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# Another Casualty of the War . . . Vagrancy Laws Target the Fourth Amendment

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## ANOTHER CASUALTY OF THE WAR . . . VAGRANCY LAWS TARGET THE FOURTH AMENDMENT

### INTRODUCTION

THE TIME: World War II  
THE PLACE: Casablanca, Morocco

Casablanca is teeming with European refugees desperate for passage to neutral Lisbon — from there, to America.

SCENE ONE: Two German couriers have just been murdered in the desert; their visas are missing. The alarm bell sounds and the loudspeaker commands "Round up all suspicious characters and search them for the documents!"

In the ensuing chaos on the streets, police officials seize upon appearance, flight, and upon the suspect's failure to answer questions. A local explains to an American tourist, "It's the customary round up of refugees, liberals. . . ."

This scene reflects an untrammelled play of police persecution, guaranteed by our founding fathers to never reach the shores of America. As Justice Douglas so assuredly wrote: "We do not permit the practice engaged in in some other lands of allowing arrests on suspicion or at the caprice of the police"<sup>1</sup> . . . the "police must make out part of their case at least before the citizen is arrested."<sup>2</sup> Indeed, to allow such a practice would be "repugnant to American institutions and ideals. . ."<sup>3</sup>

The reason for this protection? The Fourth Amendment's prohibition of unreasonable seizures.<sup>4</sup> It is an Amendment which protects a "catalog of indispensable freedoms";<sup>5</sup> it is an Amendment which "sets our nation apart from much of the world."<sup>6</sup> But it is an amendment which may soon become our nation's greatest casualty in its war on drugs.

Responding to the mounting public pressure in the face of our nation's drug problem, law enforcement officials have increased their traditional detection and

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<sup>1</sup>William O. Douglas, *Vagrancy And Arrest On Suspicion*, 70 YALE L.J. 1, 13 (1960).

<sup>2</sup>*Id.*

<sup>3</sup>*State ex rel. Ekstrom v. Justice Court*, 136 663 P.2d 992, 997 (Ariz. 1983) (Feldman, J., concurring).

<sup>4</sup>See U.S. CONST., amend. IV. It guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>5</sup>*Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

<sup>6</sup>See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1337 (1990).

deterrence efforts, and have also resorted to the use of illegal seizures.<sup>7</sup> Congress and state legislatures have spurred this disregard of the Fourth Amendment's prohibition against unreasonable seizures by enacting a rash of vagrancy laws---for example making it a crime to loiter with a purpose to engage in illegal drug activities.<sup>8</sup> Court rulings have continued this trend, enlarging the government's investigatory powers in the face of our nation's drug crisis yet failing to acknowledge serious Fourth Amendment implications of these new vagrancy laws. Although passing muster under the constitutional challenge of vagueness, these laws provide a subterfuge for arrests without probable cause and result in discriminatory enforcement.<sup>9</sup>

This Comment will review the origins of the vagrancy law and its traditional abuses. It will then examine decisions discussing the vagrancy law's constitutionality under the Due Process clause void-for-vagueness doctrine and the courts' attempted remedy of explicit standards as to place, scope, or purpose. The remainder of this Comment will discuss the constitutionality of these revised vagrancy laws under the Fourth Amendment's prohibition of unreasonable seizures.

### VAGRANCY'S VOYAGE TO AMERICA

#### *Promoting the General Welfare by Banishing the Poor*

Vagrancy laws are a part of our American heritage. They began in England in the Fourteenth Century as "the criminal aspect of the poor laws".<sup>10</sup>

The poor laws confined the laboring class to stated areas at specified wages.<sup>11</sup> These laws were the ruling class' tool to control the labor shortages at

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<sup>7</sup> A special committee chaired by Professor Dash has found that "[some] disregard for the Fourth Amendment, specifically in drug cases, may be an unavoidable by-product of a drug problem so pervasive that the police feel they sometimes must violate constitutional restraints in order to regain control of the streets." Professor Dash's committee also noted that both "legal and illegal searches and arrests for drugs have generally proven ineffective in controlling or reducing the drug problem." ABA Criminal Justice Section, Special Comm. on Criminal Justice in a Free Society, *CRIMINAL JUSTICE IN CRISIS* 46 (1988).

<sup>8</sup> See *infra* text accompanying notes 78-100.

<sup>9</sup> Maclin, *supra* note, at 1333-34. ("Stemming the flow of illegal narcotics is the driving force behind many cases involving police-citizen encounters, and behind much of the [Supreme] Court's fourth amendment jurisprudence in general."); See Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1222 (1983) ("It is almost as if a majority of the [Supreme] Court [were] hell-bent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials."); Cf. Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 3 (1986) ("It is understandable that the judicial branch of government would want to join with the other two in fighting against the use of illegal drugs.").

<sup>10</sup> See Douglas, *supra* note 1, at 5 n.24.

<sup>11</sup> See, e.g., Statute of Labourers, 23 EDW. 3, cI (1349).

the breakup of the feudal system.<sup>12</sup> Thus, the runaway serf became a vagrant and his wandering and loitering<sup>13</sup> became a crime.

Over the centuries, the philosophy behind the vagrancy laws shifted from a means to control labor to embrace the more socially acceptable means to control crime.<sup>14</sup> As a result, vagrancy laws evolved to encompass not only the runaway serf, but a host of curious accretions: begging, drunkenness, disorderly conduct, prostitution, lewdness, and narcotics.<sup>15</sup>

Despite the apparent clash with American ideals of liberty<sup>16</sup>, vagrancy-type laws<sup>17</sup> were incorporated into the law in the American colonies.<sup>18</sup>

The tradition of vagrancy laws in America has also produced a tradition of abuse.<sup>19</sup> These abuses have produced damaging effects on the people of this nation — including an encroachment on those rights protected by the Fourth Amendment. As Justice Douglas and other critics of the vagrancy law concluded, the vagrancy law results in abuse on the streets as law enforcement officials may arrest anyone merely on the suspicion that they have been involved in another crime which can not be proved,<sup>20</sup> and to justify arrests for conduct which is not criminal.<sup>21</sup>

<sup>12</sup> C.J. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING 39 (1887).

<sup>13</sup> Prohibitions against loitering were incorporated within the vagrancy laws because the concepts overlapped. See Mark Malone, Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L. J. 749 (1982).

<sup>14</sup> Douglas, *supra* note 1 at 6. See also *District of Columbia v. Hunt*, 163 F.2d 833, 835 (D.C. Cir. 1947) ("A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life."); *Ex parte Branch*, 137 S.W. 886, 887 (Mo. 1911) ("[A vagrant] is the chrysalis of every species of criminal.")

<sup>15</sup> Douglas, *supra* note 1; at 6; see also Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

<sup>16</sup> Arthur H. Sherry, *Vagrants, Rogues and Vagabonds- Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 558 (1960) ("... centuries later [vagrancy laws] were unhappily spread upon the books of a nation whose legal, political, and social principles were of a very different order.")

Justice Douglas also alludes to the conflict of vagrancy laws with American ideologies. He was aghast at the banishment of the "hobo" from American cities by vagrancy laws. After noting that the hobo is glorified and immortalized by poems and literature, Justice Douglas referred to himself as a fellow hobo--- a term which he declared "implies an independence, a restless spirit, the quest for a better life, and rebellion against submission to orthodoxy".

Douglas, *supra* note 1, at 3.

<sup>17</sup> "Vagrancy law" is used as a generic term to describe the various types under consideration in this article.

<sup>18</sup> See, e.g., Massachusetts statute of March 26, 1788 [St. 1788, c. 21]. See also *State v. Burgess*, 123 A. 178 (Me. 1924) (reciting the history of the Maine statute). By 1956, vagrancy was a statutory offense in every state except West Virginia where it remained a common law offense. See Caleb Foote, *Vagrancy-Type Law And Its Administration*, 104 U. PA. L. REV. 603, 609 (1956). Today, vagrancy is a statutory offense in all fifty states.

<sup>19</sup> See generally Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Note, *Use Of Vagrancy-Type Laws For Arrest And Detention Of Suspicious Persons*, 59 YALE L.J. 1351 (1950). See also *infra* note 22.

<sup>20</sup> See Foote, *supra* note 18, at 649. ("One cannot escape the conclusion that the administration of vagrancy-type laws serves as an escape hatch to avoid the rigidity imposed by real or imagined defects in criminal law and procedure.")

Justice Douglas tells of his journey to Afghanistan and of a political leader who had campaigned too vigorously against the church and was prosecuted for sacrilege. Although the political leader was eventually acquitted of that charge, he was convicted of vagrancy and disorderly conduct. Douglas, *supra* note 1, at 9 n. 45.

## VOID-FOR-VAGUENESS

*Vagrancy's Versatility vs. The Constitution*

The courts have attempted to remedy abuses of the vagrancy law by finding these laws a violation of Due Process<sup>22</sup> under the void for vagueness doctrine. A statute is unconstitutionally vague "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application."<sup>23</sup> As a result, a vague statute "violates the first essential of Due Process of law."<sup>24</sup> A statute will be

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Lord Hewatt expressed his reservation about the vagrancy law in *Rex v. Dean*:

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.

*Id.* n. 49.

Another example of judicial denouncement of the vagrancy law is provided in *People v. Craig*, 91 P. 997-1000 (Cal. 1907).

<sup>21</sup> Given the staggering number of episodes of abuse since the genesis of the vagrancy law, this Comment will only list a few such abuses to suggest the tenor of such abuses:

The vagrancy law's most prevalent use was to banish the destitute from our nation's cities which was deemed a necessary part of the public policy. See *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837); see also Foote, *supra* note 18, at 603. (discussing the results of a study of the administration of vagrancy-type laws to rid the streets of undesirables through well-publicized drives). This abuse was not curbed until the early 1900's. See *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930) (banishment from the state prohibited by public policy); see also *Edwards v. California*, 314 U.S. 160, 177 (1941) (first recognized the right of indigents to move freely from state to state).

Another group recognized as bearing the brunt of vagrancy laws were the Puerto Rican migrant workers. Because the migrant worker hampered the ability of other community members to gain employment, their presence in some communities produced great discord. As a result, the migrant workers were prosecuted under vagrancy laws when their only crime was being an International Worker of the World. See 1951 REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATING LABOR; see also S. REP. NO. 1150, pt. 3, 77th Cong., 2d Sess. (1942); *United States v. Wheeler*, 254 U.S. 281 (1920).

The vagrancy law was also used for political persecution. In 1935, California waterfront strikers were convicted of vagrancy during a police drive against "radicals". The court of appeals reversed, convinced the strikers were convicted because they were Communists at a time when the Communist Party was lawful in California. See *THE RECORDER*, January 24, 1935, pp. 1, 8.

The vagrancy law was also used to suppress unpopular speech. See, e.g., *Edelman v. California*, 344 U.S. 357, 365-66 (1953) (Black, J. dissenting) (concluding the vagrancy law was used to suppress speech critical of the police).

Another category of abuse as a result of the vagrancy law is what Professor Maclin calls the "worst case scenario"; that is, those cases which fall into the ugly abyss of racism. Maclin, *supra* note, at 1258. The Supreme Court created a "no evidence rule" under the Due Process clause to attempt to remedy the abuse of the vagrancy law. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966) (Five negroes were convicted of vagrancy because they refused to leave the reading room of the public library.); *Garner v. Louisiana*, 368 U.S. 157 (1961) (prosecuted under vagrancy-type law by sitting at 'white lunch counters' in business establishments); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

<sup>22</sup> See U.S. CONST. amend. XIV.

A problem related to the void-for-vagueness doctrine is the overbreadth doctrine. The overbreadth doctrine comes into effect when conduct that is protected by the constitution is regulated by a statute. See Comment, *Constitutional Law- Arbitrary Enforcement and Overbreadth of Vagrancy Ordinance Violative of the Due Process Clause*, 19 N.Y.L. F. 191, 194-95 (1973). For a recent discussion, see *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

<sup>23</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>24</sup> *Id.*

held void-for-vagueness if it fails to provides people of ordinary intelligence the opportunity to know what is prohibited, so that they may act accordingly,<sup>25</sup> or fails to express explicit standards to prevent arbitrary enforcement.<sup>26</sup>

The void-for-vagueness doctrine is designed to forbid wholesale legislative delegation of lawmaking authority to the courts.<sup>27</sup> Courts employ it to ensure and advance legislative crime definition, universally recognized in this country as the "first principle of the criminal law".<sup>28</sup> Likewise, the goals furthered by application of the void-for-vagueness doctrine are political accountability in the use of government power and fairness in the administration of justice.<sup>29</sup>

However, the dearth of useful precedent has shown the doctrine's main thrust is not only being used as a marker in the separation of powers question, and to ensure notice,<sup>30</sup> but in combination with the real dangers of judicial innovation--- arbitrary and capricious law enforcement.<sup>31</sup> Indeed, of the many justifications for the vagueness doctrine, the Supreme Court's most recent enunciation in the vagrancy context proclaims the protection against the "whim and caprice" of the police to be the paramount concern.<sup>32</sup> The concern for protection against the abuse of police discretion raised by the Supreme Court has gained fervor in the lower courts and is repeatedly cited in the evaluation of vagrancy statutes.<sup>33</sup>

The void-for-vagueness doctrine does not appear to be the panacea for reducing police misconduct. As Justice Frankfurter acknowledged, "[the vagueness doctrine], in itself, is an indefinite concept".<sup>34</sup> Scholars have

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<sup>25</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>26</sup> *Grayned*, 408 U.S. at 108-09; *see also* *Kolender*, 461 U.S. at 357; *Papachristou*, 405 U.S. at 162.

<sup>27</sup> *See* John Calvin Jeffries, Jr., *Legality, Vagueness, And The Construction Of Penal Statutes*, 71 VA.L. REV. 189, 189 (1985).

Of course, some interstitial judicial lawmaking is inevitable, as any resolution of statutory ambiguity involves judicial choice. The void-for-vagueness doctrine is meant to keep individualized decision making to a minimum and recognizes judicial incompetence in the formulation of the substantive criminal law.

<sup>28</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, 79-80 (1968).

<sup>29</sup> Jeffries, *supra* note 27, at 212.

<sup>30</sup> *See supra* note 26.

<sup>31</sup> *See supra* note 27, at 197-99, 217-18. ("[T]he individualized adjudication of guilt is an unusually inadequate check on prosecutorial and police action.")

<sup>32</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

<sup>33</sup> *See, e.g.,* *Sawyer v. Sandstrom*, 615 F.2d 311, 316-17 (5th Cir. 1980); *United States ex. rel. Newsome v. Malcolm*, 492 F.2d 1166, 1172-74 (2d Cir. 1974); *Waters v. McGuriman*, 656 F. Supp. 923, 925-27 (E.D. Pa. 1987); *People v. Superior Court (Caswell)*, 758 P.2d 1046, 1050, (Cal. 1988); *Coleman v. City of Richmond*, 364 S.E.2d 239, 242 (Va. Ct. App. 1988).

<sup>34</sup> *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

commented that the difficulty of review often results in decision making which is contextual and impressionistic.<sup>35</sup>

Vagrancy law is often criticized as the epitome of inherent vagueness.<sup>36</sup> Facing the difficulty of defining terms like "vagrant", "loiter", and "prowl" coupled with the ambiguity in the standard itself, courts have turned to considerations of social policy and practicality.<sup>37</sup> These concerns have played a prominent role to help defeat the vagueness challenge due to this nation's declared war on drugs.<sup>38</sup>

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<sup>35</sup> Anthony G. Amsterdam, *Federal Constitutional Restriction on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasuring, Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 221-24 (1967).

<sup>36</sup> As Professor Sherry predicted:

If [loitering laws] were merely a matter of style, if phraseology alone were at the heart of the matter, retaining the quaint medieval syntax of old England might be tolerated on grounds of historical sentiment. Unfortunately, the 14th century [terminology] are not just words for which modern substitutes stand readily at hand, nor are the statutes in which the vagrant, rogue and vagabond of today are identified and defined so written that their inadequacies may be cured by translating their terms into the prose of the mid-twentieth century draftsman.

Sherry, *supra* note 16, at 557-58.

<sup>37</sup> See Model Penal Code and Commentaries Part II, sec. 250.6, at 394, 396-97 (1980) (Official Draft and Revised Comment) ("Most courts are willing to consider in a void-for-vagueness analysis the need for some provision and the impossibility of achieving greater precision.").

*People v. Guilbert*, 472 N.Y.S. 2d 90 (N.Y. Crim. Ct. 1983), provides an example of the emphasis on social concerns prevalent in vagrancy cases. Judge Bianchi, sitting at the criminal court for the City of New York could not escape the social ramifications. After an extensive discussion and analysis suggesting the statute prohibiting loitering in certain transportation facilities at issue is unconstitutional, he states in his final paragraphs:

The court must consider the realities of our society and the broad implications of its ruling. For within the geographical jurisdiction of this county are two of the world's busiest international airports and innumerable subway, railroad and enclosed bus stations and terminals. I am impressed that there is indeed a reasonable relationship between the welfare of the public at large, and the concern and efforts of the legislature to insure the safety of the many patrons who utilize transportation facilities which often serve as the setting of society's most violent crimes.

Therefore, although the statute is by no stretch of the imagination a monument to legislative craftsmanship, and is...constitutionally nettlesome, the Court is constrained to conclude that the defendants have failed to discharge their burden of proving the statutes constitutional invalidity beyond a reasonable doubt.

*Id.* at 94.

The Supreme Court, itself, is not beyond a certain reliance on practical considerations. See *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) ("Impossible standards of clarity are not required."); *Smith v. Goguen*, 415 U.S. 566, 581 (1974) ("There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish a standard with great precision.").

<sup>38</sup> Akron, Ohio, Code Ordinances 138.26 (1989), a version of the modern vagrancy ordinance prohibiting loitering for the purpose of engaging in drug-related activities, was enacted in 1988 over much disagreement. Less than five short months after the enactment of Section 138.26, over one hundred fifty individuals had been charged with violating the ordinance. When the ordinance was first presented for constitutional review, an Akron Municipal Court began:

Illegal drug use in Akron has increased to an alarming level, and the number of drug-related arrests have skyrocketed...Much of this increase is believed to be drug related...The

Although frequently struck down by courts in the 1960-70's on vagueness grounds, the vagrancy laws have retained surprising vitality with the aid of both legislatively and judicially created limitations as to place, scope, or purpose.<sup>39</sup>

### A. The Original Vagrant

In *Papachristou v. City of Jacksonville*,<sup>40</sup> the Supreme Court reviewed the language employed in the once common vagrancy law.<sup>41</sup> In *Papachristou*, eight individuals were charged with offenses such as being a "vagabond" or a "common thief".<sup>42</sup> They were convicted under a vagrancy ordinance. The ordinance prohibited seemingly innocent behavior such as loafing and habitual nightwalking.<sup>43</sup> The Court found this type of "large net" cast for offenders void for vagueness because it encouraged arbitrary arrests and convictions.<sup>44</sup> The majority explained that because the ordinance criminalized many activities that were common and innocent by modern standards, the ordinance granted the police unrestrained discretion to choose which members of society to arrest.<sup>45</sup> The Court then condemned the law for permitting arrest on suspicion and for providing a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."<sup>46</sup>

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ordinance is a reaction to this crisis. In enacting the ordinance, the Akron City Council, in Section 3, declared it to be 'an emergency measure' . . .

*City of Akron v. Holley*, 557 N.E. 2d 861, 863 (Akron, Ohio Mun. Ct. 1989).

<sup>39</sup> *Milwaukee v. Nelson*, 439 N.W.2d, 562, 566, (Wis. 1989).

<sup>40</sup> 405 U.S. 156 (1972).

<sup>41</sup> For other examples of vagrancy statutes found void-for-vagueness, *see, e.g.*, *People v. Belcastro*, 190 N.E. 301 (Ill. 1934) (vagrant defined as those reputed to be habitual criminals); HAW. REV. STAT. § 314-1 (1955) (Proscriptions were directed against any person "who practices hoopiopio, hoounauna, hoomanamana, anaana, or pretends to have the power of praying persons to death."); ARIZ. REV. STAT. ANN. § 13-991(4) (1956) (repealed 1978); COLO. REV. STAT. ANN. § 40-8-19 (West 1963). For a more complete listing of vagrancy statutes, *see* Comment, *Constitutional Attacks on Vagrancy*, 20 STAN. L. REV. 782 (1968).

<sup>42</sup> *Papachristou*, 405 U.S. at 158.

<sup>43</sup> The loitering statute found void-for-vagueness provided:

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, person 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."

*Id.* at 156-57 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

<sup>44</sup> *Id.* at 163.

<sup>45</sup> *Id.* at 163-65.

<sup>46</sup> *Id.* at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).



After *Papachristou*, the lower courts followed suit and struck down broad vagrancy laws on grounds similar to those expressed in *Papachristou*.<sup>47</sup> Consequently, the drafters of the vagrancy laws rallied, as mentioned previously, by limiting "loitering" or "vagrancy" to a particular place, scope, or illicit purpose. Moreover, most of these new vagrancy laws carefully delineated the circumstances in which the activity would be considered criminal.<sup>48</sup> In many courts' view, this approach appears to cure the risk of arbitrary enforcement.

### B. Place Limitations

In *People v. Bright*<sup>49</sup>, the Court of Appeals of New York addressed a version of the vagrancy law which confined the activity made criminal to a particular place.<sup>50</sup> New York Penal Law section 240.35(7) stated that one is guilty of a violation if he "loiters or remains in any transportation facility, or is found sleeping therein..."<sup>51</sup> A transportation facility is defined as:

any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.<sup>52</sup>

The court declared that "loitering" may be prohibited in a specific facility only if it is one of limited size or knowable boundary.<sup>53</sup> Under these circumstances, the court explained, law enforcement officials' discretion in enforcing the law is limited to the confines of a facility "where illegal activity is notorious."<sup>54</sup>

Although the crime was limited to a "transportation facility", the court found the statute nonetheless failed to give clear notice to the public "that an

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<sup>47</sup> See, e.g., *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (Henderson, Nevada, vagrancy ordinance prohibiting loitering or prowling held void-for-vagueness), *rev'd on other grounds*, 428 U.S. 465 (1976); *People v. Berck*, 300 N.E.2d 411, 412, (N.Y. 1973) (provision prohibiting loitering or prowling declared void for vagueness), *cert. denied*, 414 U.S. 1093 (1973); *City of Portland v. White*, 495 P.2d 778, 779 (Or. Ct. App. 1972) (meaning of "loiter" and "prowl" is too indefinite); *City of Bellevue v. Miller*, 536 P.2d 603, 608 (Wash. 1975) (ordinance forbidding loitering or prowling held void-for-vagueness). *But see* *State v. Ecker*, 311 So. 2d 104, 109 (Fla. 1975) (provision using words "loiter" and "prowl" not void-for-vagueness), *cert. denied*, 423 U.S. 1019 (1975).

<sup>48</sup> See *supra* text accompanying notes 49-101.

<sup>49</sup> 520 N.E.2d 1355, (N.Y. 1988).

<sup>50</sup> For other examples of loitering laws confining the crime to a particular place, see *Peters v. Breier*, 322 F.Supp. 1171 (E.D. Wis. 1971) (park); *People v. Merolla*, 172 N.E. 2d 541, (N.Y. 1961) (waterfront facilities); *Jeffrey F. Ghent, Annotation, Validity and Construction of Statute or Ordinance Forbidding Unauthorized Persons to Enter Upon or Remain in School Building or Premises*, 50 A.L.R.3d 340 (1973).

<sup>51</sup> N.Y. PENAL LAW §. 240.35(7) (McKinney 1988.)

<sup>52</sup> N.Y. PENAL LAW §. 240.00(2)(McKinney 1988).

<sup>53</sup> *Bright*, 520 N.E. 2d at 1359.

<sup>54</sup> *Id.*

activity as innocuous as mere loitering [was] prohibited."<sup>55</sup> Thus, the statute violated Due Process and was void for vagueness.<sup>56</sup>

### C. Scope Limitations

In *Kolender v. Lawson*<sup>57</sup>, the Supreme Court evaluated a California vagrancy statute which limited its scope to circumstances warranting alarm for the public safety.<sup>58</sup> This statute, similar to the Model Penal Code version,<sup>59</sup> offers a vagrancy law of the "stop and identify" variety.<sup>60</sup> The Model Penal Code version limiting its scope to "alarm for the public safety"<sup>61</sup> was adopted for the same reason as the version of the vagrancy law limited to place — both were conceived in an effort to cure the wholly standardless reach of older vagrancy laws.<sup>62</sup> The Model Penal Code has been adopted by most states. The California statute in *Kolender* declares guilty every person:

who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.<sup>63</sup>

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<sup>55</sup> *Id.* at 1360-61. The court found the definition too broad, analogizing it to a public street rather than to a restricted area of public access. The court recognized that many transportation facilities had developed into "small, indoor cities." *Id.* Thus, the statute failed to give unequivocal warning. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 461 U.S. 352 (1983).

<sup>58</sup> *Id.*

<sup>59</sup> MODEL PENAL CODE § 250.6 (1980) provides:

A person violates the statute if he or she loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.

Among the circumstances which may be considered in determining whether such alarm is warranted is the actor's . . . refusal to identify himself. . .

A police officer shall prior to arrest . . . afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence . . .

<sup>60</sup> For those articles focusing on the "stop and identify" version of the vagrancy law, *see generally* Leslie V.F. Silvestrini, Note, *Kolender v. Lawson: Fourth and Inches On Fourth Amendment Issues And Supreme Court Punts*, 10 J. CONTEMP. L. 239 (1984); Alan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057 (1983).

<sup>61</sup> *See, e.g.*, State v. Bitt, 798 P.2d 43 (Idaho 1990).

<sup>62</sup> *See* Model Penal Code and Commentaries Part II § 250.6 at 383-91, 393-98 (Official Draft and Revised Comments 1980).

<sup>63</sup> CAL. PENAL CODE § 647(e) (West 1970).

Although the Ninth Circuit<sup>64</sup> found the statute unconstitutional on a variety of grounds<sup>65</sup>, the Supreme Court only addressed the identification requirement.<sup>66</sup> The Court noted that "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way."<sup>67</sup> The Court condemned the statute as a "convenient tool"<sup>68</sup> for abusive or discriminatory law enforcement, which "entrusts lawmaking to the moment to moment judgement of the policeman on his beat."<sup>69</sup> Accordingly, the Supreme Court ruled that particular section of the statute void for vagueness.<sup>70</sup>

Subsequent cases addressing similar Model Penal Code-based vagrancy provisions in the lower courts are split as to whether these laws should be declared void for vagueness.<sup>71</sup> In *Watts v. State*<sup>72</sup>, the Supreme Court of Florida addressed a similar statute declaring it unlawful for any person:

to loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight...makes it impracticable, a law

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<sup>64</sup> See *Kolender v. Lawson*, 461 U.S. 352, 356 n.4. (1983) (explaining the reasons for accepting the case from the Court of Appeals for the Ninth Circuit).

<sup>65</sup> *Kolender*, 461 U.S. at 355.

<sup>66</sup> The majority in *Kolender v. Lawson* stated:

Because we affirm the judgment of the court below on [the question of the vagueness of the identification requirement]..., we find it unnecessary to decide the other questions raised by the parties... The remaining issues raised by the parties include whether section 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems.

*Id.* at 361-62 n.10 (citations omitted).

<sup>67</sup> 461 U.S. at 358.

<sup>68</sup> *Id.* at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> For cases holding the identification section constitutional see, e.g., *Bell v. State*, 313 S.E.2d 678 (Ga. 1984); *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 57 (Wis. 1989).

For cases finding the identification section unconstitutionally void for vagueness: see, e.g., *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987).; *State v. Bitt*, 798 P.2d 43 (Idaho 1990).

<sup>72</sup> 463 So. 2d 205 (Fla. 1985).

enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct.

No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.<sup>73</sup>

The court distinguished the Florida law<sup>74</sup> from the California statute reviewed by the Supreme Court, in *Kolender* noting that failure to identify oneself was not an element of the crime under the Florida law.<sup>75</sup> Instead, "a person's identification or refusal to identify is merely a circumstance to consider in deciding whether the public safety is threatened."<sup>76</sup> Thus, although the court intimated that an arrest might hinge on such a failure,<sup>77</sup> the statute did not create a certainty that the arrest would be based solely on such a failure.<sup>78</sup> In the court's opinion, the risk of arbitrary police conduct was minimized and the void for vagueness challenge failed.<sup>79</sup>

The Idaho Supreme Court, in *State v. Bitt*<sup>80</sup>, opted for a different interpretation of the identification requirement. The Idaho ordinance<sup>81</sup>, identical to the statute in *Watts*, also required the police to dispel any alarm prior to arrest, but did not specify if a failure to respond would mandate arrest.<sup>82</sup> The Idaho Supreme Court ruled that by imposing the requirement for police interrogation, "albeit . . . in a backhanded manner", the ordinance suffered from the same constitutional infirmity that the Supreme Court ascribed to the California statute in the *Kolender* case.<sup>83</sup> The court reasoned that although there was no certainty of arrest, the suspect must still dispel the officer's alarm.<sup>84</sup> It feared that a suspect's failure to respond or an inadequate response (in the officer's opinion)

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<sup>73</sup> FLA. STAT. § 856.021 (1981).

<sup>74</sup> *Watts*, 463 So.2d at 207.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *State v. Bitt*, 798 P.2d 43 (Idaho 1990).

<sup>81</sup> *Id.* at 47.

<sup>82</sup> See *supra* note 59.

<sup>83</sup> *Bitt*, 798 P.2d at 50.

<sup>84</sup> *Id.*

could still serve as a predicate for the arrest.<sup>85</sup> Thus, the court declared the statute unconstitutionally vague.<sup>86</sup>

#### D. *Mens Rea* Limitations

The version of the contemporary vagrancy law which requires *mens rea* appears to be given the most lenient constitutional consideration by the legal community.<sup>87</sup> In *People v. Superior Court (Caswell)*,<sup>88</sup> the California Supreme Court upheld a provision of the California Penal Code which declared every person guilty of disorderly conduct who commits any of the following acts: ". . . loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act."<sup>89</sup>

In assessing the void for vagueness challenge, the California court relied on the Supreme Court's disposition of cases involving vagrancy laws which included a *scienter* requirement.<sup>90</sup> In those cases, the Supreme Court upheld the law at issue, finding particularly persuasive the idea that the illicit purpose requirement mitigated the law's vagueness because of the adequacy of notice.<sup>91</sup> Although the Supreme Court did not address the vagueness question with respect to the danger of unfettered police discretion, the California court held that police discretion was restrained in the California statute by the additional place requirement.<sup>92</sup> The court explained that the term "loiter" was not vague because it had previously defined "loiter" as "lingering in the designated places for the purpose of committing a crime."<sup>93</sup> It reasoned the requisite "purpose of engaging in or soliciting any lewd or lascivious or unlawful act"<sup>94</sup> was also not vague because law enforcement officers could determine this element by considering the several factors listed in the statute.<sup>95</sup> Accordingly, the court found the statute constitutional.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *State v. E.L.*, 595 So.2d 981, 984 (Fla. Dist. Ct. App. 1992) (summarily dismissing the ordinance prohibiting loitering for the purpose of engaging in drug-related activities because the "less specific" Model Penal Code ordinance had been previously upheld against a vagueness challenge); see also Jordan Berns, *Is There Something Suspicious About The Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 727 (1989) ("Laws that prohibit loitering with some specified illicit intent are probably the most common type of loitering laws and almost certainly the safest constitutionally."); cf. Douglas, *supra* note 1, at 11. (suggesting he would condone an intent requirement).

<sup>88</sup> 758 P.2d 1046, (Cal. 1988).

<sup>89</sup> CAL. PENAL CODE § 647(d) (West 1988).

<sup>90</sup> *Caswell*, 758 P.2d at 1049-56.

<sup>91</sup> See *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); see also *Colautti v. Franklin*, 439 U.S. 379, 395 (1975); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101-02 (1945) (plurality opinion).

<sup>92</sup> *Caswell*, 758 P.2d at 1049-56.

<sup>93</sup> *Caswell*, 758 P.2d at 1049 (quoting *In re Cregler*, 363 P.2d 305, 307 (Cal. 1961)).

<sup>94</sup> CAL. PENAL CODE § 647(d) (West, 1988).

<sup>95</sup> *Caswell*, 758 P.2d at 1049. These factors include whether the actor has repeatedly solicited or committed similar acts in the same location in the past; whether the officer has some reliable information from an

By contrast, the Virginia appellate court in *Coleman v. City of Richmond*<sup>96</sup> ruled the circumstances listed in the ordinance did not save the law from vagueness.<sup>97</sup> The court reasoned that the circumstances were only "investigative hints" because police officials were free to disregard them.<sup>98</sup> The Virginia court then concluded that circumstances which merely serve as investigative hints were not relevant to the constitutional inquiry as they had no force of law.<sup>99</sup> Thus, the court focused its scrutiny on the "loitering" element of the offense. Because loitering, itself, is not illegal conduct, the court ruled an officer may arrest "on mere suspicion of future criminality" and held the law unconstitutional.<sup>100</sup>

Moreover, the court rejected a claim alleging an overt act would save the ordinance from vagueness.<sup>101</sup> The court reasoned that because an overt act, by itself, would prove a charge of attempt or solicitation of some other crime, there already exists a less restrictive means of addressing the problems confronted by the Richmond ordinance.<sup>102</sup>

Notwithstanding *Coleman*,<sup>103</sup> the majority of courts have found the new breed of vagrancy laws--those equipped with limits as to place, scope, or purpose (especially those which list specific circumstances) — explicit enough to pass

informant as to the suspects's intent; and whether the officer is notified by citizen who have used a restroom that the suspect was lingering inside while "engaging in suggestive conduct-- not amounting to an actual solicitation or indecent exposure" but suggestive enough of the person's intent that the officer could find probable cause to arrest. CAL. PENAL CODE § 647(d) (West 1988).

For other court decisions defining an ambiguous term such as "loiter" or "prowl" by requiring a particular purpose to be manifested, then subsequently defining the purpose by a list of circumstances, see *State v. Ecker*, 311 So. 2d 104 (Fla. 1975) (defines usual by reasonable alarm, then alarm by the *Terry* standard), cert. denied, 423 U.S. 1019 (1975); see also *Bell v. State*, 313 S.E.2d 678 (Ga. 1984) (defines usual by reasonable alarm, then alarm by listed circumstances).

<sup>96</sup> *Coleman v. City of Richmond*, 364 S.E.2d 239 (Va. Ct. App. 1988).

<sup>97</sup> The ordinance at issue in *Coleman* provided:

It shall be unlawful for any person, within the city limits, to loiter, lurk, remain, or wander about in public place, or in any place within view of the public or open to the public, in a manner or under circumstances manifesting the purpose of engaging in prostitution, or of patronizing a prostitute, or of soliciting for or engaging in any other act which is lewd, lascivious or indecent.

RICHMOND, VA. CODE §§ 20-83, (1986).

The ordinance specified what places are public and also included several circumstances that may be considered in evaluating whether the prohibited purpose has been manifested. *Id.*

<sup>98</sup> The court alternatively held that if the circumstances listed were sufficient individually to manifest the prohibited intent, then the law was constitutionally overbroad because it deterred unwritten rights to loiter, wander, and idle. *Coleman*, 364 S.E.2d at 243 (citing examples such as a former prostitute who could be arrested for window shopping).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 244. The court's concerns are similar to those expressed by the Supreme Court of California in evaluating the statute at issue in *People v. Superior Court (Caswell)*, 758 P.2d 1046 (Cal. 1988).

<sup>101</sup> *Coleman*, 364 S.E.2d at 244.

<sup>102</sup> *Id.*

<sup>103</sup> See *State v. Ecker*, 311 So.2d 104, 109 (Fla. 1975) (The court criticized the Oregon court, stating that it "failed to apply the judicial principle of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible."), cert. denied, 423 U.S. 1019 (1975); see also *Milwaukee v. Nelson*, 439 N.W.2d 562, 567 (Wis. 1989).

constitutional muster under the void for vagueness doctrine. Moreover, similar to the lower court in *Kolender* and the court in *Watts*, those courts construing the Model Penal Code version of the vagrancy law adopt the *Terry* stop standard<sup>104</sup> to test which combination of circumstances amount to a violation. In these courts' opinions, the *Terry* standard provides a sufficient guarantee against police abuse.

However, while seemingly explicit, these newly-crafted vagrancy laws have not been a prophylactic against those abuses<sup>105</sup> declared by the Supreme Court to be the most important reason for the vagueness doctrine itself.<sup>106</sup> As the intractable morass of history demonstrates, the vagrancy law's chimerical qualities undermine the requirements of probable cause for arrest. This instability results in unreasonable seizures which place our Fourth Amendment rights in jeopardy.

The Supreme Court has yet to undertake a Fourth Amendment approach for review of the vagrancy law.<sup>107</sup> The lower courts which have indulged in the Fourth Amendment analysis are few; the results checkered. Thus, after reviewing the Fourth Amendment, the remainder of this Comment argues that our Fourth Amendment rights must be addressed before they are forever sacrificed in the name of social policy.<sup>108</sup>

#### FOURTH AMENDMENT: FROM BRIGHT LINES TO BALANCING . . .

##### A. Policy

The Constitution's prohibition against unreasonable seizures places the citizenry beyond the reach of governmental intrusion unless the government has good reason to believe that a crime has been or is being committed.<sup>109</sup> The Fourth Amendment is more than just a negative right against a specific kind of

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<sup>104</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968); see also *infra* notes 124-35.

<sup>105</sup> See *infra* note 187.

<sup>106</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

<sup>107</sup> Rather, the Court has expressed its ultimate concern with arbitrary police behavior under the void-for-vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 352 (1983).

Other courts have also suggested that much of the criticism of the vagrancy law rests on the postulate that these laws permit arrest on suspicion of criminal activity, rather than probable cause as mandated by the Fourth Amendment. Indeed, the Court long ago established that a law permitting the government officials to stop persons on mere suspicion leaves citizens "at the mercy of the officer's whim or caprice."

*Brinegar v. United States*, 338 U.S. 160, 176 (1979).

<sup>108</sup> The hostility to seizures predicated on mere suspicion was the primary motivation for the adoption of the Fourth Amendment. *Dunaway v. New York*, 442 U.S. 200, 213 (1979).

<sup>109</sup> See *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) ("Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime.")

The Fourth Amendment was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

government intrusion; rather, it protects a bundle of constitutional values.<sup>110</sup> Among those rights protected in the "street encounter" include, *inter alia*, the right to be let alone,<sup>111</sup> the right to personal security,<sup>112</sup> and the right to travel.<sup>113</sup> Accordingly, if police discretion is not adequately checked, police will have dictatorial power over the streets resulting in unreasonable seizures, distorting the fundamental guarantees inherent in our Fourth Amendment promises of protection.

In the Supreme Court's opinion, not every police-citizen street encounter constitutes a constitutionally protected seizure.<sup>114</sup> The Court reasons that such an approach would cause undue harm to "a wide variety of legitimate law enforcement practices".<sup>115</sup> The standard formulated by the Court to determine if the police-citizen encounter is a seizure is if the police presence is "unduly intimidating".<sup>116</sup> Undue intimidation results if, under all the circumstances, a reasonable person would believe he or she were not free to leave.<sup>117</sup>

According to the Court, a police officer's "request" for identification is not unduly intimidating to the reasonable person;<sup>118</sup> a "demand" for identification

<sup>110</sup> The commitment to individual rights, in addition to the Fourth Amendment's mandate against unreasonable seizures, combine to afford the citizen on the street substantive, as well as procedural protection against unreasonable police interference. Maclin, *supra* note 6, at 1260.

<sup>111</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>112</sup> See U.S. CONST. amend IV.

The first clause of the Fourth Amendment states: "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." *Id.*

<sup>113</sup> The Fourth Amendment's protection of the personal liberty and security of those who move about the streets is collateral to the right to travel recognized by other provisions of the Constitution. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

The constitutional source of the right to travel has been a frequently debated topic. See *Zobel v. Williams*, 457 U.S. 55, 66-67 (1982) (Brennan, J., concurring); *id.* at 78-81 (O'Connor, J., concurring).

<sup>114</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>115</sup> Some criticize this approach not only because it contravenes precedent but because it fails to account for the illegitimate law enforcement practices it may encourage. See Maclin, *supra* note 6, at 1284. (it cannot be demonstrated that "such a rule may be employed without leaving citizens at the mercy of the police."). See also, *Brinegar v. United States*, 338 U.S. at 187-88 (1941). Justice Jackson describes the risk in street encounters:

There is no way in advance to protect against illegal...seizures...They are usually a single incident, perpetuated by surprise, conducted in haste, kept purposely beyond court supervision and limited only by the judgement and moderation of the officers whose own interests and record are often at stake. There is no opportunity to appeal for an injunction or to disinterested intervention. The citizens choice is to either submit to whatever officers undertake or to resist at risk of arrest or immediate violence.

*Id.*

<sup>116</sup> *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984).

For a criticism of the undue intimidation standard, see *United States v. White*, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting); see also Maclin, *supra* note 6, at 1284.

<sup>117</sup> *Michigan v. Chesternut*, 486 U.S. 587 (1988). (If the suspect's freedom of movement is already restricted by factors independent of the police officer's conduct, the Court describes the test as "whether a reasonable person would feel free to disregard the police.") See also *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

<sup>118</sup> *INS v. Delgado*, 466 U.S. 210 (1984)(holding an interrogation, by itself, does not constitute a Fourth Amendment seizure).



is.<sup>119</sup> However, even if the police officer's presence is unduly intimidating by demanding identification, these demands may not constitute a "seizure". The Court recently held that a police officer's demands do not amount to a seizure if the suspect fails to comply with such demands.<sup>120</sup>

### B. Probable Cause

Only when the police conduct amounts to a constitutionally protected seizure, will the Court examine if that seizure was justified. Since at least 1925,<sup>121</sup> the Court had adhered to the requirement that police officers must have "probable cause" to believe a crime is being or has been committed before seizing a suspect.<sup>122</sup> Probable cause remained the benchmark to justify a seizure until *Terry v. Ohio*,<sup>123</sup> and continues to be the litmus for a formal arrest.<sup>124</sup>

Probable cause means the "known factors and circumstances are such that a person of reasonable caution would feel a fair degree of confidence that he or she knows what is going on and can take action in response."<sup>125</sup> To determine the existence of probable cause, the Court undertakes a "totality of the circumstances"<sup>126</sup> approach under a rational basis test.<sup>127</sup> Accordingly, the Court

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Indeed, the Court has recently assured us that these on-the-spot encounters do not trouble the average law-abiding citizen. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 452 (1990).

Likewise, the Court characterizes being following down an alley by a police car as another such trouble-free encounter. *See Michigan v. Chesternut*, 486 U.S. 567 (1988); *see also Maclin, supra* note 6, at 1260 (suggesting the justices try the experience).

Professor LaFave also concedes this standard is a legal fiction. *See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE* § 9.3(e), at 477 (2d ed. 1987).

Even more disturbing is that some members of the Court now advance a "no restraint, no seizure" theory which narrows a constitutionally protected seizure to intentional acquisition of physical control over the suspect. *See California v. Hodari*, 111 S. Ct. 1547 (1991); *see also Maclin, supra* note 6, at 1281.

<sup>119</sup> For a discussion and criticism of the Court's distinction between "request" and "demand", *see Marjorie E. Murphy, Encounters Of A Brief Kind: On Arbitrariness And Police Demands for Identification*, ARIZ. ST. L.J. 207, 217 (1986).

<sup>120</sup> *California v. Hodari*, 111 S. Ct. 1547 (1991). Of course, physical contact constitutes a seizure regardless of whether the suspect yields to the police officer's authority. *Id.*

<sup>121</sup> *Carroll v. United States*, 267 U.S. 132, 154 (1925).

<sup>122</sup> *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

<sup>123</sup> 392 U.S. 1 (1968) (The Court allowed police officers, who lacked probable cause, to question and search a citizen whom the officers suspected might be armed and dangerous.).

<sup>124</sup> *See* U.S. CONST., amend. IV. It guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.* (emphasis added)

<sup>125</sup> *Draper v. United States*, 358 U.S. 307 (1959).

<sup>126</sup> *Illinois v. Gates*, 462 U.S. 213 (1983).

Prior to expansion of the probable cause doctrine in *Gates*, the Court applied a two pronged test:

- 1) basis of knowledge of affiant's allegation of criminal activity occurring, and
- 2) veracity of the source of the information

*See Spinelli v. United States*, 393 U.S. 410 (1969); *see also Aguilar v. Texas*, 378 U.S. 108 (1964).

has described probable cause as a "fluid concept - turning on the assessment of probabilities in particular factual contexts-- not readily, or even usefully, reduced to a neat set of legal rules."<sup>128</sup>

The quantum of evidence relied upon to make the probable cause determination need not be evidence that would be admissible at trial;<sup>129</sup> it need not be circumstances which would evidence criminal activity. Indeed, the Supreme Court stated that the existence of probable cause does not turn on whether the conduct allegedly giving rise to probable cause is "innocent" or "guilty."<sup>130</sup> Rather, what is significant is "the degree of suspicion which attaches to the particular types of noncriminal acts."<sup>131</sup> Although the totality of the circumstances approach does not "limit the [types of innocent] circumstances which can be considered relevant",<sup>132</sup> recent Supreme Court precedent appears to suggest that the innocent circumstances must be extraordinarily specific.<sup>133</sup>

### C. Reasonable Suspicion

After *Terry v. Ohio*,<sup>134</sup> probable cause was no longer the touchstone for determining when an officer may effect a seizure not amounting to a formal arrest.<sup>135</sup> Instead, "reasonable suspicion" may now justify a seizure.<sup>136</sup> In *Terry v. Ohio*<sup>137</sup>, the Supreme Court held that a police officer may stop an individual

After the Court's decision in *Gates*, a police officer need only satisfy one prong, if there is a strong showing of evidence on the other prong. *Gates*, 462 U.S. at 233 (1983) (White, J., concurring).

<sup>127</sup> Cf. *supra* note 6, at 1333-34 (The evidentiary standard which must be met is not the preponderance, but just a reasonable explanation.)

<sup>128</sup> *Illinois v. Gates*, 462 U.S. 213, 232 (1983); see also *Maclin*, *supra* note 6, at 1331-33.

<sup>129</sup> *Brinegar v. United States*, 338 U.S. 160 (1949); see also FED. R. CRIM. P. 41 (c)(1).

<sup>130</sup> *Gates*, 462 U.S. at 243-44 n.13.

<sup>131</sup> *Id.*

<sup>132</sup> *Yale Kamisar, Gates, "Probable Cause", "Good Faith", and Beyond*, 69 IOWA L. REV. 551, 570 (1984).

<sup>133</sup> Cf. *Illinois v. Gates*, 462 U.S. 213 (1983) (The facts given by an informant were suspect specific, designated the particular crime, described where, when and how the alleged crime would occur, and were corroborated by extensive police surveillance.)

See *Maclin*, *supra* note 6, at 1260 (The facts supporting probable cause in *Gates* were not ordinary, everyday innocent facts.); see also *Kasimar*, *supra* note 132, at 568 (The facts in *Gates* suggested a definite nexus between the corroborated details and the alleged crime.)

<sup>134</sup> 392 U.S. 1 (1968).

<sup>135</sup> Although *Terry* stands for the proposition that under the reasonable suspicion test, an officer may accost and stop a person on less than probable cause, the *Terry* Court actually assumed the officer had the authority to accost the suspects. See John M. Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681, 684 (1978) (arguing that *Terry* never authorized a general power to investigate). Regrettably, subsequent cases solidify this concept. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972).

The Supreme Court has established other exceptions to the general rule that an arrest or search must be based on probable cause to satisfy the Fourth Amendment. These include: searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which special needs beyond the normal need for law enforcement make the probable cause requirement impracticable. Project, TWENTIETH ANNUAL REVIEW OF CRIMINAL PROCEDURE: UNITED STATES SUPREME COURT AND COURTS OF APPEALS 1989-1990, 79 GEO. L.J. 591, 613 (1991).

<sup>136</sup> See *supra* note 133.

<sup>137</sup> 392 U.S. 1, 22-24 (1968).

reasonably suspected of criminal activity, question him or her briefly, and perform a limited pat down frisk for weapons.<sup>138</sup> The Court justified ignoring settled constitutional precedent<sup>139</sup> to accommodate national concern over burgeoning urban crime.<sup>140</sup> Because a short, investigatory detention is a lesser invasion than an arrest, and because such seizures serve important government interests, the Court reasoned that the government interests outweigh the minimal intrusion into a suspect's privacy.<sup>141</sup> The Court believed it was the essence of good police work to adopt this intermediate response.<sup>142</sup>

Justice Douglas, in his dissenting opinion, criticized the Court's policy decision and predicted that such a blurring of the bright line rule of probable cause would usher in a "new regime" — one that sanctions police power at the expense of individual rights.<sup>143</sup> Scholarly analyses suggest this prediction was accurate.<sup>144</sup>

Reasonable suspicion requires a quantum of objective data, less than necessary to show probable cause. The reasonable suspicion standard is indicated when a police officer advances specific, articulated reasons to explain his or her suspicion that a crime has been committed or is imminent.<sup>145</sup> Thus, the predicate for reasonable suspicion is the police officer's personal observations.<sup>146</sup>

Similar to the type of information sufficient for probable cause, the observations which support an officer's reasonable suspicion may be wholly innocent acts.<sup>147</sup> The Supreme Court condones innocent circumstances as grounds for reasonable suspicion because it feels an officer can infer criminal

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<sup>138</sup> *Id.*

<sup>139</sup> As Justice Jackson proclaimed in *Brinegar v. United States*: "[A police officer] is either taking the initial steps to arrest, search and seizure, or committing a completely lawless and unjustifiable act." 338 U.S. 160, 187-88 (1941).

<sup>140</sup> See, e.g., Maclin, *supra* note 6, at 1310.

<sup>141</sup> *Terry* 392 U.S. at 22-24.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 26.

<sup>144</sup> See, e.g., Maclin, *supra* note 6, at 1310. Professor Maclin states: "The Court's rhetoric is fine, but the Court does not take its own rhetoric seriously. . . . The Court's Fourth Amendment principles are limited by those who feel that expansive government power is necessary in light of some social crisis. . . ." *Id.*

<sup>145</sup> *United States v. Hensley*, 469 U.S. 221 (1985); *Terry*, 392 U.S. at 21 (1968).

<sup>146</sup> See *United States v. Sharpe*, 470 U.S. 675, 682 n.3 (1985) (police observation of overloaded pickup truck with camper shell commonly used to transport illegal drugs driving in tandem with car and evading police provided reasonable suspicion to justify stop for suspected drug use); *Terry*, 392 U.S. at 28 (police observation of suspects pacing nervously and repeatedly looking into store provided reasonable suspicion that a robbery was contemplated).

<sup>147</sup> Several innocent acts, considered together, may amount to reasonable suspicion. See *United States v. Sokolow*, 490 U.S. 1, 9 (1989). However, an officer may not base reasonable suspicion on isolated instances of innocent activity. See *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (*per curiam*) (no reasonable suspicion when person arrived on early morning flight from known narcotics source city and glanced repeatedly back to another passenger).

acts from conduct which seems innocuous to the untrained observer.<sup>148</sup> Consequently, it affords great deference to the officer's observations and conclusions.<sup>149</sup>

Should the police conduct amount to a constitutionally protected seizure, which the Court finds to be justified by reasonable suspicion, it will apply a common sense approach to determine whether the police officer's actions during the seizure were reasonable and whether it was conducted for a legitimate investigatory purpose.<sup>150</sup> While the Court's recent doctrine intimates a balancing test, the law is actually presumed constitutional. Accordingly, the Court weights the balance to permit intrusive police actions so long as those actions promote effective law enforcement.<sup>151</sup>

Although the scales of justice are tipped in favor of police action, the Court's inspection of a police officer's actions during a seizure is designed to ensure police discretion is closely shepherded. The Court recognizes that if police discretion is not constrained in the dynamics of a street encounter addressed by *Terry*, there is an overwhelming potential for a *de facto* arrest.<sup>152</sup>

In fact, the Court has declared a *Terry* stop to be a "narrowly drawn" exception to the probable cause requirement.<sup>153</sup> Indeed, the Court has been adamant that under no circumstances does police authority allow a search for evidence.<sup>154</sup> Moreover, the Court's more recent cases suggest it disapproves of

<sup>148</sup> See *United States v. Cortez*, 449 U.S. 411, 418 (1981) (officer's special training and experience permit inferences of criminal activity sufficient to create reasonable suspicion).

<sup>149</sup> The Supreme Court's deference extends to the collective knowledge of several law enforcement personnel. See *United States v. Hensley*, 469 U.S. 221 (1985) (another police department's reasonable suspicion satisfies the Fourth Amendment; no personal information required).

The Court has also sanctioned reasonable suspicion based on the information from an unknown informant when police investigation had extensively corroborated such information. See *Alabama v. White*, 496 U.S. 325 (1990) ("close case" for establishing reasonable suspicion).

Furthermore, it appears to have approved the use of statistically calculated personal traits (better known as stereotypes). See *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (upheld reasonable suspicion which was primarily based on drug courier profile compiled by statistical evidence).

<sup>150</sup> In *Terry*, the Court stated that a seizure is limited to a brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information. 392 U.S. at 5 (1968).

<sup>151</sup> Josephine R. Potuto, *A Practitioner's Primer to the Fourth Amendment*, 70 NEB. L. REV. 412 (1991).

<sup>152</sup> See *Terry v. Ohio*, 392 U.S. at 6 (1968) (There is no bright line rule for the guidance of police officers in the field).

When coupled with the reasonable suspicion standard to stop, chronicled police escapades suggest the Court's constitutional doctrine has not been adequate.

For instance, a tactic employed by a sheriff in Florida was to post highway signs announcing drug search roadblocks to oncoming motorists. If any motorists slowed down or made a U turn to avoid the search, the car would be stopped. See Seth Mydans, *Powerful Arms of Drug War Arousing Concern For Rights*, N.Y. TIMES, Oct. 16, 1989, at A1.

<sup>153</sup> *United States v. Sharpe*, 470 U.S. 675, 689 (1985) (Marshall, J., concurring).

<sup>154</sup> See *Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983) (search of automobile passenger's compartment may not include search for evidence).

police actions which escalate the intensity of police-citizen encounters.<sup>155</sup> Furthermore, a citizen may even have the constitutional right to walk away from a questioning officer without the risk of arrest.<sup>156</sup>

#### FOURTH AMENDMENT AND VAGRANCY LAWS

##### *A. The Supreme Court: Laying the Groundwork*

Justice Brennan laid the groundwork for a Fourth Amendment analysis of the current vagrancy laws with his concurring opinion in *Kolender v. Lawson*.<sup>157</sup> Recall that in *Kolender*, the majority found the identification section of a Model Penal Code version of the California vagrancy law void for vagueness.<sup>158</sup> The majority did not address the other sections of the statute nor did it address any Fourth Amendment issues.<sup>159</sup> However, Justice Brennan found not only the entire statute void for vagueness, but also adopted the opinion of the lower court which declared the identification section of the statute a violation of the Fourth Amendment's protection against unreasonable seizures.<sup>160</sup> As Justice Brennan noted: "We have long recognized that the government may not 'authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct.'"<sup>161</sup>

Justice Brennan explained that the identification requirement violated the Fourth Amendment because it permitted arrest on mere suspicion that another crime had been committed.<sup>162</sup> Because the lower court had defined the statutory text at issue<sup>163</sup> (which required the police officer to interrogate the suspect) to be equivalent to the *Terry* test of reasonable suspicion,<sup>164</sup> Justice Brennan reasoned that permitting arrest based upon a suspect's failure to answer the officer's questions would amount to arrest on the vague suspicion of the crime for which

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<sup>155</sup> Cf. William J. Mertens, *The Fourth Amendment and the Control Of Police Discretion*, 17 U. MICH. J.L. REF. 551, 608 (1984). In describing *Terry* and its prodigy, Professor Mertens states: One interpretation of *Terry* is "not permitting the intensification of the intrusion when the intensification's most obvious purpose is creation of pressure to achieve the police goal of consent to search." *Id.*

<sup>156</sup> See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (plurality opinion); *Terry v. Ohio*, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring); *id.* at 34 (White, J., concurring).

<sup>157</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983).

<sup>158</sup> *Id.* at 361.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 364 (Brennan, J., concurring).

<sup>161</sup> *Id.* at 362 n. 1 (quoting *Sibron v. New York*, 392 U.S. 40, 61 (1968)).

<sup>162</sup> Justice Brennan found an additional violation of the Constitution's prohibition of unreasonable seizures. He stated that the identification requirement "compelled" answers because the suspect could be arrested for failing to answer. Since compelling answers is beyond the scope of *Terry*, the statute is unconstitutional. *Id.* at 365.

For a more in-depth look at the Fourth Amendment and the right to walk away from the police absent probable cause, see Hallock, *supra* note 60, at 1057; Silvestrini, *supra* note 60, at 239.

<sup>163</sup> See *Kolender*, 461 U.S. at 356 n.5 (only when the circumstances manifest to a reasonable person that the public safety is endangered).

<sup>164</sup> *People v. Solomon*, 108 Cal. Rptr. 867 (Cal. 1973), *cert. denied*, 415 U.S. 951 (1974).

the suspect was originally stopped.<sup>165</sup> Thus, probable cause requirement for the original crime could be circumvented by permitting the police officer to bootstrap his or her way into probable cause.<sup>166</sup>

### *B. The Lower Courts: Building on the Foundation*

The Idaho Supreme Court in *State of Idaho v. Bitt*<sup>167</sup> agreed with Justice Brennan's analysis and applied it to a comparable Model Penal Code version of an Idaho vagrancy law.<sup>168</sup> As with the California court in *Kolender*, the Idaho majority also accepted a reading of the statutory text authorizing the police officer to interrogate on "reasonable suspicion" that another crime was being committed.<sup>169</sup>

In contrast to *Kolender*, however, the vagrancy law at issue in *Bitt* did not make failure to identify, or an inadequate identification, an element of the crime.<sup>170</sup> Yet the court reasoned that requiring the police officer to dispel his alarm prior to an arrest--even with a list of specific circumstances for guidance--was tantamount to conscripting the officer with the authority to define the crime.<sup>171</sup> Thus, although there was no absolute guarantee that an arrest on suspicion of another crime would occur (such as the case with failure to answer in *Kolender*)<sup>172</sup>, the court found that the risk of arrest<sup>173</sup> on suspicion exceeded constitutional limits.<sup>174</sup> Accordingly, although the court conceded that the

<sup>165</sup> *Kolender*, 461 U.S. at 363.

<sup>166</sup> *Id.*

<sup>167</sup> *State v. Bitt*, 798 P.2d 43 (Idaho 1990).

<sup>168</sup> *Id.* at 47.

<sup>169</sup> The Idaho Supreme Court quotes the lower court opinion where Judge Winmill stated:

The . . . ordinance, although employing different language, utilizes the *Terry* standard in defining conduct which authorizes a police officer to request an identification of the suspect and an explanation of his behavior. If the suspect fails to respond or his response is inadequate, his suspicious conduct may then serve as a predicate for his arrest, detention, conviction and punishment. In this way, the...ordinance criminalizes behavior which amounts to nothing more than the type of suspicious conduct which justifies a *Terry* stop. By far exceeding the limited intrusion on individual privacy permitted by the Constitution where an officer observes suspicious conduct not amounting to probable cause, the . . . ordinance clearly violates the defendant's right under . . . both the Idaho and the United States Constitutions.

*Id.* at 49.

<sup>170</sup> *Id.* at 50.

<sup>171</sup> *Id.* (The court states its reasons for finding the statute constitutionally infirm under the Fourth Amendment is similar to its reasons for finding the statute void for vagueness-- both are a result of a lack of guidelines for the ordinance's enforcement.)

<sup>172</sup> See *supra* notes 67-70.

<sup>173</sup> In order to hold a statute facially unconstitutional, there must be a core of circumstances to which the ordinance could be unquestionably constitutionally applied. *Kolender v. Lawson*, 461 U.S. 352 (1983) (majority opinion). *But see Kolender* at 370 (White, J., dissenting) (A facial challenge requires finding that ordinance is unconstitutional under any and all factual circumstances.)

<sup>174</sup> See *State v. Bitt*, 798 P.2d 43, 50 (Idaho 1990).

defendant challenging the vagrancy law at issue had a "hard test", it nevertheless declared the statute unconstitutional.<sup>175</sup>

The Wisconsin majority in *City of Milwaukee v. Nelson*<sup>176</sup> had a different opinion when faced with an identical (Model Penal Code-patterned) vagrancy law which did not absolutely compel an answer or subject the suspect to arrest.<sup>177</sup> In contrast to the Idaho majority, this court upheld the statute's constitutionality against a facial challenge of the Fourth Amendment.<sup>178</sup> The court began with an extensive discussion of the expertise of the Model Penal Code drafters, noting that the Model Penal Code's version of vagrancy has had nearly universal acceptance by the states.<sup>179</sup> Although conceding that even the drafters of the Model Penal Code were aware of the potential invalidation of such vagrancy laws because the law could be used as a ruse for authorizing arrest without probable cause, the court disregarded any suggestion that unscrupulous police officials may be encouraged to harass persons for reasons other than the legitimate concerns embodied in the ordinance.<sup>180</sup>

The court stated that any law may be subject to abuse<sup>181</sup> and reasoned that the danger of arbitrary and capricious police abuse resulting in arrests on suspicion would be slight because a violation occurs only under circumstances that "warrant alarm for the safety of persons or property in the vicinity."<sup>182</sup> It found those circumstances warranting alarm listed in the statute to establish "minimal guidelines for arrest which we find to be constitutionally reasonable."<sup>183</sup> In addition, the court relied on the part of the statute which prohibited "loitering" to provide further safeguards against arrests for other crimes without probable cause.<sup>184</sup> The court explained that because "loitering" is the proscribed conduct, the statute is already violated at the time of the police intrusion.<sup>185</sup>

The court repeatedly noted with assurance the statutory requirement that a police officer must allow the suspect to dispel the alarm prior to the arrest as a

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<sup>175</sup> *Id.*

<sup>176</sup> 439 N.W.2d 562, (Wis. 1989).

<sup>177</sup> *Id.* at 563 n. 1.

<sup>178</sup> Defendant asserted four arguments; all were rejected by the court: (1) the law is without a statutory criminal counterpart requiring probable cause to believe that a crime has been committed for a warrantless arrest; (2) it is an unreasonable seizure to arrest without a warrant for a minor offense only punishable by a fine; (3) the law is without statutory guidelines to govern law enforcement officials as to when to arrest or issue a written citation; (4) the law is without a probable cause requirement. *Milwaukee*, 439 N.W.2d at 566-73.

<sup>179</sup> *Id.* at 565.

<sup>180</sup> *Id.* at 572.

<sup>181</sup> *Id.* at 574. ("We have other laws designed to curb and punish such abuses as the many civil rights suits amply demonstrate.") (Day, J. concurring).

<sup>182</sup> *Id.* at 567.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 570, 149 Wisc. 2d at 442.

<sup>185</sup> *Id.*

bulwark against arbitrary arrest.<sup>186</sup> After discussing the important social objectives of the ordinance, and reminding the parties that the statute would be presumed constitutional, the court held that the defendant had failed to meet his burden beyond a reasonable doubt.<sup>187</sup>

### C. *The Future: Breaching the Wall?*

Although Justice Brennan laid the groundwork in his Fourth Amendment review of the Model Penal Code version of the vagrancy law, which appears to have taken hold in some lower courts,<sup>188</sup> it is still doubtful whether this foundation will survive.

At least one court has already expressed its reservations as to whether a statute which defines a crime can even violate the Fourth Amendment.<sup>189</sup> There is no specific precedent for such a proposition, nor do traditional Fourth Amendment claims support such a notion. Rather, those claims have been directed toward police conduct, not the definition of a crime as set out by statute.<sup>190</sup>

However, there is no precedent against such a channel of Fourth Amendment review.<sup>191</sup> Justice Brennan feels confident that early court intimations guarantee a statutory analysis under the Fourth Amendment.<sup>192</sup> From the case-by-case basis for which allegations of unreasonable seizures have been resolved in the past, it would seem to follow that a statute authorizing such seizures would also offend the Constitution.<sup>193</sup>

Should a court agree that a statute can even violate the Fourth Amendment, it still has other options. It may still reject the allegation that the vagrancy statute at issue results in unreasonable seizures. Similar to the reasoning of the *Milwaukee* court, a court may assert that the risk of arrest without probable cause is dispelled, or at least minimized, because "loitering" is the conduct which is prohibited. Therefore, the crime has been committed prior to police action.<sup>194</sup>

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<sup>186</sup> See *id.* at 571-72, (If the officer does not afford the actor an opportunity to dispel any alarm, the actor cannot be convicted of violating the ordinance. If an explanation is given, the trier of fact ultimately decides if the explanation was reasonable under the circumstances.).

<sup>187</sup> *Id.* at 563.

<sup>188</sup> See, e.g., *State v. Bitt*, 798 P.2d 43 (Idaho 1990); *City of Milwaukee v. Nelson*, 439 N.W.2d 562, (Wis. 1989).

<sup>189</sup> *Bit*, 798 P.2d at 50-55 (Bakes, C.J., dissenting).

<sup>190</sup> See *Kolender v. Lawson*, 461 U.S. 352, 367 (1983) (Brennan, J., concurring).

<sup>191</sup> *Id.* at 367 n.10 (Brennan, J., concurring).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 363 n.2 (Brennan, J., concurring).

<sup>194</sup> See *City of Milwaukee v. Nelson*, 439 N.W.2d 562, (Wis. 1989); see also *State v. Bitt*, 798 P.2d 43 (Idaho 1990) (Bates, C.J., dissenting).



This rhetoric is disturbing in theory as well as in practice. First, similar to the *Milwaukee* court, in order to discern whether a vagrancy statute has met the vagueness challenge, the majority of courts engage in a serpentine semantic marathon. Those courts have equated the first element of the crime ("loitering under circumstances not usual to law abiding individuals") with the second element ("under circumstances that warrant alarm").<sup>195</sup> Essentially, the courts have used the second element — "under circumstances that warrant alarm" — to define the first. For a court to then assert it has relied on the first element to temper police misconduct is inconsistent and illogical.<sup>196</sup>

Second, even if a court should retain the facade of defining the vagrancy law by two separate elements, distinguishing the elements is practically impossible.<sup>197</sup> This problem should not be surprising, since emphasizing the "loitering" aspect of the vagrancy statute is the reason the statutes were originally declared void for vagueness.<sup>198</sup>

However, a court may rule that the specific circumstances listed in the statute, in and of themselves, save the vagrancy law from arbitrary application. In the context of the Model Penal Code "stop and identify" vagrancy statutes, those courts addressing the claim of vagueness have simply read the

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The very fact these vagrancy laws are amenable to judicial interpretation should cause concern. The Court's development of the void-for-vagueness doctrine stems from a rejection of common law crime creation which results when statutory construction degenerates into fact-specific, case by case criminalization. Consequently, individualized crime making by judicial fiat allows "agencies of law enforcement to exploit uncertainty according to their own agendas of social control." See Jeffries, Jr., *supra* note 27, at 223 ("Where judges stand ready to create new crimes [by attributing new meanings to preexisting rubrics of common law criminalization], police and prosecutors will bring them new crimes to create.").

<sup>195</sup> See *Bell v. State*, 313 S.E.2d 678 (Ga. 1984) (The court reasoned that "the offense of loitering is committed only when the actor engages in conduct 'not usual for law abiding individuals' which created 'a reasonable alarm or immediate concern for the safety of persons or property in the vicinity.'" Rejecting the argument that "usual" is vague, the court responded that the phrase is made clear by the clause which provides that the suspect's conduct would have to alarm a reasonable person.); see also *City of Milwaukee v. Nelson*, 439 N.W.2d 562, (Wis. 1989); *State v. Ecker*, 311 So. 2d 104 109 (Fla. 1975).

Courts have used the same tautological approach in their construction of the vagrancy law requiring *mens rea*. See, e.g., *People v. Superior Court (Caswell)*, 758 P.2d 1046, (Cal. 1988) (Loitering is made clear by "purpose" to engage in another crime. "Purpose" is then defined by the list of circumstances.).

<sup>196</sup> *Milwaukee*, 439 N.W.2d at 567, 572, (1989); *Bitn*, 798 P.2d at 43.

<sup>197</sup> See *D.A. v. State*, 471 So. 2d 147, 150-152 (Fla. Dist. Ct. App. 1985).

The court stated the first element- "loitering in a place, at a time, or in a manner not usual for law-abiding individuals"- means conduct which just falls short of actual commission or attempted commission of a substantive crime. In explaining the second element of "those circumstances that would justify reasonable alarm", the court stated that this means conduct which points toward the commission or attempted commission of a crime which would amount to an imminent threat to public safety.

*Id.*

<sup>198</sup> See *supra* notes 40-48.

The courts are concerned (when evaluating the vagrancy law under the void-for-vagueness doctrine) that "loitering" is not, by itself, illegal conduct. Therefore, an officer may arrest on mere suspicion of future criminal activity. *Coleman v. City of Richmond*, 364 S.E.2d 239, 244 (Va. App. 1988); *State v. Ecker*, 311 So. 2d 104, 107-08, cert. denied, 423 U.S. 1019 (1975) (relying on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965)); *Hallock*, *supra* note 60, at 1062 (concluding that the statute "must avoid making loitering or vagrancy an element of the offense.").

circumstances as "reasonable suspicion" that another crime is being committed, disregarding any further specificity as impractical.<sup>199</sup> Likewise, with the vagrancy laws requiring *scienter*, most courts have also refused to examine the risk of abusive enforcement by the ad hoc balancing of a list of discretionary circumstances.<sup>200</sup> A court addressing the problem of arbitrary police conduct inherent in those circumstances would probably also becloud the Fourth Amendment issue with a litany of grave social consequences.<sup>201</sup>

Yet, it is ultimately the judgment of the police officer on the street as to what circumstances to apply.<sup>202</sup> Obviously, police discretion can never be entirely eliminated. But it is also clear that the problem can be exacerbated by accepting statutes, such as the vagrancy laws, "which embrace open-ended progressivity in the criminal law", producing arbitrary law enforcement.<sup>203</sup>

For instance, the current Fourth Amendment analysis of either probable cause or reasonable suspicion is a "balancing of the circumstances" act.<sup>204</sup> With a certain, definition of a crime in advance, an officer may use his or her reasoned judgment to assess a range of circumstances to see if that crime has been committed.

The problem with vagrancy is that the courts are reading those circumstances listed in the statute (which allow the law to pass the vagueness challenge) as "reasonable suspicion".<sup>205</sup> This approach defines the crime by the Supreme Court's present judicial construction of the Fourth Amendment.

This approach is not only impractical, it is impossible.<sup>206</sup> The Supreme Court, itself, has conceded the Fourth Amendment standard for assessing unreasonable seizures is a "fluid concept" and "not usefully reduced to legal rules."<sup>207</sup> Therefore, even if a court should read those circumstances as discretionary (as with those vagrancy statutes requiring an illicit intent), the peril

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<sup>199</sup> See *supra* text accompanying notes 57-85.

<sup>200</sup> See *supra* text accompanying notes 86-106.

<sup>201</sup> See, e.g., *supra* note 37.

<sup>202</sup> Cf. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

<sup>203</sup> Jeffries, *supra* note 27, at 223.

<sup>204</sup> See *supra* text accompanying notes 108-150.

<sup>205</sup> See, e.g., *D.A. v. State*, 471 So. 2d 147 (Fla. Dist. Ct. App. 1985).

The court cautioned other courts to zealously protect against the unconstitutional application of the vagrancy law because it plainly reaches the outer limits of the constitution. The court was particularly worried about those courts who attempt to use the list of circumstances as probable cause to justify a formal arrest and to justify a conviction beyond a reasonable doubt.

*Id.* at 152.

<sup>206</sup> Professor Maclin argues that the present Supreme Court pronouncements on the Fourth Amendment with respect to unreasonable seizures make it impossible to distinguish between probable cause and reasonable suspicion. Maclin, *supra* note 6, at 1333-34.

<sup>207</sup> See *id.* (claiming that the standard is not even useful to distinguish between probable cause and reasonable suspicion).

of moment-to-moment crime definition is the same. Consequently, regardless of the construction given a vagrancy statute, crime definition is not left to the legislature, it is left to the patrol officer on the street.

As the abuses throughout history have grafted upon the American conscience since the genesis of the vagrancy law, crime definition as a tool of the police officer has resulted in arrests on suspicion and just plain discrimination.<sup>208</sup> Police officers are trained to be suspicious. They operate under "settings of secrecy and informality, often perpetuated by a sense of emergency, rarely constrained by self-conscious generalization of standards."<sup>209</sup> Moreover, studies suggest police abuse often results from lack of proper training and guidance in assessing circumstances, isolation from the community,<sup>210</sup> and prejudices developed on the force. These studies further support the proposition that the power to define the criminal law, such as is granted with the vagrancy law's discretionary specification of circumstances, should not be left to those who enforce it.<sup>211</sup>

Aggravating the abuse brought on by this random balancing of constitutional standards is the fact that vagrancy is a misdemeanor.<sup>212</sup> Minor crimes such as vagrancy law violations rarely appear in state or regional

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<sup>208</sup> See *supra* notes 20-21. The two most recent vagrancy cases to reach the Supreme Court even show that such laws engender hidden bias and discrimination. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy prosecution of two white women and two black men riding together down the town's main street); *Kolender v. Lawson*, 461 U.S. 352 (1983) (Edward Lawson is a black man of unconventional appearance whose avocation is walking, usually late at night, and often in wealthy and predominately white residential areas. He had been stopped at least 15 times on such occasions before the statute was declared unconstitutional.).

Studies provide further support for the suggestion that if given wide discretion, police will abuse it. See, e.g., Michael K. Brown, *Working the Street, Police Discretion and the Dilemmas of Reform* 163-66 (1981) (study concluding that police are more likely to use aggressive patrol tactics against minorities); cf. Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control Of The Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 453 N.146 (1967) (discussing how the police even welcome resistance during investigatory detentions); cf. Kenneth C. Davis, *POLICE DISCRETION* 18 (1975) (describing how Chicago police officers divided society into two classes of people: the kinky (criminal) class and the law-abiding class); Aldert Vrij & Frans W. Winkel, *Crosscultural Police-Citizen Interactions: The Influence of Race, Beliefs, and Nonverbal Communication on Impression Formation*, 22 J. OF APPLIED PSYCHOL. 1546 (1992) ("Several studies done in both the United States and Europe suggest that police officers assess black citizens more negatively than they do white citizens.").

<sup>209</sup> Maclin, *supra* note 6, at 1317.

<sup>210</sup> See Brown, *supra* note 208, at 163-66. (study concluding that when minorities are found outside a minority neighborhood, their race may arouse a police officer's suspicion, even if their actions would warrant no alarm in a minority neighborhood.); see also Berns, *supra* note 87, at 730 (cautioning courts to scrutinize police conduct under the modern vagrancy laws because a person's behavior that might not be objectionable in one community may arouse suspicion in another).

<sup>211</sup> The list of circumstances, themselves, should cause concern. For instance, prior crimes and bad acts are not far from the original "habitual criminal" found unconstitutional not so long ago. Of course, most courts get around these concerns by declaring the circumstances discretionary or by simply stating they will "wait another day". See, e.g., *City of Akron v. Holley*, 557 N.E.2d 861 (Ohio Mun. Ct. 1989). But see *Coleman v. City of Richmond*, 364 S.E. 2d 239 (Va. Ct. App. 1988).

<sup>212</sup> See *City of Milwaukee v. Nelson*, 439 N.W. 2d 562, (Wis. 1989). (rejecting the claim that it was a Fourth Amendment violation for police to seize a suspect for minor crimes). The Supreme Court has not yet decided this issue.

reporters, and if reported, seldom reach the higher courts.<sup>213</sup> The resulting abuse is especially acute concerning unreasonable seizures not amounting to an arrest.<sup>214</sup> As one critic of the vagrancy law explained: "[Because] minor offenses are seldom reviewed by higher courts, the actual limits of the vagrancy law are not set in the statute, but by practices of the police."<sup>215</sup> Furthermore, even if there is an arrest, the suspect's legal vindication of his right in court does not save him from all that goes with it: "new acquaintances among jailers, lawyers, prisoners, and bail-bondsmen, firsthand knowledge of local jail conditions, a "search incident to an arrest", and the expense of defending against a possible prosecution."<sup>216</sup>

Should a court conclude the list of circumstances are indeed inherently ambiguous, it should strike down both the Model Penal Code "stop and identify" version and those vagrancy statutes requiring an illicit intent, such as loitering for the purpose of engaging in drug activities.<sup>217</sup>

However, it seems unlikely any court at the present time would find a vagrancy law requiring *scienter* unconstitutional. Regrettably, scholars and courts alike seem to disregard *scienter*, assuming it will not result in unfettered police discretion because a *scienter* element would be less vague than the Model Penal Code version.<sup>218</sup> The only court to yet address the issue came to this conclusion.<sup>219</sup>

Social concerns apparently have an overriding influence on many courts when examining the modern vagrancy law under the second prong of the void for vagueness doctrine or under the Fourth Amendment.<sup>220</sup> Give this country's war on drugs, which appears to be one of the vagrancy law's objectives, a court can

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<sup>213</sup> In 1956, the FBI Uniform Crime Reports concluded that arrest on suspicion is common in this country. Those arrested on suspicion and released without prosecution ran at the rate of 280.4 people per 100,000 inhabitants; and the total of persons arrested either for a specific offense or for suspicion alone, and released without being held for prosecution, was at the rate of 666.7 per 100,000 inhabitants. FBI, UNIFORM CRIME REPORTS No. 1, Semiann. Bull. 65 (1957). The total figure for arrests on suspicion in 1958 was 96,740. *Id.* at 93 (1958).

<sup>214</sup> One black male expressed the resentment of minorities to abusive police tactics: "When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE POLICE 184 (1967).

<sup>215</sup> Foote, *supra* note 18, at 608.

<sup>216</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983) (Brennan, J., concurring); *but see City of Milwaukee v. Nelson*, 439 N.W.2d 562 (Wis. 1989).

<sup>217</sup> The Model Penal Code puts it bluntly: "if this provision is unconstitutional. . . then it seems likely that no general provision against loitering can be drafted to survive constitutional review. . . ." MODEL PENAL CODE AND COMMENTARIES Part II § 250, 6, at 396-97 (Official Draft and Revised Comments 1985).

<sup>218</sup> *See supra* note 86.

<sup>219</sup> *See State v. E.L.*, 595 So. 2d 981 (Fla. 1992).

<sup>220</sup> *See supra* note 37-38.

salve its conscience that it is doing the right thing.<sup>221</sup> If still in doubt, a court may resort to inserting an "overt act" requirement into the statute.<sup>222</sup> Yet an illicit purpose requirement will be likely only to cure the statute with respect to notice under the void-for-vagueness doctrine.<sup>223</sup> Moreover, any "overt act" does not specify what act or where it may take place to give police officials guidance about what constitutes "loitering". The very breadth of circumstances in which this type of vagrancy law may be invoked suggests a broad opportunity for abuse.

The version of the vagrancy law which prohibits loitering in a particular place would, and should, probably withstand Fourth Amendment scrutiny. Because this type of vagrancy law restricts any presence in a particularly described place, police judgement is limited to ascertaining the correct place. There is no balancing of circumstances to ascertain what conduct, if any, manifests the "illegal purpose" or the "alarm for the public safety" (both of which have been read by courts to describe the "loitering").<sup>224</sup>

In any event, it appears clear that the issue will not be settled until the Supreme Court is presented with a non-vague vagrancy statute. Until then, it will reserve comment on whether a vagrancy statute can amount to a Fourth Amendment violation.<sup>225</sup>

### CONCLUSION

It is beyond doubt that combating our nation's war on drugs is a noble effort. To many, vagrancy law is an invaluable tool in this war. However, others believe our government needs to develop better ways to combat the epidemic of crime that plagues our nation.

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<sup>221</sup> Moreover, courts seem more ready to uphold the vagrancy law requiring the suspect to harbor an illicit purpose because of the law's apparent moral condemnation. *See, e.g., State v. Ecker*, 311 So. 2d 104 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975).

<sup>222</sup> *See, e.g., City of Akron v. Holley*, 557 N.E.2d 861 (Ohio Mun. Ct. 1989).

<sup>223</sup> Supreme Court precedent addressing vagrancy laws with *scienter* requirements under the void for vagueness doctrine have upheld them primarily on notice grounds. *See supra* note 89. It does appear that the Supreme Court will presume such laws are constitutional. *Cf. D.V. v. Juvenile Department*, 434 U.S. 914 (1977) (summary dismissal of the case affirmed on the merits an Oregon Supreme Court decision upholding a challenged statute on void-for-vagueness grounds).

<sup>224</sup> However, these laws may have other constitutional concerns. *See Berns, supra* note 87, at 731.

<sup>225</sup> A related issue is the degree of risk of unconstitutional applications that will amount to a violation. Relying on Justice White's dissenting opinion in *Kolender*, Chief Justice Bakes, in his dissenting opinion in *Idaho v. Bitt*, found that a vagrancy ordinance only amounts to a violation of the Fourth Amendment if, under any and all factual circumstances, it would be unconstitutionally applied. He asserted that, "The court should consider any factual variant under which the statute might be applied which might compose a constitutional application." 798 P.2d 43, 51 (Idaho 1990) (Bakes, C.J., dissenting).

But, the majority in *Kolender*, although in dicta, responded to Justice White's opinion by citing past precedent which permitted challenges under what the court considered to be analogous cases (especially for those cases assessing statutes with criminal penalties) even when the statute could conceivably have had some valid application. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

However, even the Supreme Court's most recent review of the vagrancy law proclaimed that "as weighty as this concern is,...it cannot justify legislation that would otherwise fail to meet constitutional standards."<sup>226</sup> Likewise, Justice Douglas, in his criticism of the original vagrancy laws, warned of the abuse of government power for noble causes — of those measures "designed to increase our security in a troubled world", but measures determined to erode our constitutional freedoms.<sup>227</sup>

We need not speculate on the destruction of our Fourth Amendment freedoms produced by the vagrancy law.<sup>228</sup> The deleterious effect that the vagrancy law has had on our freedoms should be recognized and reexamined under the Fourth Amendment's promises against unreasonable seizures. It should not pass constitutional scrutiny merely through force of age.<sup>229</sup>

Holding a version of the modern vagrancy law unconstitutional would not result in a blanket restriction on needed police activities. There are many ways to investigate without interfering with liberty or personal security.<sup>230</sup> For instance, police need not use the Model Penal Code version of vagrancy to stop a suspect when a *Terry* stop would be sufficient. Moreover, police have access to existing laws against attempt and conspiracy, not to mention solicitation. It is hard to believe that allowing vagrancy would leave a significant gap in the law since attempt, conspiracy, and solicitation also prevent the fruition of criminal activity by giving law enforcement officers a tool to allow arrest and conviction on the basis of a prediction that criminal activity is imminent.<sup>231</sup> Furthermore, there is no evidence that police are winning the war effort by strengthening traditional

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<sup>226</sup> *Kolender*, 461 U.S. 352 at 354 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

<sup>227</sup> Douglas, *supra* note 1, at 13. Justice Douglas describes those loyalty procedures and investigations for federal and state employees after our second world war. He explains:

We sat by and watched the parade of branded people march into oblivion . . . We salved our consciences by saying that no one has the right to work for the government, and from that premise found power in the government to put the scarlet letter "S" on the foreheads of thousands of our people.

*Id.*

Justice Douglas also explained that the same justification was given for holding people *incommunicado* and for allowing coerced confessions to be used in evidence. *Id.* at 11.

<sup>228</sup> See *supra* notes 20-21.

<sup>229</sup> The American version of the vagrancy law is even different from its historical origins which placed exclusive emphasis on conduct. See, e.g., Vagrancy Act of 1824, 5 Gao. 4, ch. 83 (making it a crime to wander and enter another's property without giving a good account of oneself; loiter and possess a tool for the purpose of breaking and entering another's property).

<sup>230</sup> See Maclin, *supra* note 6, at 1308.

<sup>231</sup> In attempt law, an act beyond mere preparation is required; in conspiracy and solicitation, the communication of the intent to commit a proscribed act is deemed to be a reliable predictor of future harm. Vagrancy laws, in contrast, allow a prediction of a person's ultimate future conduct merely from the fact that he or she is "loitering or prowling". This difficulty is exacerbated when a list of circumstances is meant to provide guidance as to what is "loitering" such as those vagrancy laws requiring an illegal intent or those which require an alarm for the public safety. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 488 (2d ed. 1986).

law enforcement techniques. It appears that the drug problem is a social disease beyond police resources and expertise to address alone.<sup>232</sup>

In a society of multiplying crime, it is undoubtably difficult to feel concern for those arrested on "mere suspicion" of a crime, but later found to be guilty. Yet we must recall that "the measure of the health of our legal system is the justice dispensed at *all* levels."<sup>233</sup> Indeed, history has shown "that the safeguards of liberty have frequently been forged in controversies involving not very nice people."<sup>234</sup> Besides, as Justice Douglas and others warn, the "list of casualties of the vagrancy law will continue. . . everyone is a potential target."<sup>235</sup> "Vagrancy and arrest on suspicion are not distant, remote, speculative; they are just around the corner in many of our communities."<sup>236</sup>

Thus, while police accosting and chasing criminals produce little sympathy for those unsavory characters, police accosting and chasing children do not.

THE TIME: 1993

THE PLACE: Anytown, USA

SCENE ONE: Children are playing hide and seek about one block from home. One child crouches in the bushes near the expressway exit. "Ready or not, here I —" She is seized and arrested for vagrancy. The police explain that the neighborhood is a high crime area.<sup>237</sup>

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<sup>232</sup> See, e.g., Maclin, *supra* note 6, at 1333-34 (When law enforcement officials concede that conventional police methods will not deter drug abuse, society is naive to believe that greater investigatory powers for the police will solve the drug crisis.); Mathea Falco, *The Bush Drug Plan: Nothing New*, N.Y. TIMES, Sept. 5, 1989, at A19 (criticizing the Bush Administration's new drug plan because the "new" strategy would continue to concentrate primarily on law enforcement, despite overwhelming evidence accumulated during the past eight years of the minimal impact of law enforcement on drug abuse and drug trafficking.); *President's "Victory Over Drugs" Is Decades Away, Officials Say*, N.Y. Times, Sept. 24, 1989, § 1, at 1; *After Studying for War on Drugs, Bennett Wants More Troops*, N.Y. Times, Aug. 6, 1989, § 4, at 5. This article noted that:

Some law-enforcement professionals grouse that [Director of National Drug Control Policy] Bennett is too reliant on law-and-order prescriptions for a problem with deep social and economic roots. "I know it would be heresy for a cop to say this, but we need to quadruple our effort on the demand side," said Sheriff Clarence W. Dupnik of Pima County, Ariz. . . . But such programs will get short shrift, he added, because "people are in a 'lock 'em up and throw the key away' mood, and it is that emotion that is fueling our national policy."

*Id.*

<sup>233</sup> Douglas, *supra* note 1, at 14.

<sup>234</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>235</sup> Cf. Maclin, *supra* note 6, at 1336.

<sup>236</sup> Douglas, *supra* note 1, at 14.

<sup>237</sup> This fact pattern was taken from a recent vagrancy case, see *L.S. v. State*, 449 So. 2d 1305 (Fla. Dist. Ct. App. 1984).

Professor Amsterdam, a respected authority on the Fourth Amendment stated, "The formulation of our Fourth Amendment principles are ultimately a value judgment about the type of society in which we wish to live."<sup>238</sup>

*Is this the way we want to live?*

**T. LEIGH ANENSON**

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<sup>238</sup> Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).



