56.

[57] *See id.* at 56–57.

[58] *See id.* at 56 (first citing Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965); and then citing Cameron v. Johnson, 390 U.S. 611, 612 n.1, 615 (1968)).

another person."[59] The court reasoned that the innocent behavior of walking on the sidewalk or picnicking and the "bare physical displacement of others" that results was not prohibited.[60] It was only when an individual appropriated "more than his fair share" of public space that the statute was violated.[61] The court's use of "common sense" to interpret the language of the statute thus created a subjective standard for violation: an individual's "fair share" of a public place.[62] Determining whether someone is occupying "more than [their] fair share of space" is a subjective and socially weighted judgment. Under this interpretation, a police officer can order virtually any individual in a public place to move on, based on the officer's subjective judgment that such individual is occupying more than their fair share of public space.[63] That the plaintiffs in this case were not actually in violation of the statute[64] illustrates that the statute was unclear to police officers, and that they interpreted it as giving them leeway to arrest individuals like the plaintiffs.

The failure to recognize the excessive discretion granted to police officers under the anti-obstruction statute, and the introduction of a highly normative standard for interpreting and enforcing it, are additionally problematic because the statute is already ripe for discriminatory enforcement. The same police officer arrested both of the black male plaintiffs in the case, and was allegedly known for issuing citations to other black individuals on the basis of the anti-obstruction statute.[65] Both male plaintiffs were arrested in the same neighborhood, on the very same block.[66] The court itself conceded that none of the three plaintiffs were actually obstructing a public way; in all three cases, there was adequate room to get around the plaintiff.[67] All three arrests took place in Ward 8,[68] the population of which was 93.5% black in 2010.[69]

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[59] *Id.* at 58.

[60] *Id.*

[61] *Id.*

[62] *Cf.* City of Chicago v. Morales, 527 U.S. 41, 61–62 (1999) (finding that a statute criminalizing loitering "with no apparent purpose," *id.* at 61, was unconstitutionally vague because having an "apparent purpose" is a subjective determination).

[63] *See, e.g.*, Justin Louis Mann, *What's Your Emergency? White Women and the Policing of Public Space*, 44 FEMINIST STUD. 766, 769–70 (2018).

[64] *See Agnew*, 920 F.3d at 60 ("The conduct [the plaintiffs] describe would appear to fall outside the scope of the statute, correctly understood.").

[65] *See* Second Amended Class Action Complaint, *supra* note 6, at 17.

[66] *See id.*

[67] *See Agnew*, 920 F.3d at 54.

[68] *Compare* Second Amended Class Action Complaint, *supra* note 6, at 17, 22, 25 (listing addresses at which plaintiffs were arrested as 3146 Buena Vista Terrace, S.E., 3130 Buena Vista Terrace, S.E., and 2403 Martin Luther King, Jr. Ave., S.E.), *with What's My Ward?*, D.C. GOV'T OFF. PLAN., https://planning.dc.gov/whatsmyward [https://perma.cc/5MH3-4ENM] (showing that all three addresses are in Ward 8).

[69] JOY PHILLIPS, D.C. STATE DATA CTR., MONTHLY BRIEF 2 (Feb. 2012) (reporting figures from the census).

The D.C. Office of Police Complaints also issued a report about the statute before the plaintiffs appealed, detailing that there had been fourteen complaints alleging harassment by D.C. police officers since its enactment.[70] Out of the nine complainants who identified their race, eight were black or members of another minority group.[71] This evidence, though circumstantial, indicates that despite the fact that the D.C. Circuit has determined that the statute is not facially vague, it has been enforced disproportionately against black citizens. Likely constrained by the purely facial challenge before it, the D.C. Circuit's analysis of the statute failed to acknowledge that both the broad range of innocent conduct covered and the subjectivity inherent in determining whether a person is occupying more than their fair share of public space enable police to arbitrarily target disfavored groups.

Thus, the D.C. Circuit misapplied the vagueness doctrine by failing to analyze the statute's text in light of practical opportunities for excessive discretion, and, more importantly, introduced a subjective and socially weighted standard of enforcement. In doing so, the court not only upheld a statute that enables arbitrary and discriminatory application of the law — contrary to the principles and goals of the doctrine — but may also have strengthened its potential for such misuse. Defending individuals from arbitrary enforcement of vague laws is a principal purpose of vagueness inquiries. Loitering and obstruction statutes have historically used broad language that lends itself to such arbitrary and discriminatory enforcement against disfavored populations.[72] The *Agnew* plaintiffs did not get relief from their facial challenge to the law, leaving them with the option of challenging the discriminatory enforcement itself.[73] These individual enforcement suits are insufficient to protect the broader population that is subject to arbitrary and discriminatory enforcement under the statute.

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[70] POLICE COMPLAINTS BD., OFFICE OF POLICE COMPLAINTS, GOV'T OF D.C., PCB POLICY REPORT #17-3: BLOCKING PASSAGE 3–4 [hereinafter PCB POLICY REPORT #17-3]. Though fourteen is not a large number, there are powerful reasons why individuals may choose not to report an incident of police harassment, including a perceived likelihood that the complaint will not be successful. *See* John L. Worrall, *If You Build It, They Will Come: Consequences of Improved Citizen Complaint Review Procedures*, 48 CRIME & DELINQ. 355, 358 (2002) (discussing studies regarding complaint success rates and citizens' perceptions of the complaint process).

[71] PCB POLICY REPORT #17-3, *supra* note 70, at 4.

[72] *See, e.g.*, Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 782–86 (1999).

[73] *See Agnew*, 920 F.3d at 60.