Chapter 2: Constitutional Limitations

Chapter Overview:

The Constitution of the United States puts limits on the powers of the federal and state governments. These include the prohibition of bills of attainder and *ex post facto* laws, and the requirements for statutory clarity, equal protection, freedom of speech, and privacy. The illegality of bills of attainder and *ex post facto* laws reflect the concept of the rule of legality, expressed by the latin phrase *nullum crimen sine lege, nulla poena sine lege,* or "no crime without law, no punishment without law."

Bills of attainder are acts of the legislature that impose punishment on a specific individual or individuals without a trial. *Ex post facto* laws seek to punish the commission of a crime that occurred before the law took effect. Applying both of these concepts, "no crime without law, no punishment without law" means that if a law is not in place to prohibit an act at the time the act is committed, then the act cannot be considered criminal, nor be punished, even if legislation is later passed that criminalizes the act in question.

The ideal of the rule of legality is also carried out by the requirement for statutory clarity, whose aim is to avoid unclear legislation that could lead to uncertainty as to whether an act was against a written law at the time of its commission. A similar concept is the voidfor-vagueness doctrine that limits vague statutes in cases where constitutional liberties are in danger.

The Constitution now also puts a requirement on the government to uphold an equal protection of the laws. This was not always the case, however. It was not until after the civil war that Congress added the equal protection clause to the Constitution, and it was not until many years later that the amendment was regularly invoked. Despite the importance of the equal protection clause, statutes continue to make distinctions based on factors such as age of the perpetrator and the seriousness of the crime, as long as such distinctions serve a legitimate purpose. Such statutes are subject to a minimum level of scrutiny with regards to constitutionality.

Some statutes make distinctions based on race or nation of origin. Because the danger of racial discrimination instills a rational fear in lawmakers, these types of distinctions are subject to strict scrutiny. For statutes that make distinctions based on gender the court utilizes an intermediate level of scrutiny. The reasoning behind this intermediate scrutiny is that the biological differences between the genders increases the probability that such distinctions will serve legitimate purposes.

The First Amendment to the Constitution prohibits the government from interfering with an individual's rights to free speech, peaceable assembly, and petition for redress. There are certain types of speech, however, which are not protected by the First Amendment. These include such things as incitement to illegal action, obscenity, and libel. Two important challenges lawmakers face with regard to the First Amendment are overbreadth and hate speech. The doctrine of overbreadth prohibits legislation that limits an excessive amount of free speech. Hate speech keeps lawmakers questioning what kinds of speech should be protected. In this chapter of the

Florida supplement you will see how Florida's statutes and case law uniquely reflect the issues of these constitutional limitations.

I. The Rule of Legality

Section Introduction: The rule of legality asserts that there can be no crime or punishment without law. This means that if a defendant can show that there was either no law prohibiting their action at the time of its commission or that the law was insufficient to clearly define their action as criminal, then they cannot be held accountable for the behavior. The case below addresses how this rule has been applied in Florida.

State v. Anderson, 764 So.2d 848, (2000)

Procedural History: Defendant was charged with unlawful possession of firearm by convicted felon. The Circuit Court, Monroe County, Richard S. Payne, J., granted defendant's motion to dismiss, and state appealed. The District Court of Appeal held that statute making it unlawful for person who has been convicted of felony to possess firearm did not require actual use by convicted felon.

Issue(s): Whether Florida Statute, section 790.23(1), prohibiting felons from possession of a firearm requires "use of a firearm."

Facts: Anderson filed a verified motion to dismiss the information in count one, averring in pertinent part that he never "used" the firearm. He argued that he was entitled to dismissal because he was permitted to possess the firearm at his place of business pursuant to section 790.25(3)(n), Florida Statutes (1997), which the legislature stated should be liberally construed. He further argued that section 790.25(2)(b)(1), providing that the protections of the section did not apply to a person "using" a firearm in violation of section 790.23, did not apply to the facts of this case because he was not charged with "using" a firearm. The State filed a traverse and demurrer, claiming that Anderson was in possession of the firearm and that "use" was not required by section 790.23. The trial court granted Anderson's motion to dismiss the count for violation of section 790.23(1) due to the operation of section 790.25, because Anderson was not "using" a firearm, but merely possessing one.

Holding: Reversed and remanded.

Opinion: PER CURIAM.

The State appeals from the lower court's order dismissing one count of an information charging Thomas Anderson with unlawful possession of firearm by a convicted felon under section 790.23(1), Florida Statutes (1997). We reverse.

We conclude that the trial court erred in granting the motion. Section 790.25 protects the rights of citizens in Florida to lawfully own and possess firearms. However, within this section the Legislature has also made an express declaration of public policy that "it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime...." §

790.25(1), Fla. Stat. (1997). In keeping with this declaration, section 790.25(2) specifies uses not authorized, which include, in pertinent part:

> (b) The protections of this section do not apply to the following:
> 1 .... a person using weapons or firearms in violation of ss. 790.07-790.12, 790.14-790.19, 790.22-790.24;

Section 790.23 states in pertinent part:

> (1) It is unlawful for any person to own or have in his or her care, custody, possession, or control any firearm or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:
> (a) Convicted of a felony in the courts of this state

Whenever possible, courts must give effect to all statutory provisions and construe related provisions in harmony with one another. *[See Unruh v. State,* 669 So.2d 242, 245 (Fla.1996)] The cardinal rule of statutory construction is that a statute should be construed to give effect to the intention the legislature expressed in the statute. *[See City of Tampa v. Thatcher Glass Corp.,* 445 So.2d 578, 579 (Fla.1984)] For a court to hold otherwise would make the obvious mandate of the legislature subservient to the discretion of the court. *[See Ellis v. State,* 622 So.2d 991, 1001 (Fla.1993)] To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute. *[See McKibben v. Mallory,* 293 So.2d 48, 52 (Fla.1974); *Hinn v. Beary,* 701 So.2d 579, 581 (Fla. 5th DCA 1997)]

Section 790.23 is intended to protect the public from persons, who, because of their past conduct, have demonstrated they are unfit to be trusted with dangerous instruments such as firearms. *[See State v. Snyder,* 673 So.2d 9, 10 (Fla.1996); *Nelson v. State,* 195 So.2d 853, 855 n. 8 (Fla.1967)] The evil contemplated by section 790.23 is clearly the prevention of the possession and the use of firearms by convicted felons. Anderson argues that, given the legislative intent in section 790.25(4) that the section be construed liberally, and the express permission for a person to possess arms at his or her home or place of business under section 790.25(3)(n), a convicted felon should be allowed to possess a firearm as long as he does not use it, in spite of the clear language in section 790.23(1)(a). To reach this result would not only frustrate the intent of section 790.23(1)(a), but render it meaningless. It is axiomatic that the legislature does not intend to enact purposeless and useless legislation. *[See Unruh,* 669 So.2d at 245] Statutes will not be interpreted to create absurd results. *[See State v. Iacovone,* 660 So.2d 1371, 1373 (Fla.1995); *Carnes v. State,* 725 So.2d 417, 418 (Fla. 2d DCA 1999); *United Auto. Ins. Co. v. Viles,* 726 So.2d 320, 321 (Fla. 3d DCA 1998); *Badaraco v. Suncoast Towers v. Assocs.,* 676 So.2d 502, 503 (Fla. 3d DCA 1996)]

Section 790.23 clearly states that it is unlawful for any convicted felon to have in his or her care, custody, possession or control of a firearm. One cannot use a firearm without having it in his or her care, custody, possession or control. Anderson's claim that a violation of section 790.23 requires actual "use" is mere semantics, violates all common sense and frustrates the declared public policy to keep weapons out of the hands of criminals expressed in section 790.25(1).

Accordingly, we reverse the dismissal of count one of the information and remand for trial.

Critical Thinking Question(s): In this case, there clearly was a law on the books making it a crime for felons to possess a firearm. Do you believe the rule of legality was created primarily to address crimes that are not listed in statutes? How does defendant develop his argument that felons can possess firearms when it appears to be spelled out plainly in the statute? Is it proper for courts to consider other statutes when interpreting the meaning and/or legislative intent of another statute? Explain.

II. Bills of Attainder and *Ex Post Facto* Laws

Section Introduction: Both bills of attainder and *ex post facto* laws are prohibited by the rule of legality. Bills of attainder are disallowed because they only seek to punish a specific individual, suggesting that there was no law in place under which to validly charge that individual. *Ex post facto* laws also seek to punish behavior which was not defined as criminal at the time it took place by attempting to apply new statute to past acts. The following cases provide further examples of how the rule of legality is used in defense of criminal prosecution.

Jones v. Slick, 56 So.2d 459 (1952)

Procedural History: Suit by S. E. Jones and others, as members of the City Council of North Miami Beach, against George W. Slick, as Mayor of the city, to enjoin suspension of City Manager and City Attorney and other relief, wherein defendant filed a cross-bill. From an adverse decree of the Circuit Court, for Dade County, Stanley Milledge, J., plaintiffs appealed. The Supreme Court, Thomas, J., held that Special Acts 1949, Chapter 26056, authorizing City Council to create office of City Manager, elect a Manager and prescribe his powers and duties, is a valid exercise of the power vested in Legislature by Constitution and that repeated suspensions of City Manager by Mayor merely because Mayor believed that there should be no such office were invalid, but that city ordinance providing for punishment of a city official by two-thirds vote of city council for disobedience of an ordinance, resolution or order of council is invalid.

Issue(s): Could the mayor be subject to sanctions legislated by City Council after he had already taken office?

Facts: The appellants as members of the City Council of North Miami Beach instituted a suit against the appellee as mayor of that city seeking an injunction against his suspension of the city manager and city attorney, a declaration of the legality of an ordinance creating the office of manager, and a definition of this officer's duties. By Chapter 26056, Laws of Florida, Special Acts of 1949, the council was empowered to create the office of city manager, to elect a manager and to prescribe his powers and duties. The council, 1 May 1951, passed such an ordinance, No. 232, and selected John D. Hansell for the post. We pass now to Section 26, Chapter 15824, Laws of Florida, Special Acts of 1931, where we find that the mayor may suspend employees and officers, except a councilman, and submit to the council at its next meeting the cause of his action. It is there provided that if the suspension is sustained by a majority of that body the officer or employee 'shall be dismissed, otherwise he shall be reinstated.'

Section 23 of the same act provides for the election by the council of the city attorney whose duties shall be those prescribed in the act and, from time to time, by ordinance. On 24 April 1951 John W. Estes, Jr., had been chosen for this position. The very day the manager was selected it appears that a feud was started between the council and the mayor by the latter's removal of the manager on the grounds that the 'appointment [was] a waste of the tax payers money,' the majority of the voters in the municipality was opposed to such form of government and the ordinance was 'contrary to the charter,' hence illegal. Three days later the council voted not to sustain the suspension of Hansell so Hansell was reinstated. The following day the mayor again suspended the manager, giving but one new ground this time, namely, the usurpation by the manager of 'the office of the Mayor.'

Three days passed and the council again voted not to approve this action by the mayor, therefore Hansell was again reinstated. The very next day the mayor suspended Hansell for the third time on the ground that the ordinance was invalid. Meanwhile the mayor had also turned his guns on the attorney, removing him May 1 by verbal order for causes that do not appear in the record. The council, three days thereafter, disapproved this action and the following day the mayor again suspended the attorney because he was 'unqualified' and so biased and prejudiced that he could not 'fairly represent the City impartially.' The council refused to confirm and the attorney was consequently reinstated, whereupon the mayor, the same day, removed the attorney on the same grounds and added one more that he was 'inexperienced.'

But these unusual goings on as they were detailed in the bill did not stop here. From an amendment it appears that both manager and attorney were continued in office by vote of the council and immediately suspended by the mayor, all since the bill was filed. The mayor in his answer directly attacked the ordinance and the act under which it was passed. By way of cross bill he asked for a determination of the validity of the ordinance, also one numbered 233, and sought allied relief. Although the parties prayed primarily for construction of the ordinance creating the city managership, they seem rather in accord on the two questions answered here: the validity of Chapter 26056, and of ordinance No. 233 which we will presently analyze. In any event answers from this court should settle all phases of the controversy and put an end to a situation that appears to have reached a point of absurdity, and to have unsettled the proper administration of the city's affairs.

Holding: Reversed in part and affirmed in part.

Opinion: THOMAS, Justice.

Before discussing the first matter we will digest the chancellor's comment on the law involved. He considered it too broad because it authorized the council 'to repeal all or any part of Chapter 15824 which the Council [saw] fit to do, including the delegation to a City Manager not only the duties previously exercised by the Mayor, but the powers exercised by the Council.' He apprehended that the council 'could' even delegate the power to enact ordinances. He pronounced such a 'construction * * * impossible [because] the Legislature cannot be held to have delegated to its own creations the power to repeal an act of the Legislature.' So he held that the law had 'no meaning whatever,' consequently the ordinance was 'ineffectual.'

Under Section 8 of Article VIII of the Constitution, F.S.A., the legislature may establish municipalities, provide for their government, and make alterations or amendments at any time. This is precisely what was done by the passage of the act now challenged authorizing the city council to originate the office of city manager, fix the duties of the incumbent, and, incidentally, repealing all laws or parts of laws in conflict. There is no occasion now to be concerned with any attempt the council might make to place inordinate power in the manager. What the mayor has done in repeatedly undertaking to remove the officer brings into focus only the validity of the creation of the office. This is obvious from the mayor's reasons for his efforts to thwart the city's legislative body. Under his authority to suspend an officer for cause, he has tried to impose on the council his idea of the unwisdom of establishing the office. Such was not his function or his province. He did not suspend because of anything that would even indicate that the officer was unfit to serve or that he had served improperly, but solely because the mayor held the opinion that there should be no such office.

Obviously there could have been no 'cause' chargeable to the appointee Hansell for he was never given an opportunity to perform his duties. We are unable to find in the law or system of government anything to justify the mayor's arrogating to himself such authority. His power was limited to suspensions and to interim appointments until the council had reviewed the reasons given. Final authority was reposed in that body: to remove if good reason was established, to reinstate if it was lacking. If they decided that the cause was well-founded, the suspension ripened into a removal. We conclude that the actions were invalid, the continued suspensions wholly unwarranted.

Although the point is not included in the formal questions, we think it well to decide, as the chancellor did, the propriety of the treatment the city attorney received at the hands of the mayor. The chancellor thought that no cause whatever was shown for his suspensions; that the mayor's reasons for them were nothing more than mere opinions; and that the mayor's defiance of the council's vote rejecting his actions amounted to improper interference with both the council and the attorney. We quite agree with that decision.

This brings us to ordinance No. 233, enacted 8 May 1951 while the suspensions and reinstatements were in full career. Passed as an emergency measure it contained the provision that all ordinances, resolutions and orders of the council should be obeyed by all city officials and that any official who should be found guilty of disobedience *'by a two thirds vote of the City Council'* should be fined or imprisoned, or both, and removed from office. [Emphasis added.] We will forego any curiosity about the emergency feature. The measure providing for the imposition of fine, imprisonment or both by a majority vote of the city council strongly resembles an attainder and its operation would constitute deprivation without due process of law. The provisions are not strengthened by the further stipulation that removal could also be imposed. Even if the council had the power to discipline all 'officers' this manner of exercising it would be improper. Reversed in part and affirmed in part.

Critical Thinking Question(s): Often, new laws are made in response to new social problems that are identified. When a new form of social problem/crime, is identified and a law is made to address society’s concern, should the person that committed the “deviant” act in the first place

be subject to the new law's provisions? Why or why not? If not, should s/he be sanctioned in some other fashion or just get away with the act?

Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891 (1997)

Procedural History: State prisoner filed petition for writ of habeas corpus, alleging that state statute which had retroactively cancelled his provisional early release credits awarded to alleviate prison overcrowding violated ex post facto clause. The District Court dismissed petition and denied certificate of probable cause. The Court of Appeals for the Eleventh Circuit also denied certificate of probable cause. After granting certiorari, the Supreme Court, Justice Stevens, held that challenged statute violated ex post facto clause by increasing prisoner's punishment.

Issue(s): Whether legislative revocation of provision awarding "good time toward early release" for prisoners violates the Ex Post Facto clause?

Facts: In 1983 and thereafter the Florida Legislature enacted a series of statutes authorizing the department of corrections to award early release credits to prison inmates when the population of the state prison system exceeded predetermined levels. The question presented by this case is whether a 1992 statute canceling such credits for certain classes of offenders after they had been awarded - indeed, after they had resulted in the prisoners' release from custody - violates the *Ex Post Facto* Clause of the Federal Constitution.

In 1986 petitioner pleaded *nolo contendere* to a charge of attempted murder and received a sentence of 22 years (8,030 days) in prison. In 1992 the Florida Department of Corrections released him from prison based on its determination that he had accumulated five different types of early release credits totaling 5,668 days. Of that total, 1,860 days were "provisional credits" awarded as a result of prison overcrowding. Shortly after petitioner's release, the state attorney general issued an opinion interpreting a 1992 statute as having retroactively canceled all provisional credits awarded to inmates convicted of murder or attempted murder. Petitioner was therefore rearrested and returned to custody. His new release date was set for May 19, 1998.

In 1994 petitioner filed a petition for a writ of habeas corpus alleging that the retroactive cancellation of provisional credits violated the *Ex Post Facto* Clause. Relying on Eleventh Circuit and Florida precedent holding that the revocation of provisional credits did not violate the *Ex Post Facto* Clause because their sole purpose was to alleviate prison overcrowding, the Magistrate Judge recommended dismissal of the petition. The District Court adopted that recommendation, dismissed the petition, and denied a certificate of probable cause. The Court of Appeals for the Eleventh Circuit also denied a certificate of probable cause in an unpublished order. Because the Court of Appeals for the Tenth Circuit reached a different conclusion on similar facts, *Arnold v. Cody,* [951 F.2d 280 (1991)], we granted certiorari to resolve the conflict. [517 U.S. 1186, 116 S.Ct. 1671, 134 L.Ed.2d 775 (1996)]

Motivated largely by the overcrowded condition of the entire Florida prison system, in 1983 the state legislature enacted the Correctional Reform Act of 1983, a comprehensive revision of the State's sentencing laws. The Act authorized generous awards of early release credits including

"basic gain-time" at the rate of 10 days for each month, "up to 20 days of incentive gain time, which shall be credited and applied monthly," and additional deductions of "meritorious gain-time of from 1 to 60 days." [See 1983 Fla. Laws, ch. 83-131, § 8] The Act also created an emergency procedure to be followed "whenever the population of the state correctional system exceeds 98 percent of the lawful capacity of the system for males or females, or both." § 5(1). When such an emergency was declared, "the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time in 5- day increments as may be necessary to reduce the inmate population to 97 percent of lawful capacity." [§ 5(2)]

In the ensuing years, the Florida Legislature modified the overcrowding gain-time system. In 1987 the legislature raised the threshold for awarding emergency release credits from 98% to 99% of capacity. At the same time, the legislature authorized a new form of overcrowding credit, administrative gain-time, with a 98% threshold, which authorized up to a maximum of 60 days additional gain-time to inmates already earning incentive gain-time. Inmates serving sentences for certain offenses were ineligible for the awards. In 1988 the legislature repealed the administrative gain-time provision, and replaced it with a provisional credits system. The language of the provisional credits statute was virtually identical to that of the administrative gain-time statute - it also authorized up to 60 days of gain-time but was triggered when the inmate population reached 97.5% of capacity. In addition, the legislature expanded the list of offenders who were ineligible for the awards.

Having received overcrowding gain-time under the administrative gain-time and provisional credits statutes, as well as basic and incentive gain-time, petitioner was released from prison in 1992. That same year, the legislature canceled provisional overcrowding credits for certain classes of inmates, including those convicted of attempted murder. As a result of that action, credits for 2,789 inmates who were still in custody were canceled, and rearrest warrants were issued for 164 offenders who had been released. Petitioner was in the latter class.

Holding: Reversed and remanded. The 1992 statute canceling provisional release credits violates the *Ex Post Facto* Clause.

Opinion: STEVENS, J.

Respondents contend that the cancellation of petitioner's provisional credits did not violate the *Ex Post Facto* Clause for two reasons: (1) Because the credits had been issued as part of administrative procedures designed to alleviate overcrowding, they were not an integral part of petitioner's punishment; and (2) in petitioner's case, the specific overcrowding credits had been awarded pursuant to statutes enacted after the date of his offense rather than pursuant to the 1983 statute. We consider the arguments separately.

The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *[Landgraf v. USI Film Products,* 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994)] This doctrine finds expression in several provisions of our Constitution. The specific

prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *United States v. Winstar Corp.*, [518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996)], but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.

Article I, § 10, of the Federal Constitution provides that "[n]o State shall ... pass any ... ex post facto Law." In his opinion for the Court in *Beazell v. Ohio*, [269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925)], Justice Stone explained:

> The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." [Id., at 170, 46 S.Ct., at 68-69]

The bulk of our *ex post facto* jurisprudence has involved claims that a law has inflicted "a greater punishment, than the law annexed to the crime, when committed." *[Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)] We have explained that such laws implicate the central concerns of the *Ex Post Facto* Clause: "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *[Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981)]

To fall within the *ex post facto* prohibition, a law must be retrospective - that is, "it must apply to events occurring before its enactment" - and it "must disadvantage the offender affected by it," [id., at 29, 101 S.Ct., at 964], by altering the definition of criminal conduct or increasing the punishment for the crime. [See *Collins v. Youngblood*, 497 U.S. 37, 50, 110 S.Ct. 2715, 2723, 111 L.Ed.2d 30 (1990)] In this case the operation of the 1992 statute to effect the cancellation of overcrowding credits and the consequent reincarceration of petitioner was clearly retrospective. The narrow issue that we must decide is thus whether those consequences disadvantaged petitioner by increasing his punishment.

In arguing that the cancellation of overcrowding credits inflicts greater punishment, petitioner relies primarily on our decision in *Weaver v. Graham*, in which we considered whether retroactively decreasing the amount of gain-time awarded for an inmate's good behavior violated the *Ex Post Facto* Clause. In that case the petitioner had pleaded guilty to second-degree murder and had been sentenced to prison for 15 years. At the time of Weaver's plea, Florida law provided credits contingent on the good conduct of the prisoner of 5 days per month for the first two years of his sentence, 10 days per month for the third and fourth years, and 15 days per month thereafter. The law therefore provided him with an opportunity to be released after serving less than nine years of his sentence. In 1978 the Florida Legislature enacted a new formula for computing gain-time; instead of 5, 10, and 15 days per month, it authorized only 3,

6, and 9 days. The new statute did not withdraw any credits already awarded to Weaver, but by curtailing the availability of future credits it effectively postponed the date when he would become eligible for early release. Because the statute made the punishment for crimes committed before its enactment "more onerous," we unanimously concluded that it ran "afoul of the prohibition against *ex post facto* laws." [450 U.S., at 36, 101 S.Ct., at 968]

According to petitioner, although this case involves overcrowding credits, it is essentially like *Weaver* because the issuance of these credits was dependent on an inmate's good conduct. Respondents, on the other hand, submit that *Weaver* is not controlling because it was the overcrowded condition of the prison system, rather than the character of the prisoner's conduct, that gave rise to the award. In our view, both of these submissions place undue emphasis on the legislature's subjective intent in granting the credits rather than on the consequences of their revocation.

In arriving at our holding in *Weaver*, we relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute "lengthen[ed] the period that someone in petitioner's position must spend in prison." [Id., at 33, 101 S.Ct., at 967] Similarly, in this case, the fact that the generous gain-time provisions in Florida's 1983 statute were motivated more by the interest in avoiding overcrowding than by a desire to reward good behavior is not relevant to the essential inquiry demanded by the *Ex Post Facto* Clause: whether the cancellation of 1,860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration.

In our *post-Weaver* cases, we have also considered whether the legislature's action lengthened the sentence without examining the purposes behind the original sentencing scheme. In *Miller v. Florida*, [482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)], we unanimously concluded that a revision in Florida's sentencing guidelines that went into effect between the date of petitioner's offense and the date of his conviction violated the *Ex Post Facto* Clause. Our determination that the new guideline was " 'more onerous than the prior law,' " [id., at 431, 107 S.Ct., at 2452 (quoting *Dobbert v. Florida*, 432 U.S. 282, 294, 97 S.Ct. 2290, 2298-2299, 53 L.Ed.2d 344 (1977)], rested entirely on an objective appraisal of the impact of the change on the length of the offender's presumptive sentence. [482 U.S., at 431, 107 S.Ct., at 2452 ("Looking only at the change in primary offense points, the revised guidelines law clearly disadvantages petitioner and similarly situated defendants")]

In *California Dept. of Corrections v. Morales*, [514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)], we also relied entirely on objective considerations to support our conclusion that an amendment to California's parole procedures that decreased the frequency of parole hearings for certain offenders had not made any "change in the 'quantum of punishment,' " [id., at 508, 115 S.Ct., at 1602] The amendment at issue in *Morales* allowed the parole board, after holding an initial parole hearing, to defer for up to three years subsequent parole suitability hearings for prisoners convicted of multiple murders if the board found that it was unreasonable to expect that parole would be granted at a hearing during the subsequent years. We stated that the relevant inquiry is whether the "change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." [Id., at 507, n. 3, 115 S.Ct., at 1602, n. 3] After making that inquiry, we found that "there is no reason to conclude that the amendment will have any

effect on any prisoner's actual term of confinement." [Id., at 512, 115 S.Ct., at 1604] Our holding rested squarely on the conclusion that "a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings." [Id., at 513, 115 S.Ct., at 1605] Although we held that "speculative and attenuated possibilit[ies]" of increasing the measure of punishment do not implicate the *Ex Post Facto* Clause, [id., at 509, 115 S.Ct., at 1603], the bulk of our analysis focused on the effect of the law on the inmate's sentence.

We did not imply in *Morales,* as respondents contend, that the constitutionality of retroactive changes in the quantum of punishment depended on the purpose behind the parole sentencing system. The only mention of legislative purpose in *Morales* was in the following passage:

> In contrast to the laws at issue in *Lindsey v. Washington,* [301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937)], *Weaver,* and *Miller* (which had the purpose and effect of enhancing the range of available prison terms, see *Miller, supra,* at 433434 [107 S.Ct., at 2452-2453], the evident focus of the California amendment was merely "to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings" for prisoners who have no reasonable chance of being released. *[In re Jackson,* 39 Cal.3d 464, 473 (216 Cal.Rptr. 760, 765-766) 703 P.2d 100, 106 (1985) (quoting legislative history)] [Id., at 507, 115 S.Ct., at 1602]

Thus, we concluded, the change at issue had neither the purpose nor the effect of increasing the quantum of punishment. Whether such a purpose alone would be a sufficient basis for concluding that a law violated the *Ex Post Facto* Clause when it actually had no such effect is a question the Court has never addressed. Moreover, in *Morales* our statements regarding purpose did not refer to the purpose behind the creation of the original sentencing scheme; they referred instead to the question whether, in changing that sentencing scheme, the legislature intended to lengthen the inmate's sentence. To the extent that any purpose might be relevant in this case, it would only be the purpose behind the legislature's 1992 enactment of the offense-based exclusion. Here, unlike in *Morales,* there is no evidence that the legislature's change in the sentencing scheme was merely to save time or money. Rather, it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits.

Respondents also argue that the retroactive cancellation of overcrowding credits is permissible because overcrowding gain-time - unlike the incentive gain-time at issue in *Weaver* which is used to encourage good prison behavior and prisoner rehabilitation - "b[ears] no relationship to the original penalty assigned the crime or the actual penalty calculated under the sentencing guidelines." [Brief for Respondent Mathis 20] To the extent that respondents' argument rests on the notion that overcrowding gain-time is not "in some technical sense part of the sentence," *Weaver,* [450 U.S., at 32, 101 S.Ct., at 966], this argument is foreclosed by our precedents. As we recognized in *Weaver,* retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the *Ex Post Facto* Clause because such credits are "one determinant of petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once this determinant is changed." *[Ibid.]* We explained in *Weaver* that the removal of such provisions can constitute an increase in punishment, because a "prisoner's eligibility for reduced imprisonment is a significant factor

entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *[Ibid.]*

Respondents argue that this reasoning does not apply to overcrowding credits because, when petitioner pleaded *nolo contendere,* he could not reasonably have expected to receive any such credits. The State, after all, could have alleviated the overcrowding problem in various ways: It could have built more prisons; it could have paroled a large category of nonviolent offenders; or it might have discontinued prosecution of some classes of victimless crimes. Respondents thus argue that the 1992 statute does not violate the *Ex Post Facto* Clause because, like the California amendment at issue in *Morales*, it "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." [514 U.S., at 509, 115 S.Ct., at 1603] Given the fact that this petitioner was actually awarded 1,860 days of provisional credits and the fact that those credits were retroactively canceled as a result of the 1992 amendment, we find this argument singularly unpersuasive. In this case, unlike in *Morales,* the actual course of events makes it unnecessary to speculate about what might have happened. The 1992 statute has unquestionablydisadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment. Unlike the California amendment at issue in *Morales,* the 1992 Florida statute did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible - ncluding some, like petitioner, who had actually been released.

Although it does not appear that respondents advanced this argument in the papers filed in the District Court, the Court of Appeals, or in their brief in opposition to the petition for certiorari in this Court, they now argue that petitioner is not entitled to relief because his overcrowding credits were awarded pursuant to statutes enacted after the date of his offense rather than pursuant to the 1983 statute. We disagree.

The overcrowding statute in effect at the time of petitioner's crime was modified in subsequent years, but its basic elements remained the same: The statute provided for reductions in a prisoner's sentence when the population of the prison system exceeded a certain percentage of lawful capacity. At the time of petitioner's sentence in 1986, the emergency gain-time statute was in effect. Under that statute, when the prison population reached 98% of lawful capacity, the secretary of the department of corrections was required to advise the Governor and, after receiving the Governor's verification of the capacity certification, to declare a state of emergency whereupon the sentences of all eligible inmates "shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 97 percent of lawful capacity." [Fla. Stat. § 944.598(2) (1983)]

The later statutes slightly modified the procedures outlined in the 1983 statute. The administrative gain-time statute enacted in 1987 (after petitioner's plea of *nolo contendere)* provided that the secretary, after certification to the Governor, "may grant up to a maximum of 60 days administrative gain-time." [Fla. Stat. § 944.276(1)] Unlike the emergency gain-time statute, the administrative gain-time statute made the issuance of gain-time discretionary, and it contained certain offense-based exclusions. The provisional credits provision was enacted to replace administrative gain time and is essentially the same, except that it provides for the

issuance of gain-time when the prison reaches 97.5% of lawful capacity, rather than 98%. [Fla. Stat. § 944.277 (1988)] [See *Griffin v. Singletary*, 638 So.2d 500 (Fla.1994)]

The changes in the series of statutes authorizing the award of overcrowding gain-time do not affect petitioner's core *ex post facto* claim. Petitioner could have accumulated gaintime under the emergency gain-time provision in much the same manner as he did under the provisional credits statute. We recognize, however, that although the differences in the statutes did not affect petitioner's central entitlement to gain-time, they may have affected the precise amount of gain-time he received. Between 1988 and 1992, the provisional credits were authorized when the prison reached 97.5% capacity rather than 98% capacity as under the emergency gain-time statute. If the prison population did not exceed 98% of capacity between 1988 and 1992, and if petitioner received provisional credits during those years, there is force to the argument that the cancellation of that portion of the 1,860-day total did not violate the *Ex Post Facto* Clause. Because this point was not adequately developed earlier in the proceeding, and because it may not in any event affect petitioner's entitlement to release, we leave it open for further consideration on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Critical Thinking Question(s): Why is it that a "reward" provided to prisoners to overcome an administrative problem may not be withdrawn when the conditions improve? Do you believe that defendants make calculations in their heads when they are being sentenced? Is it okay for the State to revoke the "reward system" if it permits the prisoner to maintain "good time" that s/he earned up to that time? What if the "reward" was instituted after the defendant was sentenced; could the State then allege that the prisoner did not "rely" on the reward?

III. Statutory Clarity

Section Introduction: The rule of legality, holding that the condition of "without law" can be satisfied by a law that is unclear and so casts doubt on whether a particular action is criminal, places a requirement on statutes to maintain clarity. If an individual can show that they reasonably were not able to understand that a statute prohibited a certain act due to that statute's unclear nature then the defendant may not be held liable for the crime. Such an unclear statute will be held unconstitutional and void-for-vagueness. The following Florida case illustrates how this principle is utilized in criminal defense.

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

Procedural History: Eight defendants were convicted in a Florida Municipal Court of violating City of Jacksonville vagrancy ordinance. They appealed and their convictions were affirmed by the Florida Circuit Court in a consolidated appeal and their petition for certiorari was denied by the Florida District Court of Appeals, 236 So.2d 141. Petition for certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that vagrancy ordinance containing the archaic classifications of vagrancy laws is void for vagueness because it fails to give person of ordinary intelligence fair notice that his contemplated conduct is forbidden, it encourages arbitrary and erratic arrests and convictions, makes criminal those activities which by modern standards are normally innocent and places almost unfettered discretion in hands of the police.

Issue(s): Was the Jacksonville ordinance prohibiting vagrancy void for vagueness?

Facts: At issue are five consolidated cases. Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were all arrested early on a Sunday morning, and charged with vagrancy - 'prowling by auto.' Jimmy Lee Smith and Milton Henry were charged with vagrancy - 'vagabonds.' Henry Edward Heath and a codefendant were arrested for vagrancy - 'loitering' and 'common thief.' Thomas Owen Campbell was charged with vagrancy - 'common thief.' Hugh Brown was charged with vagrancy - 'disorderly loitering on street' and 'disorderly conduct - resisting arrest with violence.'

The facts are stipulated. Papachristou and Calloway are white females. Melton and Johnson are black males. Papachristou was enrolled in a job-training program sponsored by the State Employment Service at Florida Junior College in Jacksonville. Calloway was a typing and shorthand teacher at a state mental institution located near Jacksonville. She was the owner of the automobile in which the four defendants were arrested. Melton was a Vietnam war veteran who had been released from the Navy after nine months in a veterans' hospital. On the date of his arrest he was a part-time computer helper while attending college as a full-time student in Jacksonville. Johnson was a tow-motor operator in a grocery chain warehouse and was a lifelong resident of Jacksonville.

At the time of their arrest the four of them were riding in Calloway's car on the main thoroughfare in Jacksonville. They had left a restaurant owned by Johnson's uncle where they had eaten and were on their way to a nightclub. The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest. The arrest, they said, was made because the defendants had stopped near a used-car lot which had been broken into several times. There was, however, no evidence of any breaking and entering on the night in question. Of these four charged with 'prowling by auto' none had been previously arrested except Papachristou who had once been convicted of a municipal offense.

Jimmy Lee Smith and Milton Henry (who is not a petitioner) were arrested between 9 and 10 a.m. on a weekday in downtown Jacksonville, while waiting for a friend who was to lend them a car so they could apply for a job at a produce company. Smith was a parttime produce worker and part-time organizer for a Negro political group. He had a common-law wife and three children supported by him and his wife. He had been arrested several times but convicted only once. Smith's companion, Henry, was an 18year-old high school student with no previous record of arrest. This morning it was cold, and Smith had no jacket, so they went briefly into a dry cleaning shop to wait, but left when requested to do so. They thereafter walked back and forth two or three times over a two-block stretch looking for their friend. The store owners, who apparently were wary of Smith and his companion, summoned two police officers who searched the men and found neither had a weapon. But they were arrested because the officers said they had no identification and because the officers did not believe their story.

Heath and a codefendant were arrested for 'loitering' and for 'common thief.' Both were residents of Jacksonville, Heath having lived there all his life and being employed at an automobile body shop. Heath had previously been arrested but his codefendant had no arrest record. Heath and his

companion were arrested when they drove up to a residence shared by Heath's girl friend and some other girls. Some police officers were already there in the process of arresting another man. When Heath and his companion started backing out of the driveway, the officers signaled to them to stop and asked them to get out of the car, which they did. Thereupon they and the automobile were searched. Although no contraband or incriminating evidence was found, they were both arrested, Heath being charged with being a 'common thief' because he was reputed to be a thief. The codefendant was charged with 'loitering' because he was standing in the driveway, an act which the officers admitted was done only at their command.

Campbell was arrested as he reached his home very early one morning and was charged with 'common thief.' He was stopped by officers because he was traveling at a high rate of speed, yet no speeding charge was placed against him. Brown was arrested when he was observed leaving a downtown Jacksonville hotel by a police officer seated in a cruiser. The police testified he was reputed to be a thief, narcotics pusher, and generally opprobrious character. The officer called Brown over to the car, intending at that time to arrest him unless he had a good explanation for being on the street. Brown walked over to the police cruiser, as commanded, and the officer began to search him, apparently preparatory to placing him in the car. In the process of the search he came on two small packets which were later found to contain heroin. When the officer touched the pocket where the packets were, Brown began to resist. He was charged with 'disorderly loitering on street' and 'disorderly conduct - resisting arrest with violence.' While he was also charged with a narcotics violation, that charge was nolled.

Jacksonville's ordinance and Florida's statute were 'derived from early English law,' *[Johnson v. State, 202* so, 2d, at 854], and employ 'archaic language' in their definitions of vagrants. [Id., at 855] The history is an often-told tale. The break-up of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers, designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions. Later vagrancy laws became criminal aspects of the poor laws. The series of laws passed in England on the subject became increasingly severe. But 'the theory of the Elizabethan poor laws no longer fits the facts.' *[Edwards v. California,* 314 U.S. 160, 174, 62 S.Ct. 164, 167, 86 L.Ed. 119] The conditions which spawned these laws may be gone, but the archaic classifications remain.

Holding: Reversed.

Opinion: DOUGLAS, J.

This case involves eight defendants who were convicted in a Florida municipal court of violating a Jacksonville, Florida, vagrancy ordinance. Their convictions, entailing fines and jail sentences (some of which were suspended), were affirmed by the Florida Circuit Court in a consolidated appeal, and their petition for certiorari was denied by the District Court of Appeal, [236 So.2d 141], on the authority *of Johnson v. State,* [202 So.2d 852]. The case is here on a petition for certiorari, which we granted. [403 U.S. 917, 91 S.Ct.
2233, 29 L.Ed. 694] For reasons which will appear, we reverse.

Jacksonville Ordinance Code s 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.

[We are advised that at present the Jacksonville vagrancy ordinance is s 330.107 and identical with the earlier one except that 'juggling' has been eliminated.] This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *[United States v. Harris,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989], and because it encourages arbitrary and erratic arrests and convictions. *[Thornhill v. alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; *Herndon v. Lowry,* 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066]

Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.' *[Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888] *Lanzetta* is one of a wellrecognized group of cases insisting that the law give fair notice of the offending conduct. [See *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. *322; Cline v. Frink Dairy Co.,* 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146; *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 41 S. Ct. 298, 65 L.Ed. 516] In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed. *[Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367; *United States v. National Dairy Products Corp., 372* U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561; *United States v. Petrillo,* 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877]

The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act. [See *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; *Boyce Motor Lines, Inc. v. United States,* supra] The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. 'Nightwalking' is one. Florida construes the ordinance not to make criminal one night's wandering, *[Johnson v. State, 202* So.2d, at 855], only the 'habitual' wanderer or, as the ordinance describes it, 'common night walkers.' We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleepinducing relaxation will result. Luis Munoz-Marin, former Governor of Puerto Rico, commented once that 'loafing' was a national virtue in his Commonwealth and that it should be encouraged. It is, however, a crime in Jacksonville.

Persons 'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay. The qualification 'without any lawful purpose or object' may be a trap for innocent acts. Persons 'neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf clubs and city clubs. Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be 'casing' a place for a holdup. Letting one's wife support him is an intra-family matter, and normally of no concern to the police. Yet it may, of course, be the setting for numerous crimes.

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence. They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering,' and by Henry D. Thoreau.

This aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' *[United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563] While that was a federal case, the due process implications are equally applicable to the States and to this vagrancy ordinance. Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police. In *Winters v. New York,* [333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840], the Court struck down a New York statute that made criminal the distribution of a magazine made up principally of items of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person. The infirmity the Court found was vagueness - the absence of 'ascertainable standards of guilt,' [id., at 515, 68 S.Ct., at 670], in the sensitive First Amendment area.

Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police. Caleb Foote, an early student of this subject, has called the vagrancy-type law as offering 'punishment by analogy.' [Id., at 609] Such crimes, though long common in Russia, are not compatible with our constitutional system. We allow our police to make arrests only on 'probable cause,' a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Future criminality, however, is the common justification for the presence of vagrancy statutes. [See *Foote,* supra, at 625] Florida has, indeed, construed her vagrancy statute 'as necessary regulations,' inter alia, 'to deter vagabondage and prevent crimes.' *[Johnson v. State, 202* So.2d 852; *Smith v. State,* Fla., 239 So.2d 250, 251]

A direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. *[People v. Moss,* 309 N.Y. 429, 131 N.E.2d 717] But as Chief Justice Hewart said in *Frederick Dean,* [18 Crim.App. 133, 134 (1924)]:

> It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824.

Those generally implicated by the imprecise terms of the ordinance - poor people, nonconformists, dissenters, idlers - may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' *[Thornhill v. Alabama,* 310 U.S. 88, 97--98, 60 S.Ct. 736, 742, 84 L.Ed. 1093] It results in a regime in which the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.' *[Shuttlesworth v. Birmingham,* 382 U.S. 87, 90, 86 S.Ct. 211, 213, 15 L.Ed.2d 176] Under this ordinance, '(I)f some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant.' [Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim.L.Bull. 205, 226 (1967)]

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards - that crime is being nipped in the bud--is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together. The Jacksonville ordinance cannot be squared with our constitutional standards and is plainly unconstitutional. Reversed.

Critical Thinking Question(s): Why is society concerned about people that are allegedly “vagrants”? Should a law be delineated that expressly and lawfully outlaws such activity? Can you think of any other actions that would be hard to criminalize due to lack of clarity? Why is it

that such "crimes" are so hard to state unequivocally and clearly?

IV. Equal Protection

Subsection Introduction: The U.S. Constitution grants individuals equal protection of the laws. This means that statutes may not unlawfully discriminate against any individual. The statute below, part of the Florida Civil Rights Act, addresses precisely what constitutes unlawful discrimination in the state of Florida. The case that follows demonstrates the difficulty of the equal protection issue.

Florida Statutes, section 760.01 - Purposes; construction; title.

> (1) Sections 760.01-760.11 and 509.092 shall be cited as the "Florida Civil Rights Act of 1992."
>
> (2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.
>
> (3) The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

***State v. A.R.S.*, 684 So.2d 1383, (1996)**

Procedural History: Juvenile was charged with use of child in sexual performance and promotion of sexual performance by child by allegedly videotaping himself and younger girl engaged in nude, sexual foreplay and then playing videotape for friend in absence of the girl. The Circuit Court, Leon County, John Crusoe, J., dismissed charges based on equal protection clause and right to privacy. State appealed. The District Court of Appeal held that: (1) juvenile was not similarly situated with the girl; (2) juvenile failed to show prosecutor's intent to discriminate on improper basis; and (3) statutes prohibiting use of child in sexual performance and promotion of sexual performance by child did not violate state constitutional right to privacy.

Issue(s): Was the juvenile charged denied equal protection under the law?

Facts: A delinquency petition was filed on October 9, 1995, charging appellee with the following: Count I - knowingly employing, authorizing, or inducing a child of less than 18 years of age to engage in a sexual performance, contrary to section 827.071(2); Count
II - knowingly producing, directing, or promoting a performance including sexual conduct by a child of less than 18 years of age, contrary to section 827.071(3); and Count

III - possessing a videotape of a sexual performance by a child with the intent to promote presentation of the videotape, contrary to section 827.071(4). The charges stem from an incident of September 5, 1994, in which fifteen-year-old A.R.S. videotaped himself and a younger minor (M.B., a female) engaged in nude, sexual foreplay. A.R.S. also is alleged to have retained possession of the videotape and to have played the videotape for a third person when M.B. was not present.

Appellee filed a motion to dismiss the delinquency petition, which argued (1) that the statutes were applied to A.R.S. in a gender-discriminatory fashion that violated his constitutional right to equal protection and (2) that the statutes are unconstitutional as applied to A.R.S. because they violate his right to privacy under the Florida Constitution. At the hearing on the motion held January 4, 1996, appellee primarily relied on *B.B. v. State,* [659 So.2d 256 (Fla.1995)]. The State argued that the compelling interest in the statutes was to protect children from exploitation and distinguished *B.B. v. State.* The court issued an order on January 5, 1995, that dismissed Counts I and II of the delinquency petition "under the facts of this case, considering the ages of the children and based on equal protection" and cited *B.B. v. State.* Count III remains pending below.

Holding: Reversed.

Opinion: PER CURIAM.

The State appeals the trial court order dismissing two counts of the delinquency petition charging A.R.S. with violation of sections 827.071(2) and (3), Florida Statutes (1995), on the grounds of equal protection and the right to privacy. We reverse on both grounds.

The trial court's order dismissed Counts I and II of the petition expressly on the ground of equal protection in response to appellee's argument that the State's decision to charge appellee and not the female minor involved in the incident constituted gender-based discrimination. The Supreme Court has stated that the government has broad discretion in determining whom to prosecute, and this discretion "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review"; therefore, the "courts are properly hesitant to examine the decision whether to prosecute." *[Wayte v. United States,* 470 U.S. 598, 607, 608, 105 S.Ct. 1524, 1530, 1531, 84 L.Ed.2d 547(1985)] [See generally *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (reviewing requirements for selective prosecution claims)]

"The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection." *[Bell v. State,* 369 So.2d 932, 934 (Fla.1979)] Prosecutorial discretion is not unfettered, however, and " '[s]electivity in the enforcement of criminal laws is ... subject to constitutional constraints.' " *[Wayte,* 470 U.S. at 608, 105 S.Ct. at 1531 (citing *United States v. Batchelder,* 442 U.S. 114, 125, 99 S.Ct. 2198, 2205, 60 L.Ed.2d 755 (1979)] Deliberately basing the decision to prosecute upon race, religion, or other "unjustifiable" classification is prohibited. [Id.] [Accord *Bell,* 369 So.2d at 934 (To constitute a denial of equal protection, selective or discriminatory prosecution "must be deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification."); *Barber v. State,* 564 So.2d 1169, 1170 (Fla. 1st DCA), review denied, 576 So.2d 284 (Fla.1990)]

In making a claim of selective prosecution, a defendant bears a heavy burden. To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *[State v. Parrish,* 567 So.2d 461, 465 (Fla. 1st DCA 1990) (quoting *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974)), review denied, 581 So.2d 167 (Fla.1991)] [See also *Wayte,* 470 U.S. at 608, 105 S.Ct. at 1531 ("[P]etitioner is require[d] to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.")]

The second prong of the test requires the defendant to "demonstrate discriminatory purpose" by establishing that "(1) he was singled out for prosecution although the government was aware that others had violated the law, and (2) the government had followed unusual discretionary procedures in deciding to prosecute." *[Parrish,* 567 So.2d at 467] [See *U.S. v. Redondo-Lemos,* 955 F.2d 1296, 1301 (9th Cir.1992) ("It is not enough for the court to be convinced that the prosecutor's enforcement decisions have a discriminatory effect; it must also find that the prosecutor was motivated by a discriminatory purpose in the very case before it.")] A defendant must establish the selective prosecution claim by clear and convincing evidence. *[Parrish,* 567 So.2d at 464] In review, an appellate court is required to " 'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " [Id. at 467] In reviewing a ruling on a motion to dismiss, this court must view the evidence in a light most favorable to the state. *[State v. Parrish,* 567 So.2d 461, 465 (Fla. 1st DCA 1990) ("[A]ll inferences attendant upon the evidence offered in support of a motion to dismiss will be resolved against the defendant."), review denied, 581 So.2d 167 (Fla.1991)] In the instant case, appellee argued that both he and M.B. were similarly situated because she also participated in operating the video camera and the State's decision to prosecute A.R.S. was based on appellee's gender. Appellee failed to meet the first prong of the selective prosecution test as to Count II of the delinquency petition.

The second count alleged that appellee violated section 827.071(3), Florida Statutes, which provides as follows in pertinent part:

> A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age.

The statute defines "promote" as follows: "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same." [§ 827.071(1)(c), Fla.Stat.] As the State explained to the court below, the charge in Count II was based on the allegation that appellee played the videotape for a friend without M.B. in attendance. Appellee thus failed to show that others

similarly situated were not prosecuted on this charge.

In regard to Count I, even if we assume that appellee met the first prong of the selective prosecution showing, he failed to establish that the prosecutor's intent was to discriminate on an improper basis. *[U.S. v. Redondo-Lemos,* 955 F.2d 1296, 1301 (9th Cir.1992) (stating that judge's observations of "what he believed to be a disparity in the prosecutor's plea bargaining practice [with regard to males and females] provides an insufficient basis for finding invidious discrimination" and stating that a finding of the intent to discriminate "must be made on the basis of a properly noticed evidentiary hearing where all affected parties have an opportunity to present evidence and otherwise participate")]

At the hearing below, the State countered appellee's claim that he was being prosecuted because he is male by providing several gender-neutral reasons for charging appellee alone. [See *U.S. v. Redondo-Lemos,* 27 F.3d 439, 442 (9th Cir.1994) ("[T]he prima facie case does no more than shift to the party accused of discrimination, the burden of articulating a legitimate, non-discriminatory explanation for its conduct." "At that point the presumption of discriminatory intent raised by the prima facie case 'simply drop[ped] out of the picture.' ")] Here, appellee failed to carry his evidentiary burden. [Id. ("Where the evidence behind the prima facie showing is strong, it may, standing alone, justify a finding of intentional discrimination. But where the prima facie case is based on minimal evidence, it cannot.")] Taking all the evidence in the light most favorable to the state, we reverse the trial court's ruling that the charges in this case stemmed from selective prosecution which violated appellee's right to equal protection.

Next we turn to the State's claim that the trial court erred in dismissing Counts I and II of the delinquency petition on the ground that sections 827.071(2) and (3) are unconstitutional as applied to cases in which both the victim and defendant are minors. The State argues that the statute furthers the compelling state interest of protecting
minors from being exploited by anyone, not only an adult, who induces them to engage in a "sexual performance," even when both victim and defendant are minors. Appellee, on the other hand, argues that prosecuting him under the statute violates his Florida constitutional right to privacy and thus that sections 827.071(2) and (3) are unconstitutional as applied to consensual acts between minors. Appellee relies on *B.B. v. State,* [659 So.2d 256, 257 (Fla.1995)], for this assertion, and the trial court cited *B.B.* in its order dismissing two of the three counts of the delinquency petition.

The supreme court in *B.B. v. State* held that section 794.05, Florida Statutes, which prohibits "unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years," is unconstitutional under Article I, Section 23 of the Florida Constitution as applied to a minor. The court concluded that "Florida's clear constitutional mandate in favor of privacy is implicated in B.B., a sixteen-year-old, engaging in carnal intercourse." [B.B., 659 So.2d at 259] The court explained its holding in pertinent part as follows:

> We there *[Jones v. State,* 640 So.2d 1084 (Fla.1994)] held, and reiterate here, that the rights of privacy that have been granted to minors do not vitiate the legislature's efforts to protect minors from the conduct of others. " 'Sexual exploitation of children is a

> particularly pernicious evil that sometimes may be concealed behind the zone of privacy.... The state unquestionably has a very compelling interest in preventing such conduct.' "

While we do recognize that Florida does have an obligation and a compelling interest in protecting children from sexual activity before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them and that this interest pertains to one minor engaging in carnal intercourse with another, the crux of the State's interest in an adult-minor situation is the prevention of exploitation of the minor by the adult.
Whereas in this minor-minor situation, the crux of the State's interest is in protecting the minor from the sexual activity itself for reasons of health and quality of life. Having distinguished between the State's interest in the adult-minor situation and in the minorminor situation, we conclude that the State has failed to demonstrate in this minor-minor situation that the adjudication of *B.B.* as a delinquent through the application of section 794.05 is the least intrusive means of furthering what we have determined to be the State's compelling interest. [Id. at 259]

The instant case, however, is distinguishable from *B.B. v. State.* Appellee was charged in the delinquency petition with violation of sections 827.071(2) and (3), which provide as follows:

> (2) A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

As stated above, the State's compelling interest in a minor-minor situation in regard to the statute in B.B., section 794.05, is "protecting the minor from the sexual activity itself for reasons of health and quality of life." Assuming that a minor's privacy interests are implicated in the instant case, we recognize that the state's compelling interest in section 827.071 is different. The statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people. [See *Schmitt v. State,* 590 So.2d 404, 412 (Fla.1991) (stating that the "obvious purpose" of section 827.071 "is to prohibit certain forms of child exploitation"), cert. denied, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992).

The State's interest in protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting

that performance is an adult or a minor. Because the statute protects children from exploitation through the least intrusive means of furthering this compelling state interest, the trial court's holding that section 827.071(2) and (3) is unconstitutional as applied to minors is reversed.

Critical Thinking Question(s): Do you think the State would have prosecuted the minor had he not shown the video tape to a third party? Would they have charged him if there was no video tape at all? Do you believe that you were ever denied equal protection under the law? Do you think that females get less traffic tickets than males amounting to an equal protection violation? Do you think that females are sentenced less severely amounting to a violation of equal protection?

V. Freedom of Speech

Section Introduction: Both the United States Constitution and the Florida Constitution, cited below, provide for a protection of freedom of speech. What types of speech fall under this protection, however, is not always clear. This issue is left to be decided by the courts in cases such as the one that follows.

Florida Constitution - 1968 Revision, Article I. Declaration of Rights, section 4. Freedom of speech and press

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

Cashatt v. State, 873 So.2d 430 (2004)

Procedural History: Defendant pled nolo contendere in the Circuit Court, Duval County, Peter L. Dearing, J., to computer pornography, and he appealed.

Issue(s): Was defendant denied the fundamental right to free speech when the State charged him with the crime of computer pornography?

Facts: In October 2001, appellant conversed over the Internet, by means of a "bulletin board" posting and ensuing e-mail messages, with a vice detective who twice stated to appellant that he was a 14-year-old boy. Appellant arranged to meet the boy in Jacksonville for the purpose of participating in illegal sexual activities, and showed up at the meeting place at the time agreed upon, wearing the clothes which he had told the boy by e-mail that he would be wearing. After his numerous motions to dismiss were denied, appellant pled *nolo contendere* to violation of section 847.0135(3), Florida Statutes (2001), included in the "Computer Pornography and Child Exploitation Prevention Act of 1986," which provides:

> Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce,

> solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Holding: Affirmed. The District Court of Appeal held that: (1) even if computer pornography statute was considered a content-based restriction on constitutionally protected speech, it passed the strict scrutiny test because it promoted a compelling state interest in protecting children from persons who solicit or lure them to commit illegal acts; and (2) computer pornography statute did not violate the dormant commerce clause of the Federal Constitution.

Opinion: PER CURIAM.

On appeal, he challenges the facial constitutionality of this statute, and also contends that the statute is invalid for failure to state *a mens rea* or *scienter* requirement. Finally, he argues that the trial court erred in denying his motion to dismiss under Florida Rule of Criminal Procedure 3.190(c)(4), asserting that the state failed to demonstrate *a prima facie* case against him. We find that the statute is valid as against all of appellant's challenges, and that the state's evidence was sufficient to demonstrate his violation of the statute.

Constitutional Issues

Appellant contends that section 847.0135(3) violates the First Amendment of the United States Constitution because it is a content-based restriction on protected "pure speech" which cannot pass the "strict scrutiny" test, that the statute is overbroad and void for vagueness, and that it places discriminatory restrictions on interstate commerce. We have considered and rejected each of his arguments.

A facial challenge to a statute is more difficult than an "as applied" challenge, because the challenger must establish that no set of circumstances exists under which the statute would be valid. Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards. *[See People v. Hsu,* 82 Cal.App.4th 976, 99 Cal.Rptr.2d 184, 189 (2000); *People v. Foley,* 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123,128, *cert. denied,* 531 U.S. 875, 121 S.Ct. 181, 148 L.Ed.2d 124 (2000); *Hatch v. Superior Court,* 80 Cal.App.4th 170, 94 Cal.Rptr.2d 453, 470 (2000)]

Under the First Amendment, content-based speech restrictions will not survive strict scrutiny unless the government can show that the regulation promotes a compelling government interest and that it chooses the least restrictive means to further the articulated interest. *[See Sable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)] Courts have applied to statutes restricting speech an

"overbreadth" doctrine, rendering the statute invalid in all its applications (i.e., on its face) if it is invalid in any of them, the defect being that the means chosen to accomplish the government's objective are too imprecise, so that in all its applications it creates an unnecessary risk of chilling constitutionally protected speech. *[See Hsu,* 99 Cal.Rptr.2d at 189; *Foley,* 731 N.E.2d at 128]

The state has a compelling interest in protecting the physical and psychological wellbeing of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected). *[See Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244-45, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *Sable Communications,* 492 U.S. at 130-31, 109 S.Ct. 2829] Courts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection, and while a statute may incidentally burden some protected expression in carrying out its objective, it will not be held to violate the First Amendment if it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose. *[See Foley,* 731 N.E.2d at 128]

A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and is written in a manner that encourages or permits arbitrary or discriminatory enforcement. *[See Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)] However, imprecise language does not render a statute fatally vague, so long as the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *[Foley,* 731 N.E.2d at 130] And if a reasonable and practical construction can be given to the language of a statute, or its terms made reasonably certain by reference to other definable sources, it will not be held void for vagueness. *[See Hsu,* 99 Cal.Rptr.2d at 196]
A Commerce Clause challenge to a criminal statute, when both the victim and the defendant reside within the state, is necessarily a facial challenge to the statute. *[See Hatch,* 94 Cal.Rptr.2d at 470] Where a state statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *[See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)] And if a legitimate local purpose is found, the extent of the burden on interstate commerce that will be tolerated will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [Id.]

We find that even if section 847.0135(3) is considered a content-based restriction on constitutionally protected speech, it passes the "strict scrutiny" test because it promotes a compelling state interest in protecting children from persons who solicit or lure them to commit illegal acts, and is narrowly tailored to promote that interest, specifically limiting its prohibitions to communication intended to solicit or lure a child to commit illegal acts. The statute at issue is distinctively narrower than the statute found unconstitutional in *[Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)], upon which appellant relies. The use of the phrase, "or another person believed by the person to be a child" does not

render the statute unconstitutional, but simply clarifies the "attempt" portion of the statute. When the receiver is in fact an adult, but the sender believes that the receiver is a minor, the sender can be found guilty of an attempt to seduce a minor using on-line services, in violation of the statute. In *Foley, Hsu,* and *Laughner v. State,* [769 N.E.2d 1147 (Ind.App.2002), *cert. denied, Laughner v. Indiana,* 538 U.S. 1013, 123 S.Ct. 1929, 155 L.Ed.2d 849 (2003)], each of which found similar child solicitation statutes constitutional, the defendants were charged with attempt because the pretend victims were adult undercover agents.

Critical Thinking Question(s): Do you believe that mere correspondence over the internet, without more in this case, would subject the defendant to charges of computer pornography? Should the State be permitted to criminalize an individual who merely observes child pornography on websites in his/her own home? What about virtual child pornography where no minors actually participate? Explain.

VII. Privacy

Section Introduction: Protection of privacy rights is also provided for by both the U.S. and Florida Constitutions, cited below. As in the case of free speech, this right of privacy is not all encompassing. Courts must use their discretion to determine what is and is not a violation of the constitutional right to privacy in individual cases like the one you will find in this section.

Florida Constitution- 1968 Revision, Article I. Declaration of Rights, section 23. Right of privacy

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Pottinger v. City of Miami, S.D.Fla. 810 F.Supp. 1551.(1992)

Procedural History: Class action was brought under § 1983 against city on behalf of homeless persons living in city, alleging violations of constitutional rights in connection with arrests and seizures of property. The District Court, Atkins, Senior District Judge, held that: (1) city's practice of arresting homeless persons for performing such activities as sleeping, standing, and congregating in public places violated Eighth Amendment and right to travel; (2) ordinances under which homeless persons were arrested were unconstitutionally overbroad; (3) homeless persons' privacy rights were not violated; and (4) seizures of homeless persons' personal belongings violated Fourth Amendment.

Issue(s): Do the arrests of homeless persons pursuant to statutes and ordinances amount to a violation of their fundamental right to privacy?

Facts: THIS CAUSE is before the court on the non-jury portion of this bifurcated trial, which focused solely on the issue of liability. The background relevant to the court's findings and conclusions regarding the City's liability can be summarized as follows. Plaintiffs ("plaintiffs" or

"class members") filed this action in December of 1988 on behalf of themselves and approximately 6,000 other homeless people living in the City of Miami. Plaintiffs' complaint alleges that the City of Miami ("defendant" or "City") has a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life - including sleeping and eating - in the public places where they are forced to live. Plaintiffs further claim that the City has arrested thousands of homeless people for such life-sustaining conduct under various City of Miami ordinances and Florida Statutes. In addition, plaintiffs assert that the City routinely seizes and destroys their property and has failed to follow its own inventory procedures regarding the seized personal property of homeless arrestees and homeless persons in general.

Plaintiffs allege, pursuant to 42 U.S.C. § 1983, that the property destruction and arrests, which often result in no criminal charges, prosecutions or convictions, violate their rights under the United States and Florida Constitutions. Because the arrested plaintiffs are released without further official process, the argument continues, plaintiffs never have the opportunity to raise such valid defenses as necessity or duress. As discussed below, plaintiffs do not challenge the facial validity of the ordinances or statutes under which they are arrested. Rather, they contend that the City applies these laws to homeless individuals as part of a custom and practice of driving the homeless from public places. Accordingly, plaintiffs do not argue that any of the ordinances should be stricken; instead, they ask that the City be enjoined from arresting homeless individuals for inoffensive conduct, such as sleeping or bathing, that they are forced to perform in public. 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, or the District of Columbia, subjects, or causes to be subjected, any Citizen of the United States or any other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities
> secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

Holding: Injunction granted with conditions (not enumerated herein).

Opinion: ATKINS, Senior District Judge.

Upon careful review the evidence presented at trial and at prior proceedings and after weighing the various arguments presented throughout this litigation, the court finds that injunctive relief is warranted in this case for the following reasons. First, plaintiffs have shown that the City has a pattern and practice of arresting homeless people for the purpose of driving them from public areas. *[See* section III.B.] Second, the City's practice of arresting homeless individuals for harmless, involuntary conduct which they must perform in public is cruel and unusual in violation of the Eighth Amendment to the United States Constitution. *[See* section III.C.] Third, such arrests violate plaintiffs' due process rights because they reach innocent and inoffensive conduct. *[See* section III.G.2.] Fourth, the City's failure to follow its own written procedure for handling personal property when seizing or destroying the property of homeless individuals violates plaintiffs' fourth amendment rights. *[See* section III.F.] Fifth, the City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they

have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause. [*See* section III.H.2]

Critical Thinking Question(s): Do you believe that many of the ordinances to which they are subject are "aimed" at homeless people? Is arresting a homeless person for an ordinance such as loitering like charging someone for their status/condition? Should people that are homeless be excused from ordinances and statutes because they have no other alternative than to do what they do in a public place?

Essay Questions:

1. Explain the void-for-vagueness doctrine and provide analysis and application of its prongs.

2. Discuss the concept of equal protection under the law and any distinctions that may exist based on race, gender and age.

3. According to the U.S. Supreme Court, what kinds of privacy/individual rights does the Constitution protect?