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Vagrancy--A Study in Constitutional Obsolescence

William F. Maher

William E. Williams

VAGRANCY – A STUDY IN CONSTITUTIONAL ABSOLESCENCE*

Come all you cinder grifters
And listen while I hum –
A story I'll relate to you
Of the great American bum.[1]

My clothes are gettin' ragged,
My shoes are gettin' thin
What do I care? I get the air –
I'm on the bum again.

The nights are gettin' colder,
And soon we'll all be froze;
I'm going to a sunny state
Where the weather fits me clothes.[2]

Unfortunately, well-heeled tourists are not the only people who find Florida's sunshine irresistible when the weather no longer fits their clothes. The famous Florida clime also ensures the existence of vagrancy problems in Florida. In considering the criminal law aspect of vagrancy, this note attempts to define the problem in terms of the legitimate government interests involved and offers suggestions about vagrancy legislation and the constitutional difficulties presented.

A fresh examination of the problem is necessary because a three-judge federal district court recently held in *Lazarus v. Faircloth*[3] that Florida's vagrancy statute[4] is unconstitutional. Plaintiff Lazarus sought a declaratory judgment that Florida Statutes, section 856.02,[5] was unconstitutional and sued to enjoin its enforcement.[6] Lazarus had been arrested and tried for vagrancy five times,[7] twice within one twenty-four hour period.[8] Once he was given a suspended sentence on the condition that he banish himself from town.[9] During the period of these arrests he worked "hawking" concessions at the Orange Bowl and occasionally passed out campaign literature for a political party. He was otherwise unemployed, often depending on charity

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1. G. MILBURN, THE HOBO'S HORNBOOK 71 (1930).
2. *Id.* at 127.
3. 301 F. Supp. 266 (S.D. Fla. 1969).
4. FLA. STAT. §856.02 (1967).
5. *See* text accompanying notes 76-79 *infra*. The statute was applied in this case by §38-50 of the Code of the City of Miami, which makes it unlawful to commit in the city any misdemeanor defined by Florida statutes. 301 F. Supp. 266, 269 (S.D. Fla. 1969).
6. 301 F. Supp. 266 (S.D. Fla. 1969).
7. *Id.* at 268.
8. Brief for Plaintiff at 8, Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).
9. *Id.* at 18.

for his subsistence.[10] His dress was conspicuous, thrift-store clothing, "often in red, white and blue, countless Humphrey-Muskie buttons, pins, etc., topped by a straw hat with the Humphrey-Muskie banner around the crown."[11]

Basing jurisdiction on the Federal Question Statute,[12] the Civil Rights Statute,[13] and the Three-Judge Court Statute,[14] the court held the vagrancy law unconstitutional because of "vagueness and overbroadness."[15] The contrast between the "avowed purposeful indefiniteness of vagrancy statutes" and the well-settled constitutional doctrine that penal statutes must be explicit and not vague was noted.[16] Vagueness, the court continued, breeds the related vice of overbreadth. That is, vague language could be used to "criminalize" conduct, the prohibition of which is not a legitimate government concern[17] — conduct that does not impinge upon the rights of others.[18]

More specifically, it was impossible for Lazarus to have known how continuous his employment had to be or how much property he had to possess in order to have avoided his arrest three times[19] for being "without reasonably continuous employment or regular income [and] sufficient property to sustain [him] . . . ."[20]

Illustrating the potentially overbroad scope of the statute, the court inquired whether the portion that prohibited an able-bodied person from living habitually upon the earnings of his wife meant "that any of the male students attending law schools . . . whose wives work to provide the funds . . . must either find a job or suffer the penalties . . . ."[21] And, if Webster's definition of the verb "rail"[22] is correct, did section 856.02, which classifies one who "rails" as a vagrant, make a wife, angered by her husband's late return from a night out with the boys, subject to arrest for vagrancy?[23]

The idleness and loafing prohibitions of the statute were also specifically

10. *Id.* at 13, 29.
11. *Id.* at 13.
12. 28 U.S.C. §1331 (1964).
13. 28 U.S.C. §1343 (1964).
14. 28 U.S.C. §2281 (1964). This statute grants jurisdiction to a three-judge federal court when a state statute is alleged to be unconstitutional and the action involves a request to enjoin a "state officer" from enforcing such a statute. Here, the arrest was made by a Miami police officer pursuant to §38-50 of the Code of the City of Miami, which makes it unlawful to commit within the city any act that is a misdemeanor under the Florida statutes. On the jurisdictional question, the court held that it was irrelevant whether the ordinance incorporated the state statute by reference or merely authorized arrest under it, and that the local police officer was a "state officer" for jurisdictional purposes because of the function he performed in the legislative scheme. 301 F. Supp. 266, 269 (S.D. Fla. 1969).
15. 301 F. Supp. 266, 271, 273 (S.D. Fla. 1969).
16. *Id.* at 272.
17. *Id.*
18. Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).
19. 301 F. Supp. 266, 272 (S.D. Fla. 1969).
20. FLA. STAT. §856.02 (1967).
21. 301 F. Supp. 266, 272 (S.D. Fla. 1969).
22. "[T]o revile or scold in harsh, insolent, or vituperative language." N. WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1967).
23. 301 F. Supp. 266, 272 (S.D. Fla. 1969).

ruled invalid. The court pointed out that loafing or loitering is not necessarily a detriment to the public welfare or an interference with travel,[24] and that these provisions could easily be applied to idle tourists lured by the fame of Florida's climate or to Sunday hikers stopping to rest by the wayside. The susceptibility of the statute to such interpretations made it unconstitutional.[25] The opinion indicated that the statute might also be invalid on other grounds as well, but did not reach those issues.[26] While some segments of the statute were probably valid, they were so "inextricably intertwined with the invalid" that it was impossible to separate them;[27] thus, the statute was invalidated in its entirety.

Dicta concerning the historical development of vagrancy law noted the anachronistic nature of section 856.02 and asserted that this "charming grabbag of criminal prohibitions . . . reflects the historic verbiage of vagrancy laws which date back 620 years . . . . The time has come for [Florida] to adopt a modern statute."[28] Strictly speaking, the anachronistic character of the statute is irrelevant to the constitutional issues. Courts may not declare statutes invalid merely because they are unwise or because better alternatives exist. Conceivably, however, obsolescence in the extreme might violate substantive due process. The purpose of a law, for example, might, because of changing norms, no longer be reasonable or within the legitimate scope of governmental power; or the means used to effectuate the design might no longer be considered rational.[29] This approach can also be used in converse. It is irrelevant, for example, that vagrancy statutes may once have had a purpose that is presently unthinkable (preservation of serfdom)[30] so long as the present purpose (crime prevention)[31] is reasonable. Historical commentary included in the opinion indicated nothing more than an attitude of hostility toward the vagrancy statute, important only because it portends a rigorous constitutional scrutiny. Significantly, this attitude is similar to that expressed in an increasing number of recent opinions of other courts.[32]

Until recently, constitutional challenges to vagrancy statutes were uncommon.[33] The probable reason is that, despite the large numbers of arrests for vagrancy and related offenses, those arrested seldom possess the financial ability to prosecute such challenges. Moreover, penalties for vagrancy are

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24. *Id.* at 272, *citing* Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931).

25. 301 F. Supp. 266, 272 (S.D. Fla. 1969).

26. *Id.* at 271.

27. *Id.* at 273.

28. *Id.* at 271.

29. Substantive due process is generally said to require that a law have a reasonable purpose within the legitimate scope of governmental power effectuated by rational means. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 525 (1934).

30. *See* 3 T. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 203 (1883).

31. *See, e.g.*, District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947).

32. *See, e.g.*, Smith v. Hill, 285 F. Supp. 556 (E.D.N.Y. 1968); Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968); Baher v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967).

33. Note, *Constitutional Attacks on Vagrancy Laws*, 20 STANFORD L. REV. 782, 783 (1968).

usually light, frequently thirty days in jail or less; there has never been a constitutional right to counsel in state misdemeanor cases;[34] and, finally, vagrants are simply not the type of people whose misfortunes under the law are likely to arouse the sympathies of either attorneys or the general public.

The United States Supreme Court has never declared a vagrancy statute unconstitutional. In a recent case involving the constitutionality of Florida's vagrancy statute, the Court reversed a vagrancy conviction on evidentiary grounds[35] even though the Florida supreme court had expressly ruled the statute constitutional in deciding the same case.[36] However, this reluctance on the part of the United States Supreme Court has apparently not dampened the growing hostility of many lower federal courts toward traditional vagrancy-type statutes.[37]

Technically, Florida Statutes, section 856.02, is unconstitutional only within the geographic jurisdiction of the United States District Court for the Southern District of Florida. It is not unlikely, however, that other districts in Florida will reach the same result when appropriate cases arise. Florida should reexamine the concept of vagrancy and update its legislation to reflect current needs and constitutional standards. A historical perspective will help contrast new needs and objectives with old ones. It will also suggest that narrowly drawn statutes addressed directly to the problem that the vagrant creates, rather than to outlawing a type of person or status per se, will be less subject to misinterpretive abuse with the passage of time and will indicate when the law is no longer relevant to the problem it seeks to eliminate. To this end, the following historical sketch is included.

HISTORY OF VAGRANCY STATUTES

Even before the Black Plague reached England in 1348,[38] feudalism had begun to break down.[39] Over one-half the population died before the epidemic had run its course;[40] the labor force was decimated. England had engaged in a number of expensive wars financed by the manorial lords, many of whom sold freedom to the serfs in order to obtain the necessary funds.[41] Some serfs merely escaped and fled to the towns, where newly developing industry pro-

34. *But see* Steadman v. Duff, 302 F. Supp. 313 (M.D. Fla. 1969).

35. Johnson v. Florida, 391 U.S. 596 (1968). To a legal realist this decision might seem a classic example of judicial absurdity. The Court held that, since the record showed the defendant had been stationary on a park bench rather than moving about, the evidence was insufficient to convict him for wandering or strolling about without any lawful purpose.

36. Johnson v. State, 202 So. 2d 852 (Fla. 1967), *rev'd on other grounds*, 391 U.S. 596 (1968). While the correctness of the constitutional decision is questionable, the Florida court did recognize that the defendant could not have got there "by teleportation," and ruled on the constitutional issue.

37. *See* note 32 *supra*.

38. W. LUNT, HISTORY OF ENGLAND 238 (4th ed. 1957).

39. *Id.* at 237.

40. *Id.*

41. R. QUINNEY, CRIME AND JUSTICE IN SOCIETY 57 (1969).

vided a better standard of living and more personal freedom. Others joined the armies that, since the late 13th century, had been manned principally with mercenaries.[42] As the number of serfs dwindled, it became impossible to operate many manors without cheap labor by freemen, who were demanding higher wages.[43] The elimination of much of the remaining labor force by the Black Plague made critical the already tenuous position of the landed upper class.

Out of this context arose the first vagrancy statute. Passed in 1349 and known as the Statute of Laborers,[44] it was definitely a "rich man's law." The statute provided that every able-bodied person without other means of support was required to work for wages fixed at the level that preceded the Plague. Giving alms to able-bodied beggars who refused to work was also prohibited. The statute was strengthened in 1350 by making it unlawful to flee from one county to another to avoid offers of work or to seek higher wages.[45] This anti-migratory policy is a characteristic of vagrancy statutes that has persisted in some form ever since. In 1360 the punishment prescribed was imprisonment for fifteen days, and if they "do not justify themselves by the end of that time, to be sent to gaol till they do."[46] The conclusion by some commentators[47] that vagrancy laws were an attempted substitute for serfdom is well-supported by the preamble of the statute itself:[48]

> Because a great Part of the People, and especially of Workmen and Servants, late died in the Pestilence, many seeing the Necessity of Masters, and great Scarcity of Servants, will not serve unless they may receive excessive Wages . . . it is ordained that every man and woman . . . able in body and within the age of three-score years . . . be required to serve.

Statutes in 1383[49] and 1388[50] made *wandering* per se a criminal offense unless one had a letter patent from the King. Stephen describes how the situation must have seemed to the laboring man:[51]

> A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal.

However, these attempts to reverse the decay of the feudal system were unsuccessful. The act of 1414, which noted that laborers continued to flee from the country "to the great damage of gentlemen and others whom they

42. *Id.*
43. *Id.*
44. 23 Edw. 3, c. 1 (1349).
45. 25 Edw. 3, c. 7 (1350).
46. 34 Edw. 3 (1360).
47. *E.g.*, Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615 (1956).
48. 23 Edw. 3 (1349).
49. 7 Rich. 2, c. 5 (1383).
50. 12 Rich. 2, c. 3 (1388).
51. 3 T. STEPHEN, *supra* note 30, at 127.

should serve,"[52] gave minor magistrates summary power to try vagrancy cases—a power that they still possess. Punishments became even more severe.[53]

As times changed, vagrancy statutes gradually became a kind of criminal adjunct to the poor laws.[54] The scarcity of labor immediately following the Plague had by the beginning of the 16th century become a superabundance. Industrialization, the declining activity of the Church, the discharge of large numbers of soldiers, the enclosure of common lands, and wretched working conditions had resulted in large numbers of unemployed persons.[55] The evil now feared was that the idle would become charges of the community.[56] Unwillingness or inability to work became a sort of economic crime.[57]

About 1530 yet another shift occurred in the focus of the vagrancy laws. The 1530 statute included within its prohibitions one who "can give no reckoning how he lawfully gets his living" and "other idle persons . . . some of them using divers and subtle, crafty and unlawful games."[58] Added to the earlier concern with laborers was a new concern with controlling *probable criminals*. This is evidenced not only in the language above but also in the prescription of harsher punishments for these newer types of vagrants.[59] The barbarity of these punishments further indicates that the legislation was aimed at controlling a genuine criminal element rather than at punishing mere economic wrongdoers.

Considering the social conditions in England at the time, this shift in emphasis is not surprising. One authority estimates that 30,000 to 50,000 persons were dislocated or unemployed in southern and central England by the enclosure movement alone.[60] When cities and towns could not absorb and employ them all, many turned to crime. Bands of thieves and robbers such as the famous "brotherhood of beggars" made travel perilous and were "a definite and serious menace to the community."[61] One historian has described the situation this way:[62]

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52. 2 Hen. 5, c. 4 (1414).

53. Although the tendency of punishments to grow more severe during this period may have been due to the ineffectiveness of the statutes, one writer ascribes it to a general tendency to make finer distinctions in the criminal law. R. QUINNEY, *supra* note 41, at 59.

54. 3 T. STEPHEN, *supra* note 30, at 166.

55. Ledwith v. Roberts [1937] 1 K.B. 232, 271 (C.A.).

56. *See* Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 238 (1958).

57. 4 BLACKSTONE, COMMENTARIES 169 (Tucker ed. 1803).

58. 22 Hen. 8, c. 12 (1530).

59. One who could give no good account how he made his living was to be "tied to the end of a cart naked and to be beaten with whips throughout the same market town or other place, till his body be bloody." 22 Hen. 8, c. 12 (1530). For those using crafty and unlawful games, the punishment was "whipping at two days together . . . ." and on second offense "scourged two days, and the third day to be put upon the pillor from nine of the clock till eleven before noon of the same day and to have one of his ears cut off." *Id.* The punishment for a third offense was death. *Id.* Note that the punishment was harsher for those engaged in criminal activities, and that the statute mentions a specific concern with unlawful behavior.

60. A. JUDGES, THE ELIZABETHAN UNDERWORLD xx (1965).

61. Ledwith v. Roberts [1937] 1 K.B. 232, 271 (C.A.).

62. A. JUDGES, *supra* note 60, at xv (1965). One estimate is that in the last two years

> Whatever exaggeration we may discover in panicky appeals for rigorous deeds, or read into official acts . . . it is clear that a problem of first magnitude did exist, not only in the minds of justices and legislators, but also in actual fact. All accounts affirm that the number of beggars was prodigious; thieves abounded everywhere.

Vagrancy statutes were broad enough to include serious criminals within their definitions, but failure to differentiate between criminal vagrants and mere unemployed unfortunates led to an imputation of criminality to both groups. Ironically, the vagrancy laws themselves encouraged unemployed persons to enter lives of crime, since mere idleness already made them subject to barbaric punishments. Thus, the vagrancy laws assumed a character more criminal than economic.[63] In 1547 the preamble of the famous "Slavery Act" overtly recognized the vagrant as a probable criminal: "[I]dleness and vagabondry is the mother and root of all thefts, robberies, and all evil acts and other mischiefs . . . ."[64] This statute specified severe punishments for able-bodied persons found "lurking in any house, or loitering, or idle wandering by the highway side . . . such persons shall be taken for a vagabond."[65]

Later statutes began to reflect the status-criminality concept even more dramatically by listing types of persons who fell within the statute. The 1572 statute, for example, retained all the earlier classifications but added some newer, distinctly criminal categories such as counterfeiters. Significantly, it also exempted certain types of persons who fit within the statute but who were known to be noncriminals: "[P]rovided also, that this act shall not extend to cookers, or harvest folks, that travel for harvest work, corn or hay."[66] Although this and later acts added new categories, the earlier language that developed in the "economic criminality" statutes was retained; it was, however, used to define *status* rather than economic criminality.

Early in the 17th century, Parliament began to assume a more humanitarian view of the problems of the poor.[67] Efforts were made to provide for indigents on a national level, and poor relief legislation began to be sepa-

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of Henry VIII's reign there were 72,000 "rogues" in England, with 300 or 400 hanged each year. *Id.* The Continent had similar problems at the time, but they were not of such drastic dimensions. *Id.* at xvi. *See also* 4 L. RADZINOWITZ, A HISTORY OF ENGLISH CRIMINAL LAW 16 (1968). The importance of increased international trade at the time produced harsher vagrancy laws in an effort to protect foreign merchants from harm while traveling in England. R. QUINNEY, *supra* note 41, at 62.

63. Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 105 (1962).

64. 1 Edw. 6, c. 3 (1547).

65. *Id.* The harsh punishments prescribed by this act included branding on the breast with the letter "V" and enslavement for two years (first offense), branding on the forehead with the letter "S" and enslavement for life (second offense) and execution as a felon (third offense). *Id.* One writer designates 1547 as marking the transition from economic to status criminality in English vagrancy law. Note, *supra* note 63, at 105.

66. 14 Eliz. 1, c. 5 (1572). This act punished first offenders by whipping and burning "thro' the gristle of the right ear with a hot iron of the compass of an inch about . . . ." *Id.*

67. *See, e.g.*, The Poor Relief Act, 43 Eliz. 1, c. 2 (1601).

rated from criminal vagrancy statutes. Additionally, vagrancy legislation that attempted to categorize rogues, vagabonds, sturdy beggars, and the like according to the commission of specified criminal acts was developed. These changes culminated in the Vagrancy Act of 1824, which marked for England a turning point toward *conduct-criminality* in vagrancy law.[68] "Vagrancy" itself became a nonsubstantive term. This interpretation was affirmed in *Ledwith v. Roberts*,[69] for modern usage.

A review of American statutory law suggests that the English vagrancy concept in its several forms was adopted in nearly every state. West Virginia, where vagrancy is said to exist at common law,[70] is the only state without such a statute. Since the *conduct-criminality* concept in England was not fully developed by the time these laws reached the United States, most American statutes reflect the *status-criminality* concept. The language used, as in Elizabethan statutes, is a combination of definitions used during the period of economic criminality with numerous status crime categories added—all of them judicially interpreted as status-criminality. This is unfortunate, since the social conditions in England that necessitated either of these types of vagrancy statutes never existed in the United States.

The English ancestry of Florida Statutes, section 856.02, is readily apparent. One commentator has labelled it "distinctly Elizabethan" and observed that it "seems to have been selected at random from the provisions of the Statute of Elizabeth as it was enacted in 1597-98."[71] The first Florida

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68. *See* Ledwith v. Roberts [1937] 1 K.B. 232 (C.A.); 5 Geo. 4, c. 83 (1824).

69. [1937] 1 K.B. 232 (C.A.).

70. For an analysis of American statutory definitions, *see* Note, *supra* note 63, at 108-13.

71. Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 560 (1960). *Compare* 39 Eliz., c. 4 (1597): "All persons calling themselves scholars going about begging, all seafaring men pretending losses of their ships and goods at sea; all idle persons going about either begging or using any subtle craft, or unlawful games and plays, or feigning to have knowledge of physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, or such other fantastical imaginations; all fencers, bearwards, common players and minstrels; all jugglers, tinkers, and petty chapmen, all wandering persons and common laborers, able in body and refusing to work for the wages commonly given; all persons delivered out of gaols that beg for their fees or travel begging; all persons that wander abroad begging, pretending loss by fire or otherwise, and all persons pretending themselves to be Egyptians." *with* FLA. STAT. §856.02 (1967): "Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling about from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants."

vagrancy act, passed in 1832,[72] punished offenders with twelve months in jail and a 500 dollar fine, or twelve months in slavery to the highest bidder, or whipping not to exceed thirty-nine stripes, at the discretion of the jury. Small changes were enacted in 1868 and 1905.[73] In 1907, a new statute was passed and has remained in force until the present as Florida Statutes, section 856.02.[74]

It is scarcely questionable that the Florida vagrancy statute and the many municipal ordinances that resemble it are anachronistic survivors of a bygone era. Lord Justice Scott's remark in *Ledwith v. Roberts* that "[T]he early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time . . . ."[75] is equally true of the Florida statute. A change in the direction of conduct-criminality statutes is both necessary and overdue.

THE NATURE AND PURPOSES OF VAGRANCY LAW — THE VAGRANCY CONCEPT V. THE CONSTITUTION

Most state vagrancy statutes punish as vagrancy several basic categories of acts or conditions:[76]

(1) a passive status or condition such as unemployment;
(2) an activity usually considered noncriminal in itself such as loitering or wandering about;
(3) the criminal reputation of the defendant or his associates;
(4) conduct recognized as repugnant or obnoxious to the community such as drunkenness, lewdness, or drug use;
(5) conduct often recognized as a separate crime such as subversive activities or voyeurism.

A crime has been defined as "the commission or omission of an act which the law forbids or commands."[77] Vagrancy, however, normally does not involve an overt act or omission, but rather condemns a particular status, personal condition, or reputation. Since vagrancy laws often punish the mere passive act of "being," the traditional concept of crime as a union between an evil intent (mens rea) and an overt criminal act (actus reus) is not always applicable.[78]

It has been suggested that the criminality of vagrancy rests upon a combination of the neglect to secure employment, the absence of lawful means of

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72. THOMPSON, DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA, 4th div., tit. 1, ch. 8, §12 (1832).
73. Fla. Laws 1905, ch. 5419, §1; A. BUSH, DIGEST OF THE STATUTE LAW OF FLORIDA ch. 48, §24 (1872).
74. Fla. Laws 1907, ch. 5720, §1.
75. [1937] 1 K.B. 232, 271 (C.A.).
76. Annot., 25 A.L.R.3d 797 (1969).
77. J. MILLER, CRIMINAL LAW 16 (1934).
78. *See* Dominguez v. Denver, 147 Colo. 233, 237, 363 P.2d 661, 663 (1961); Jenkins v. United States, 146 A.2d 444, 447 (D.C. 1958).

support, and the offensive public exhibition of such conditions.[79] "Neither one of these things in itself and alone can be punished as a crime, but, when they all meet in one person at the same time, they constitute a vagrant."[80] The charge to the jury in *Edelman v. California* best typifies the nature of the modern American vagrancy concept:[81]

> [V]agrancy is a continuing offense. It differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. One is guilty of being a vagrant at any time and place where he is found, so long as the character remains unchanged, although then and there innocent of any act demonstrating his character . . . . His character, as I said before, is the ultimate question for you to decide.

Although vagrancy has long been recognized as an offense, courts in recent years have begun to question the validity of penal statutes involving drug addiction,[82] alcoholism,[83] and homosexuality[84] that seek to punish status alone. Moreover, in *Edwards v. California*[85] Justice Jackson commented that "a man's mere property status, without more, cannot be used by a state to test, qualify or limit his rights as a citizen of the United States"[86] and that "indigence in itself is neither a source of rights nor a basis for denying them."[87] Similarly "lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[88] Justice Douglas, dissenting in *Hicks v. District of Columbia*,[89] contended that the condition of vagrancy "is not a failure to make a productive contribution to society, for the idle rich are not reached. The idle pauper is the target."[90] Justice Douglas concluded by saying that he did "not see how economic or social status can be made a crime any more than being a drug addict can be."[91]

In *Fenster v. Leary*,[92] the New York vagrancy statute was held unconstitutional because it punished conduct that "in no way impinges on the rights

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79. *Ex parte* Branch, 137 S.W. 886, 887 (Mo. 1911).
80. *Id.*
81. 344 U.S. 357, 365 (1952).
82. Robinson v. California, 370 U.S. 660 (1962). *See also* Brown v. United States, 331 F.2d 822 (D.C. Cir. 1964). *But see* Wilson v. United States, 212 A.2d 805 (D.C. Ct. App.), *rev'd on other grounds*, 125 App. D.C. 87, 366 F.2d 666 (1965); Rucker v. United States, 212 A.2d 766 D.C. Ct. App. (1965).
83. Powell v. Texas, 392 U.S. 514 (1968). *See also* Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
84. Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).
85. 314 U.S. 160 (1941).
86. *Id.* at 184.
87. *Id.*
88. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966).
89. 383 U.S. 252 (1966).
90. *Id.* at 257.
91. *Id.*
92. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

or interests of others."[93] The court also found the statute objectionable because the only persons arrested and prosecuted for vagrancy "are alcoholic derelicts and other unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skid-row and disturbing by their presence the sensibilities of residents of nicer parts of the community."[94] Other courts have followed the lead of *Fenster* by invalidating laws of this nature.[95] These decisions reaffirm the right to be let alone so long as no one else is injured. The emerging view seems to be that punishing crimes of status contradicts our legal heritage, which has traditionally condemned only acts or omissions that are, in themselves, harmful to the social polity.

The common law definition of vagrancy[96] is of little import today since forty-six states[97] have existing statutes that greatly expand it.[98] Under the various state statutes a vagrant might fall within any or all of the following categories: a common law vagrant; healthy beggar; loiterer; unauthorized lodger; night walker; dissolute misspender of time; associate of known thieves; known criminal; common prostitute; common prostitute in public; keeper of house of prostitution; inhabitant of house of prostitution; dependent of a prostitute; solicitor for a prostitute; habitual associate of prostitutes; common gambler; common drunkard: drug addict; lewd or lascivious person; juvenile

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93. *Id.* at 312, 229 N.E.2d at 428, 282 N.Y.S.2d at 741.

94. *Id.* at 315, 316, 229 N.E.2d at 430, 282 N.Y.S.2d at 743.

95. *Cf.*, Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967). *See also* Parker v. Municipal Judge of Las Vegas, 427 P.2d 642 (Nev. 1967); City of Reno v. Second Judicial Dist. Court, 427 P.2d 4 (Nev. 1967).

96. At common law a vagrant was defined as "a person who wandered about from place to place, who had no lawful or visible means of support, and who did not work though able to do so." Prince v. State, 36 Ala. App. 529, 530, 59 So. 2d 878, 879 (1952).

97. Illinois and California have replaced their vagrancy statutes with disorderly conduct provisions, and vagrancy remains a common law offense in West Virginia. New York has no statute specifically defining the crime of vagrancy.

98. *See* ALA. CODE tit. 14, §§437-44 (1958); ALASKA STAT. §11.60.210 (1962); ARIZ. REV. STAT. §§13-991 to -993 (1956); ARK. STAT. §§41-4301, -4302; COLO. REV. STAT. §40-8-19 (1963); CONN. GEN. STAT. §53-340 (1958); DEL. CODE ANN. tit. 11, §881 (1953); D.C. CODE §22-3302 (1961); FLA. STAT. §856.02 (1967); GA. CODE ANN. §26-7001 (1953); HAWAII REV. STAT. §772-1 (1968); IDAHO CODE §18-7101 (1947); IND. STAT. §10-4602 (1956); IOWA CODE ANN. §§746.1 - .25 (1951); KAN. STAT. ANN. §21-2409 (1949); KY. REV. STAT. §436.520 (1969); LA. REV. STAT. §14:107 (1950); ME. REV. STAT. tit. 17, §3751 (1964); MD. ANN. CODE art. 27, §§490, 491, 581 (1957); MASS. GEN. LAWS ANN. ch. 272, §66 (1968); MICH. COMP. LAWS §750.167 (15) (1968); MINN. STAT. ANN. §614.57 (1962); MISS. CODE. §§2666-74 (1942); MO. ANN. STAT. §563.340 (1943); MONT. REV. CODE §94-35-248 (1947); NEB. REV. STAT. §§1115-28 to 1121 (1943); NEV. STAT. §0207.030 (1965); N.H. REV. STAT. §§586.1-3 (1955); N.J. STAT. ANN. §40:48-1 (1957); N.M. STAT. §40A-20-5 (1953); N.C. GEN STAT. §14-336 (1969); N.D. CODE §12-42-04 (1960); OHIO REV. CODE §2923.28 (Anderson 1967); OKLA. STAT. ANN. tit. 21, §§1141-42 (1956); ORE. REV. STAT. §166.060 (1968); PA. STAT. ANN. tit. 18, §§2032-42 (1959); R.I. GEN. LAWS §11-45-1 (1956); S.C. CODE tit. 16, §565 (1962); S.D. COMP. LAWS §22-13-12 (1967); TENN. CODE ANN. §39-4701 (1956); TEX. PEN. CODE art. 607, §634-636 (1952); UTAH CODE ANN. §76-61-1 (1953); VT. STAT. ANN. tit. 13, §3901 (1959); VA. CODE §63-340 (1950); WASH. REV. CODE §9.87.010 (1965); WIS. STAT. ANN. §947.02 (1958); WYO. STAT. §6-221 (1957).

vagrant; adult dependent; nonsupporter; attorney's capper; charlatan; window peeper; common brawler; trader in stolen property; expelled nonresident; possessor of burglary tools; and, an "elastic clause" that is usually added to punish anyone engaged in any unlawful activity not falling into one of the previous categories.[99] Various other uncategorizable activities, often seemingly ridiculous[100] or exotically absurd,[101] are also proscribed under various vagrancy statutes. In addition, statutes punishing disorderly conduct,[102] drunkenness,[103] and criminal associations,[104] although technically not vagrancy statutes, are occasionally used for similar purposes.

Although the initially economic purpose of vagrancy laws in England was later expanded to include the control of a huge criminal group,[105] the primary emphasis in the American statutes is the prevention of *individual* crime.[106] In *State v. Harlowe*,[107] the court recognized vagrancy as "a parasitic disease, which, if allowed to spread, will sap the life of that upon which it feeds."[108] Often the underlying, though unexpressed, concern inherent in vagrancy laws is that when a man is idle and without adequate means of support, "there is a great temptation to steal, in order to relieve his hunger and supply his bodily necessities."[109] The legislative intent behind many vagrancy statutes is "to compel individuals to engage in some legitimate and gainful occupation from which they might maintain themselves, and thus remove the temptations to lead a life of crime or become public charges."[110] This approach was reflected by the following suggestion in *Welch v. City of Cleveland*:[111]

> The best antidote against crime and criminals is honest labor. Moses, the great law-giver, recognized the wisdom of this doctrine in the great commandment he wrote centuries ago, when he said: "Six days shalt thou labor and do thy work." This policy is dictated and demanded for the prosperity of any community . . . .[112]

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99. FLA. STAT. §856.02 (1967).

100. ME. REV. STAT. tit. 17, §3758 (1965) punishes as a vagrant persons "pretending to have knowledge in physiognomy, palmistry, to tell destinies or fortunes, or to discover lost or stolen goods." S.C. CODE tit. 16, §565 (2) (1962) defines as a vagrant any "suspicious person going about the country swapping and bartering horses without producing a certificate of his good character signed by a magistrate of the county from which such person last came."

101. In what is probably the pinnacle of statutory inscrutability, HAWAII REV. STAT. §772-1 (1968) includes in its definition of vagrants "every person who practices hoopiopio, hoounauna, anaana, or pretends to have the power of praying persons to death."

102. *See, e.g.*, FLA. STAT. §877.03 (1967).

103. *See, e.g.*, FLA. STAT. §856.01 (1967).

104. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939).

105. Walsh, *Vagrancy: A Crime of Status*, 2 SUFFOLK U.L. REV. 156, 158 (1968).

106. District of Columbia v. Hunt, 163 F.2d 833, 835-36 (D.C. Cir. 1947).

107. 174 Wash. 227, 24 P.2d 601 (1933).

108. *Id.* at 233, 24 P. 2d at 603.

109. Daniel v. State, 110 Ga. 915, 36 S.E. 293 (1900).

110. People v. Banwer, 22 N.Y.S.2d 566, 569 (1940).

111. 97 Ohio St. 311, 120 N.E. 206 (1917).

112. Note that here the value judgment is made more in terms of a Judeo-Christian

The justification for vagrancy laws as valid or effective crime preventatives has been increasingly questioned. Such an approach assumes a priori that idleness and poverty are invariably associated with criminality. However, the United States Supreme Court has expressed the view that "poverty and immorality are not synonymous."[113] At least one other court has also noted that vagrancy laws have only "the most tenuous connection with prevention of crime and preservation of the public order."[114] There may, in fact, be no valid reason for assuming that the idle indigent is a future criminal.[115] Available empirical data indicates that the causal link between vagrancy and crime is weak, at best.[116] Assuming arguendo that there exists such a causal connection, the question becomes first: How serious a danger does it pose? and second: Does the danger justify vagrancy legislation of a generic nature as opposed to other alternatives? These questions must be considered in light of the formidable constitutional difficulties vagrancy statutes present.

DUE PROCESS OF LAW AND THE "VOID FOR VAGUENESS" RULE

> It is likewise to be observed, that this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have wholly confounded the very Essence of Truth and Falshood, [*sic*] of Right and Wrong . . . .[117]

In the United States the due process clauses of the fifth and fourteenth amendments require that legislative enactments creating crimes give fair notice of the nature of the conduct subject to punishment.[118] Laws must provide reasonable and adequate guidance to the law-abiding so that they can comprehend what activity is prohibited.[119] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[120] Precision sufficient

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work-ethic than in terms of legislative intent.

113. Edwards v. California, 314 U.S. 160, 177 (1941).

114. Fenster v. Leary, 20 N.Y.2d 309, 229, 312 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967).

115. "[S]ome vagrants are future criminals; some vagrants are not future criminals; and some future criminals are not vagrants. It is the over-inclusive aspect of these statutes which renders them 'unreasonable,' and therefore unconstitutional. Granting that some vagrants are future criminals, some are not, and undoubtedly a great many future criminals are not, and never have been vagrants. By reaching out and including individuals who will never be future criminals, the argument goes, the statutes over-step the bounds of reasonable class legislation." McClure, *Vagrants, Criminals, and the Constitution*, 40 DENVER L. CENTER J. 314, 333-34 (1963).

116. R. QUINNEY, CRIME AND JUSTICE IN SOCIETY 126-27 (1969).

117. J. SWIFT, GULLIVER'S TRAVELS 275-76 (Heritage Press ed. 1940).

118. Herndon v. Lowry, 301 U.S. 242 (1937); Cline v. Frink Dairy Co., 274 U.S. 445 (1927); International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914).

119. United States v. Cardiff, 344 U.S. 174 (1952); United States v. Sullivan, 332 U.S. 689 (1948).

120. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *accord*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

to give notice of proscribed conduct particularly must be present in a criminal statute affecting constitutional freedoms.[121]

There are several principles underlying this aversion to the vague or overly-broad statute. First, persons cannot in fairness be exposed to vague regulations that, in effect, trap them.[122] Additionally, vague and indefinite regulations deter people from perfectly lawful conduct[123] such as exercising first amendment rights, since those engaged in border-line activity are likely to "steer far wider of the unlawful zone."[124] Moreover, vague laws give public servants opportunities to apply the law arbitrarily[125] and harshly against particular groups that merit their displeasure.[126] Finally, juries and judges cannot reasonably conclude guilt or innocence when it is uncertain what the lawmakers intended to proscribe.[127] The United States Supreme Court has recognized that an overly-broad or vague criminal law "licenses the jury to create its own standard in each case."[128] In addition, the Court has indicated that "well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."[129]

Actions challenging the constitutionality of vagrancy statutes on the ground of vagueness have received varied responses from the courts. Though vagrancy statutes have long been subjected to intense criticism by commentators,[130] relatively few courts have held such laws to be unconstitutional. The United States Supreme Court has never directly ruled on the constitutionality of vagrancy statutes[131] and state courts have often upheld their constitutionality.[132] Although courts have been willing to strike down statutes punishing mere idleness,[133] the statutes have generally been upheld when other factors such as roaming, wandering, loitering, or nonsupport were added.[134] In up-

121. Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964).

122. People v. O'Gorman, 274 N.Y. 284, 8 N.E.2d 862 (1937).

123. Connor v. Birmingham, 257 Ala. 588, 60 So. 2d 479 (1952).

124. Speiser v. Randall, 357 U.S. 513, 526 (1958).

125. Oregon Box & Mfg. Co. v. Jones Lumber Co., 117 Ore. 411, 244 P. 313 (1926).

126. Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

127. *Cf.*, Sea Isle City v. Vinci, 34 N.J. Super. 273, 112 A.2d 18 (1955); People v. Caswell-Massey Co., 6 N.Y.2d 497, 160 N.E.2d 895, 190 N.Y.S.2d 649 (1959).

128. Herndon v. Lowry, 301 U.S. 242, 263 (1937).

129. Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

130. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Lisle, *Vagrancy Law; Its Faults and Their Remedy*, 5 J. CRIM. L., C. & P.S. 498 (1915); McClure, *Vagrants, Criminals and the Constitution*, 40 DENVER L. CENTER J. 314 (1963); Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960).

131. *See* text accompanying notes 35-36 *supra.*

132. *Cf.* Phillips v. Municipal Court of Los Angeles, 24 Cal. App. 2d 453, 75 P.2d 548 (1938); Adamson v. Hoblitzell, 279 S.W.2d 759 (C.A. Ky. 1955); *Ex parte* Taft, 284 Mo. 531, 225 S.W. 457 (1920); Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949).

133. *Ex parte* Hudgins, 86 W. Va. 526, 103 S.E. 327 (1920); *see* Matter of McCue, 6 Cal. App. 481, 482, 96 P. 110, 111 (1908).

134. *E.g.*, State v. Starr, 57 Ariz. 270, 113 P.2d 356 (1941); *In re* Clancy, 112 Kan. 247 210 P. 487 (1922); New Orleans v. Postek, 180 La. 1047, 158 So. 553 (1934); *Ex parte* Branch, 234 Mo. 466, 137 S.W. 886 (1911); *Ex parte* Strittmatter, 58 Tex. Crim. App. 156, 124 S.W. 906 (1910).

holding a statute that defined a vagrant as a common prostitute found loitering in or about places where intoxicating liquors are sold, the Minnesota supreme court, in *State v. McCorvey*, held that: "[A]bsolute certainty is not required; it is not necessary that there be mathematical precision in the statement of the conduct demanded or disapproved."[135] In *Wallace v. State*,[136] the constitutionality of the Georgia vagrancy statute[137] was upheld on the grounds that "the terms used are ordinary terms found in common usage and understood by people of common and ordinary experience."[138]

Nonetheless, a discernible trend requiring greater specificity in vagrancy statutes has appeared in state and lower federal courts. The result has been the invalidation of several statutes on grounds of vagueness and overbreadth. In *Alegata v. Commonwealth*,[139] three sections of the Massachusetts laws dealing with vagrancy and related offenses were declared unconstitutionally vague.[140] The opinion declared that "while the statute may bring to book

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135. 114 N.W.2d 703, 706 (Minn. 1962).

136. 224 Ga. 255, 161 S.E.2d 288 (1968).

137. GA. CODE §26-7001 (1953) provides in part that a vagrant is defined as: "1. Persons wandering or strolling about in idleness, who are able to work, and have no property to support them. 2. Persons leading an idle, immoral, or profligate life, who have no property to support them and who are able to work and do not work. 3. All persons able to work, having no property to support them, and who have no visible or known means of a fair, honest, and reputable livelihood. The term 'visible or known means of a fair, honest, and reputable livelihood,' as used in this section shall be construed to mean reasonably continuous employment at some lawful occupation for reasonable compensation, or a fixed and regular income from property or other investment, which income is sufficient for the support and maintenance of such vagrant."

138. 224 Ga. 255, 161 S.E.2d 288, 290 (1968).

139. 231 N.E.2d 201 (Mass. 1967).

140. The sections declared unconstitutional were MASS. GEN. LAWS ANN. ch. 272, §§63, 66, 68 (1966), which provided as follows: §63. "Tramps. Whoever not being under seventeen, or a person asking charity within his own town, roves about from place to place begging, or living without labor or visible means of support, shall be deemed a tramp. An act of begging or soliciting alms, whether of money, food, lodging or clothing, by a person having no residence in the town within which the act is committed, or the riding upon a freight train of a railroad, whether within or without any car or part thereof, without a permit from the proper officers or employees of such railroad or train, shall be prima facie evidence that such person is a tramp."

Section 66. "Vagrants. Idle persons who, not having visible means of support, live without lawful employment; persons wandering abroad and visiting tippling shops of [*sic*] houses of ill fame, or lodging in groceries, outhouses, market places, sheds, barns or in the open air, and not giving a good account of themselves; persons wandering abroad and begging, or who go about from door to door, or place themselves in public ways, passages or other public places to beg or receive alms, and who do not come within the description of tramps, as contained in section sixty-three, shall be deemed vagrants, and may be punished by imprisonment for not more than six months in the house of correction."

Section 68. "Certain Persons To Be Deemed Vagabonds. A person known to be a pickpocket, thief or burglar, if acting in a suspicious manner around any steamboat landing, railroad depot, or any electric railway station, or place where electric railray cars stop to allow passengers to enter or leave the cars, banking institution, broker's office, place of public amusement, auction room, store, shop, crowded thoroughfare, car or omnibus, the dwelling place of another, or at any public gathering or assembly shall be deemed a vagabond, and shall be punished by imprisonment in the house of correction for not less

many who are about to commit a crime, it also brings within its sweep persons who have neither committed nor intend to commit any offense."[141] The Kentucky statute declared unconstitutional in *Baker v. Bindner*[142] was characterized by the court as "a 'catch all' not specific in expression as to what it really seeks to prohibit nor what type of conduct is violative of the prohibition."[143] In *Fenster v. Leary*,[144] the New York vagrancy statute was held unconstitutionally vague because it did not clearly define the class of persons or types of conduct subject to penalty. The *Fenster* court further indicated that "the vagrancy laws were never intended to be and may not be used as an administrative shortcut to avoid the requirements of constitutional due process in the administration of criminal justice."[145] The District of Columbia vagrancy statute was held unconstitutionally vague in *Ricks v. District of Columbia*[146] because the legislature had failed to provide with a reasonable degree of certainty what constituted the offenses with which an accused would be charged:[147]

> Essentially all that has to be proved beyond a reasonable doubt in a vagrancy prosecution is that the accused was observed under circumstances deemed questionable. Charges of vagrancy thus make possible criminal convictions based on conjecture rather than on evidence of criminality, contrary to the most fundamental principles of our criminal jurisprudence.

The vagrancy ordinance of the city of Dunn, North Carolina,[148] was ruled void for vagueness in *Smith v. Hill*[149] because it offered no definite standard of conduct that was possible to ascertain with certainty or clarity; it failed to give fair notice of the nature of the crime as required by due process of law; it permitted and encouraged arbitrary and erratic arrests and convictions; and it permitted the public and courts arbitrary and oppressive power over a body of citizens. The court indicated the dangerous potential of such an ordinance to inhibit freedom of expression, and asserted that few people would "risk the possibility of criminal prosecution by obstinate endurance in unpopular conduct if they know that their activities may displease those who . . . have dictatorial control over the streets and public places."[150]

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than four nor more than twelve months."

141. Alegata v. Commonwealth, 231 N.E.2d 201, 209 (Mass. 1967).

142. 274 F. Supp. 658 (W.D. Ky 1967).

143. *Id.* at 662.

144. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

145. *Id.* at 316, 229 N.E.2d at 430, 282 N.Y.S.2d at 745.

146. 37 U.S.L.W. 2367 (D.C. Cir. 1968).

147. *Id.* at 2367-68.

148. The Dunn ordinance read in part: "Any and all tramps, vagrants, persons under suspicion who shall be found with no visible means of support, either male or female, shall not be allowed on the streets or other public place."

149. 285 F. Supp. 556 (E.D.N.C. 1968).

150. *Id.* at 562.

In *Goldman v. Knecht*[151] the Colorado vagrancy statute[152] was held unconstitutionally vague because it included clauses such as "honest and respectable calling," "loitering or strolling about," and "not having any visible means of support." The court concluded that the selection of violators under such provisions would necessarily be an arbitrary process based on the personal views of the arresting officer or the philosophy of the court hearing the case.[153] The Alabama vagrancy statute was also recently declared unconstitutional. In *Broughton v. Brewer*,[154] the court found simply that when considered with the applicable Alabama criminal procedural law, the statute was so vague as to constitute a violation of the fair notice requirements of the due process clause of the fourteenth amendment.

Another due process challenge to vagrancy statutes has concerned excessive use of the police power. The cases seem to indicate that this argument is, in essence, based on either a substantive due process or an equal protection concept. The theory is either that it is not reasonable or rational governmental activity to punish conduct or status that does not infringe on the rights of others,[155] or that it is unreasonable to discriminate against persons merely because they have no occupation or property.[156] The success of the police power argument has depended somewhat upon the precise type of statute involved, but generally the reaction of the court has been unfavorable. Statutes declaring it a crime to loiter or wander have been upheld as a valid exercise of police power.[157] The cases have been split, however, when the statute defined vagrancy in terms of criminal association or repute[158] or lack of

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151. 295 F. Supp. 897 (D. Colo. 1969).

152. COLO. REV. STAT. §40-8-19 (1963) states in part: "Any person able to work and support himself in some honest and respectable calling, who shall be found loitering or strolling about, frequenting public places, or where liquor is sold, begging or leading an idle, immoral or profligate course of life or not having any visible means of support, shall be deemed a vagrant, and may be arrested and brought before any justice of the peace."

153. Goldman v. Knecht, 295 F. Supp. 897, 906 (D. Colo. 1969).

154. 298 F. Supp. 260 (S.D. Ala. 1969).

155. *E.g.*, Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967) (statute struck down).

156. *E.g.*, Guidoni v. Wheeler, 230 F. 93 (9th Cir. 1916) (statute upheld).

157. State v. Starr, 57 Ariz. 270, 113 P.2d 356 (1941) (loitering ordinance justified by need to keep marijuana from school children); Phillips v. Municipal Court of Los Angeles, 24 Cal. App. 2d 453, 75 P.2d 548 (1938) (innocent acts may be prohibited in order to protect public welfare); Dominguez v. Denver, 147 Colo. 233, 363 P.2d 661 (1961) (valid exercise of police power to insure public safety); *Ex parte* Clancy, 112 Kan. 247, 210 P. 487 (1922) (loitering without visible means of support while being criminal syndicalist I.W.W. organizer held punishable for vagrancy and unlawful calling without deciding whether each element alone could be punished); New Orleans v. Postek, 180 La. 1048, 158 So. 553 (1934) (loitering around houses of ill repute reachable in order to protect public morals and welfare); South Euclid v. Paladino, 1 Ohio Misc. 147, 204 N.E.2d 265 (1964) (proscribing wandering and possession of burglary tools found to bear reasonable relationship to public welfare, which was held sufficient to justify the ordinance); State v. Grenz, 26 Wash. 2d 762, 175 P.2d 633, *appeal dismissed*, 332 U.S. 748 (1946) (valid exercise of police power).

158. *Ex parte* Hayden, 12 Cal. App. 145, 106 P. 893 (1909) (statute upheld punishing loitering by "confidence operator" without visible means of support upheld); People v.

visible means of support.[159] The courts have also upheld vagrancy statutes punishing "lewd or dissolute persons, drunkards or narcotics users" as against police power arguments.[160]

Analysis of due process challenges is complicated by the fact that "due process" is a multifaceted concept. The requirement of "rationality" or "reasonableness" seems uniformly at the heart of it, however; and it seems to matter little whether it is reflected in questions of fair notice, overbreadth, excessive use of police power, equal protection, infringement on "civil liberties," or simply "violations of due process." Because these aspects of due process are intimately related, a court's opinion about one of them usually indicates its view about all the others. More simply, if a court finds that vagrancy legislation is "unreasonable," it will usually invalidate it on several constitutional grounds that involve reasonableness.[161]

The foregoing cases indicate that, although a majority of courts have not yet done so, the recent trend is to find vagrancy statutes unconstitutional. These and other recent decisions holding vagrancy statutes void in whole or in part[162] should serve to put legislatures and other governmental bodies on notice that vagrancy statutes and laws regulating related offenses, such as disorderly conduct and loitering, will in the future be subjected to closer constitutional scrutiny.

Equal Protection and Involuntary Servitude

If the causal connection between vagrant status and criminogenic behavior is in fact weak or nonexistent, then a constitutional question of equal protection arises. Classification for purposes of legislation is permissible so long as there is no clear and hostile discrimination against particular persons and classes.[163] Equal protection does not require that all persons included in the

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Belcastro, 356 Ill. 144, 190 N.E. 301 (1934) (statute punishing persons reputed to be habitual criminal violators or persons habitually associating with criminals held invalid on fourteenth amendment due process grounds); State v. McCormick, 142 La. 580, 77 So. 288 (1917) (statute punishing habitual association with prostitutes held valid since legitimate exercise of police power not limited by civil liberties or fourteenth amendment).

159. Wallace v. State, 224 Ga. 255, 161 S.E.2d 288 (1968) (statute upheld); Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967) (invalidated statute as violation of due process to criminalize otherwise innocent acts); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967) (invalidated statute in part because prohibited activity bore no sufficient relationship to crime); Morgan v. Commonwealth, 168 Va. 731, 191 S.E. 791 (1937) (statute upheld); *Ex parte* Hudgins, 86 W. Va. 526, 103 S.E. 327 (1920) (invalidated statute requiring able-bodied persons to work at least thirty-six hours per week as unjustified under police power).

160. *Ex parte* McCue, 7 Cal. App. 765, 96 P. 110 (1908); State v. Finrow, 66 Wash. 2d 818, 405 P.2d 600 (1965).

161. *See, e.g.*, Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967); *cf.* Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).

162. *E.g.*, Detroit v. Bowden, 6 Mich. App. 514, 149 N.W.2d 771 (1967); Cleveland v. Forrest, 223 N.E.2d 661 (Ohio 1967); Seattle v. Drew, 423 P.2d 522 (Wash. 1967).

163. Rinaldi v. Yeager, 384 U.S. 305 (1966); Heisler v. Thomas Collier Co., 260 U.S. 245 (1922); Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283 (1898).

operation of a statute be treated identically, but it does require that any distinctions made have some relevance to the purpose for which that classification is set apart for special treatment.[161] If the avowed purpose of vagrancy statutes is the prevention of crime, and if it were conclusively shown that there is no substantial connection between the condition of vagrancy and the commission of crime, then the classification of idle indigents as criminals would be an unconstitutional denial of equal protection of the law.

Another important consideration is the seriousness of the crime to be prevented. If serious, significant restriction of individual liberties may be justified.[165] In an equal protection context this means that a causal relationship between vagrancy and *very minor* criminal activity may not be sufficient to justify the designation of a class subject to penal sanction. No case has held a vagrancy statute unconstitutional solely on equal protection grounds, although this reason has been mentioned in cases finding multiple constitutional defects in vagrancy statutes.[166]

A further objection to laws that compel persons either to accept work or face criminal prosecution is that they possibly violate the thirteenth amendment, which provides that involuntary servitude shall not exist except as punishment for a crime.[167] In addition, federal legislative policy as expressed in the Anti-Peonage Act is "to maintain a system of completely free and voluntary labor throughout the United States."[168]

Although the thirteenth amendment has only once been the sole basis for declaring a vagrancy statute unconstitutional, both courts[169] and commentators[170] have mentioned it as a possible ground for such action. Despite the fact that this amendment is infrequently used by the United States Supreme Court,[171] at least a common sense argument can be made that vagrancy statutes that indirectly force employment create involuntary servitude. How-

164. Baxstrom v. Herold, 383 U.S. 107 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964). *See generally* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

165. Where laws restrict civil liberties, their justification must be greater than the minimal substantive due process standard that is required for economic regulations. If the evil sought to be avoided is great, however, even first amendment freedoms may be restricted when they otherwise could not be. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927).

166. *E.g.*, Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

167. U.S. CONST. amend. XIII, §1.

168. 42 U.S.C. §1994 (1964).

169. In Thompson v. Bunton, 117 Mo. 83, 22 S.W. 863 (1893), the court declared invalid a statute that hired out convicted vagrants for six months to the highest bidder. Possible violation of the thirteenth amendment has also been mentioned in other cases. Pollock v. Williams, 322 U.S. 4, 16 (1944); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967). *See also* Taylor v. Georgia, 315 U.S. 25 (1942); Bailey v. Alabama, 219 U.S. 219 (1911); Broughton v. Brewer, 298 F. Supp. 260, 270 (1969).

170. *See generally* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955); Note, *Vagrancy and Related Offenses*, 4 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 291 (1969); Note, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

171. *Cf.* Shapiro, *Involuntary Servitude: The Need for a More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964).

ever, the issue will probably never be reached since most vagrancy statutes possess more obvious constitutional infirmities.

SEARCH, SEIZURE, AND PROBABLE CAUSE

The fourth amendment to the United States Constitution prohibits "unreasonable searches and seizures," and says that "no Warrants shall issue except on probable cause . . . particularly describing the persons . . . to be seized."[172]

By allowing preemptive arrest to prevent probable criminal activity, vagrancy statutes in effect provide a statutory basis for arrest on suspicion.[173] By this means, a valid arrest may be made for vagrancy when probable cause would be lacking to arrest for the commission of, or attempt to commit, a conduct crime. However, vagrancy arrests are not necessarily unconstitutional for this reason.

It can, of course, be questioned whether probable cause may *ever* exist to arrest for a crime the substantive basis of which is merely suspicion. This contention does not, however, reach the determinative issue of whether vagrancy in its present definitions may constitutionally be made a crime. The oft-quoted statements by the courts that mere "suspicion is not enough for an officer to lay his hands on a citizen"[174] refer to judgments made by arresting officers, not by the legislatures. Clearly, legislative enactments may authorize actions that no police officer could undertake solely on his own initiative. Statutes prohibiting possession of burglary tools,[175] for example, authorize arrest of suspicious persons who could not be arrested for attempt to commit burglary. Vagrancy statutes are not unconstitutional merely because they amount to a legislative scheme that permits arrest on general suspicion — that is, arrest without probable cause that a particular conduct crime is being or has been committed. If the crime of vagrancy is conceptually valid, the concept of probable cause applies in the same way as to any other crime.

Perhaps a more important problem involves "the right to privacy" — a concept said to arise in part from the fourth amendment. This "right to be let alone," as Brandeis once described it,[176] has existed for many years but has only recently reached full development as an independent constitutional right.[177] Its original limitation to protection against trespassory invasions of property[178] has been discarded,[179] and it may now be used as an

172. U.S. CONST. amend. IV.

173. *See* Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950).

174. Henry v. United States, 361 U.S. 98, 104 (1959).

175. *E.g.*, FLA. STAT. §810.06 (1967).

176. Olmstead v. United States, 277 U.S. 438, 471 (1928) (dissenting opinion). *See also* Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890) (this is the earliest commentary on the subject).

177. Griswold v. Connecticut, 381 U.S. 479 (1965).

178. *See* Olmstead v. United States, 277 U.S. 438 (1928).

179. Katz v. United States, 389 U.S. 347 (1967).

independent basis for determining the scope of individual liberties.[180] The collision between this right and most vagrancy statutes is obvious. To the extent that vagrancy statutes punish private rather than public status or conduct, they may become increasingly susceptible to constitutional attack for violating the right to privacy. Although no court has yet explicitly sustained such an attack, this eventuality becomes more likely as the right to privacy gains more importance in the constitutional scheme.

Problems arise when, pursuant to an arrest for vagrancy, a search is made that provides probable cause for arrest on another charge. In *Preston v. United States*,[181] petitioners had been arrested for vagrancy and searched for weapons after they had been seen sitting in an automobile during the early morning hours. A search of the car after it had been towed to a garage provided material evidence for conviction of conspiracy to rob a bank. The United States Supreme Court reversed the conviction, holding that the search was "too remote in time and place to have been made as incidental to the arrest [for vagrancy]."[182] In *Cooper v. California*,[183] petitioner contended that his conviction on a narcotics charge should be reversed on the authority of *Preston* since the incriminating evidence had been discovered in a search of petitioner's car one week after the initial arrest. The Court, in a 5-4 decision, refused to reverse. Justice Black distinguished *Preston*:[184]

> Preston was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they had arrested him.

The unanswered question was: "What search *is* relevant to a vagrancy charge?" The Court did not decide whether personal search of an accused vagrant is permissible. *Preston* indicated that, if the Government had probable cause to believe the car was stolen and the search of the auto had been made on the spot, the evidence might have been admissible.[185] Query: In that event, why should the arrest be for vagrancy rather than auto theft?

The difficulty that broad vagrancy laws create concerning constitutional probable cause requirements is illustrated by *Kelley v. United States*.[186] The defendant, while sitting in a restaurant next to a known prostitute whom

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180. Stanley v. Georgia, 394 U.S. 557 (1969).

181. 376 U.S. 364 (1964).

182. *Id.* At that time Mapp v. Ohio, 367 U.S. 643 (1961), had already been decided. Thus, the illegally seized evidence came under *Mapp's* exclusionary rule rule. Disposing of vagrancy cases at a trial level on fine constitutional distinctions is neither efficient nor probably even possible. The essential question is whether the vagrancy laws by their nature tend to create the unfortunate kinds of situations in which the *Mapp* rule operates. Since this exclusionary rule is remedial in nature, it does not tend to redeem the potential unconstitutionality of vagrancy statutes.

183. 386 U.S. 58 (1967).

184. *Id.* at 61.

185. 376 U.S. 364, 367-68 (1964).

186. 298 F.2d 310 (D.C. Cir. 1961).

he apparently did not know, was observed by two police officers. Thinking that he recognized him as a felon, one officer asked him to step outside. The defendant did so and admitted upon questioning that he possessed marijuana. He complied with a request that he take the marijuana out of his pocket. When asked at the trial if the defendant was doing anything wrong when he (the officer) went in the restaurant, the officer replied that this was what he entered to find out. The court held that the arrest for vagrancy (which occurred when the defendant was asked to step outside) was invalid because the arresting officer lacked probable cause. This case is illustrative of the broad vagrancy statutes' dangerous potential for generating probable cause that would not otherwise exist in the mind of an officer. Whether a personal search is "relevant to" a vagrancy charge is not answered; however, the court seemed to assume that, if the arrest were valid, so also would be a search pursuant to it.

In *Terry v. Ohio*, the Supreme Court held that a police officer may search for dangerous weapons without probable cause for arrest if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.[187] A search can thus be made on the basis of reasonable suspicion, but it is a search only for weapons.[188] The argument can be advanced that, since vagrancy arrests are, in effect, "arrests on suspicion," the same rule should apply. So long as vagrancy is fully regarded as a crime in its own right, however, this argument is not likely to succeed, for it seems well-settled that personal search of an accused pursuant to any valid arrest is permissible.[189]

The thrust of the fourth amendment's protection encompasses both a reasonable right to privacy and the prevention of arbitrary police action. A vagrancy statute, like the permissibility of the search in *Terry*,[190] will not necessarily defeat these purposes provided it is not overbroad or in itself arbitrary. The fact that no court has ruled a vagrancy statute unconstitutional under fourth amendment probable cause requirements probably reflects the relationship between difficulties in this area and the more obvious constitutional defects of vagueness or overbreadth.

CRUEL AND UNUSUAL PUNISHMENTS

Vagrancy statutes have generally withstood attack on the ground that they violate the eighth amendment's prohibition of cruel and unusual punishment. Eighth amendment arguments have been advanced upon several theories. In *Rucker v. United States*,[191] the court rejected the contention that a vagrancy statute that prescribed harsher punishments for vagrants who were narcotics users violated the eighth amendment and asserted that the harsher

187. 392 U.S. 1, 30 (1968).
188. Sibron v. New York, 392 U.S. 40 (1968).
189. *See* United States v. Rabinowitz, 339 U.S. 56 (1950).
190. 392 U.S. 1 (1968).
191. 212 A.2d 766 (D.C. App. 1965).

punishments were justified by the greater threat posed by narcotics vagrants compared with other types of vagrants.

The same statutory provision was challenged in *Ricks v. United States*[192] on the theory that a statute that imposed punishment in the absence of any overt act without criminal intent or harm to others violated the eighth amendment. The court, in upholding the statute, held that the crime was a mode of living requiring overt acts, not an instantaneous personal condition. In *Wilson v. United States,* the court rejected an eighth amendment challenge to other provisions of this statute that labeled as vagrants narcotics users found in any place where illicit drugs were kept, used, or dispensed.[193]

Much of the impetus for these challenges undoubtedly came from *Robinson v. California,* where the Supreme Court invalidated a statute that made it a misdemeanor to be addicted to the use of narcotics,[194] a *status* subjecting the defendant to criminal liability at any time before he reformed. Conceding that the ninety-day sentence itself was neither cruel nor unusual, the Court maintained that the eighth amendment question could not be considered in the abstract, for "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[195] Of crucial importance was the fact that the statute prescribed guilt whether or not the accused possessed or used any narcotics or was guilty of any antisocial behavior. This approach was used by the United States Court of Appeals for the Fourth Circuit in reversing the conviction of a chronic alcoholic for public drunkenness.[196] The act of drunkenness, the court felt, was merely a symptom of an involuntary alcoholic condition; thus, it was cruel and unusual to punish the defendant for it.[197] However, the United States Supreme Court later rejected this view in *Powell v. Texas,*[198] an almost identical case. The Court distinguished *Robinson,* holding that the law against public drunkenness punished not mere status but rather a definite act. *Robinson* did not mean that it is cruel and unusual to punish a person for a condition he is powerless to change, but only that punishment cannot be inflicted unless the accused has committed some act or engaged in some behavior that society has an interest in preventing.

Although the above cases do not involve vagrancy laws, they nonetheless provide a basis for understanding the possible eighth amendment conflict generated by *status criminality* and prohibitions resembling it.

Freedom of Movement

Another ground upon which vagrancy statutes have been attacked is that such statutes place an unconstitutional restriction upon freedom of move-

192. 228 A.2d 316 (D.C. App. 1967).
193. 212 A.2d 805 (D.C. App. 1965).
194. 370 U.S. 660, *rehearing denied,* 371 U.S. 905 (1962).
195. *Id.* at 667.
196. Driver v. Hinnant, 356 F.2d 761 (4th Cir.), *cert. denied,* 384 U.S. 908 (1966).
197. *Id.* at 765.
198. 392 U.S. 514 (1968).

ment.[199] Although there is no constitutional provision that expressly protects freedom of movement,[200] this right has long been recognized[201] through the court's utilization of a variety of constitutional provisions.[202]

In *Williams v. Fears,* the Supreme Court held that the "right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty."[203] The Court has also held that the consept of freedom of movement enables all citizens "to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[204] The right to travel and move about freely can only be restricted through due process of law.[205] The classic explication of this right was set forth in *Pinkerton v. Verberg*:[206]

> Personal liberty . . . consists of the right of locomotion — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others make it necessary for the welfare of all other citizens. . . . Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of a felony, would be most oppressive and unjust, and destroy all the rights which our constitution guaranties [*sic*]. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.

In *Edwards v. California,* the Supreme Court invalidated a California law that impeded the free interstate passage of indigents.[207] In a concurring opinion, Justice Douglas indicated that the right of free movement is inherent

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199. *E.g.*, Broughton v. Brewer, 298 F. Supp. 260, 270 (S.D. Ala. 1969).

200. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 162 (1956). *See also* Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949), where the court upheld the validity of a city ordinance making it unlawful for any person to roam or be on a public street between the hours of 1 and 5 a.m. without having a lawful purpose, as against the contention that such ordinance violated the privileges and immunities clause of the fourteenth amendment. The court reasoned that the ordinance bore a sufficiently close relation to the peace, safety, and welfare of the public as to justify the inconvenience to which law-abiding citizens may occasionally be subjected.

201. *Cf.* Passenger Cases, 48 U.S. (7 How.) 283 (1849) .

202. In Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) and Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868), the right to travel interstate was based on the privileges and immunities clause, U.S. CONST. art. IV, §2. In Edwards v. California, 314 U.S. 160 (1941); Twining v. New Jersey, 211 U.S. 78 (1908); and Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), reliance was placed on the privileges and immunities clause of the fourteenth amendment. A commerce clause approach was employed in Edwards v. California, 314 U.S. 160 (1941) and Passenger Cases, 48 U.S. (7 How.) 283 (1849). Freedom of travel outside the country was based on the due process clause of the fourteenth amendment in Zemel v. Rusk, 381 U.S. 1, 14 (1966); Aptheker v. Rusk, 378 U.S. 500, 505-06 (1964); and Kent v. Dulles, 357 U.S. 116, 125 (1958).

203. 179 U.S. 270, 274 (1900).

204. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

205. Kent v. Dulles, 357 U.S. 116, 125 (1958).

206. 78 Mich. 573, 584, 44 N.W. 579, 582 (1889).

207. 314 U.S. 160 (1941).

in the concept of *national* citizenship, and that geographical mobility is a necessary requisite to freedom of opportunity. Allowing a state to curtail the right of free movement of those who are poor or destitute would "introduce a caste system utterly incompatible with the spirit of our system of government," and would further "permit those who were stigmatized by a State as indigents, paupers, vagabonds to be relegated to an inferior class of citizenship."[208]

That vagrancy statutes impede or restrict an individual's freedom of movement is patently obvious. *Matter of Cutler*, for example, held that those persons are vagrants "who indulge in pointless, useless wandering from place to place . . . without any excuse for such roaming other the impulse generated by what is sometimes denominated wanderlust."[209] Punishment is commonly provided in vagrancy statutes for acts such as "idling," "loitering," "strolling," and "wandering."[210] Of the forty-seven states having vagrancy statutes in 1962, nineteen contained provisions against "loitering" and fifteen prohibited "night walkers."[211] The vagrancy ordinance declared unconstitutional in *Smith v. Hill* provided simply that all tramps, vagrants, or suspicious persons "shall not be allowed on the streets or other public place."[212]

Provisions of this type probably are not enforced against individuals simply because they happen to be "idling," "strolling," or "wandering" when observed by the police. These offenses are punished only when the movement of the accused is coupled with a condition of impecunity or repugnant appearance and the subsequent inability to "give a good account of himself." No valid reason exists for punishing an act as inherently innocent as wandering or strolling simply because the accused happens to be indigent.[213] It is unfortunate that these threads of antimigratory policy originating in the laws of pre-Elizabethan England should be utilized today in an American society where mobility of population is otherwise positively regarded.

Also in apparent conflict with the concept of freedom of movement is the manner in which vagrancy laws are sometimes used to banish undesirables from a jurisdiction. Matthew Lazarus, it will be remembered, once received a suspended sentence on the condition that he leave town.[214] The prevalence of this practice with or without actual trial is well known to police officers who have assisted in the transportation of undesirables to the northern city limits of Florida's east coast municipalities. The use of banishment was also

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208. *Id.* at 181.

209. 1 Cal. App. 2d 273, 280, 36 P.2d 441, 445 (1934). *See also* People v. Bell, 204 Misc. 71, 125 N.Y.S.2d 117, *aff'd*, 306 N.Y. 110, 115 N.E.2d 821 (1953).

210. *See generally* Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962).

211. *Id.* at 112-13. A loiterer is commonly defined as "an idler or dissolute person who loiters or prowls around public or private places." A night walker is "an idle or dissolute person who roams about at late or unusual hours and is unable to account for his presence." *Id.* at 109.

212. 285 F. Supp. 556, 558 (E.D.N.C. 1968).

213. Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 648 (1956).

214. Brief for Plaintiff at 18, Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).

noted by Foote in a 1956 study of Philadelphia's administration of vagrancy laws.[215] Since the *status* of vagrancy does not depend upon a discreet act, a vagrant is subject to rearrest the moment he is released from custody.[216] This characteristic of vagrancy law particularly lends itself to abuses such as banishment.

SELF-INCRIMINATION, PRESUMPTION OF INNOCENCE, AND DOUBLE JEOPARDY

Traditional vagrancy statutes such as Florida Statutes, section 856.02, usually contain one or more provisions requiring that the suspect, on inquiry, justify his presence or conduct. "Failure to give a good account of himself" or "wandering without any lawful purpose" are typical examples. These statutes present several potential conflicts with the fifth amendment provision that no person "shall be compelled in any criminal case to be a witness against himself."[217]

First, the United States Supreme Court has never decided whether refusal to answer a police officer's routine question may be made the sole basis for probable cause to arrest. Because of this, the constitutionality of vagrancy statutes that often predicate both guilt and probable cause on a refusal to justify one's presence is unsettled.

The contention has also been advanced that such statutes violate the right to remain silent.[218] Arguably, under the American system of justice, the government is burdened to produce the evidence of crime by its own labors.[219] Thus, statements to be used as evidence may not be coerced from the accused. However, the practical effect of allowing guilt to rest on unexplained presence compels the accused to testify and possibly prove his own guilt.[220] The difficulty with this line of reasoning is that the statements supposedly compelled from the defendant can do him no harm since he is already guilty under the statute if he remains silent. Thus, strictly speaking, the defendant is not indirectly compelled to incriminate himself, since by speaking out he cannot worsen his position and might well exonerate himself. The validity of statutes that place the burden on the accused to explain his presence is not normally questionable as violating the protection against self-incrimination. Only one court has ever invalidated a vagrancy statute on this ground.[221]

Yet another problem exists with respect to *Miranda* warnings. The current doctrine relating to incriminating admissions that originated in *Escobedo v. Illinois*[222] and *Miranda v. Arizona*[223] indicates that once an inquiry has

215. Foote, *supra* note 213, at 622-24.
216. As proof of this Matthew Lazarus was arrested twice within one twenty-four hour period. Brief for Plaintiff at 8, Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).
217. U.S. CONST. amend. V.
218. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
219. Chambers v. Florida, 309 U.S. 227, 238 (1940).
220. United States v. Gainey, 380 U.S. 63, 87 (1965) (dissenting opinion).
221. Detroit v. Bowden, 6 Mich. App. 514, 149 N.W.2d 771 (1967).
222. 378 U.S. 478 (1964).
223. 384 U.S. 436 (1966).

narrowed to a particular suspect who is "in custody,"[224] the suspect has, among other things, a right to be informed of his privilege against self-incrimination. Both decisions are limited to in-custody situations, because the rationale in each was that the potential to overcome an accused person's awareness of his right to remain silent inheres in such situations. Confessions obtained from one unaware of his rights were thought to be coerced in character. The purpose of *Miranda* and *Escobedo* is to protect an accused who has, in practical effect, been arrested from further incriminating himself involuntarily.

The difficulty in utilizing *Miranda* to protect vagrancy suspects arises when, in order to establish probable cause for arrest, an officer must make inquiries of a suspect. If the answers are unsatisfactory, they usually provide evidence sufficient not only for probable cause but also for conviction of vagrancy. Thus, when the accused vagrant may first be entitled to *Miranda* warnings, it in probably too late to prevent self-incrimination that will convict him. Again, this problem seemingly does not involve fifth amendment issues of constitutionality. However, it reveals still another unfortunate aspect of vagrancy laws -- a question of desirability rather than constitutionality.

The fifth amendment also provides that no person shall be for the same offense "twice put in jeopardy of life or limb."[225] Since vagrancy statutes often outlaw a status that is chronic or continuous in nature, to try such an offender more than once may be considered as subjecting him to double jeopardy.[226] However, despite the ingeniousness of this double jeopardy argument, no court has yet accepted it.

Freedom of Speech and Association

Potential encroachments by vagrancy laws upon first amendment freedoms seem an almost inevitable concomitant of vagueness and overbreadth. Vague laws allow selective enforcement against disfavored groups or individuals[227] and may produce a "chilling effect" that discourages the legitimate conduct of constitutionally protected activity.[228]

This constitutional issue concerns the *potential* that a vagrancy statute may have for such abuse rather than specific unconstitutional applications. Because of the difficulty of proving that an overbroad statute has intentionally been selectively enforced, this constitutional issue is certain to arise. The fact that Matthew Lazarus wore unusual clothing or supported the Humphrey-Muskie campaign, or that his most constant companion was a Negro ex-convict,[229] may not have made any difference. It is not desirable, however, that only the arresting officer knows for sure.

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224. Custody occurs when the suspect's freedom is substantially impaired. This need not be a taking to the police station and it may occur before formal arrest.

225. U.S. Const. amend. V.

226. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960).

227. *See* Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

228. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

229. Brief for Plaintiff at 13, Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).

Overbroad vagrancy statutes may restrain the exercise of first amendment rights even in the absence of specific arbitrary application. The Supreme Court has invalidated ordinances that are so vague as to cause those who might be included in their scope to "steer far wider of the lawful zone,"[230] and this principle has been applied to vagrancy statutes by the lower courts.[231] Here, as with selective enforcement, the potential rather than actual application of a statute is determinative of the constitutional issue.

Even narrowly drawn vagrancy-type statutes may violate constitutional guarantees. Although not overbroad, laws that seek to punish associations of various types, for example, may violate the first amendment if the associations proscribed are irrational and not reasonably related to the evil sought to be eliminated.

PERSPECTIVES IN DEALING WITH THE VAGRANCY PROBLEM

Who Is the Vagrant?

As knowledge in the areas of psychology and sociology has advanced, the vagrant has come to be recognized as something more than an idle, able-bodied parasite. A vagrant may be viewed as an individual who has relinquished culturally prescribed goals and whose behavior does not accord with social or institutional norms. Although equipped with a knowledge of the cultural goals of his society and the institutional practices to be followed in achieving them, the potential vagrant may find himself, for any number of reasons, denied access to traditional avenues of societal success-striving. He therefore resigns himself to a life of defeat by rejecting the values of the competitive society in which he has failed and, in effect, "drops out." The vagrant is thus an asocialized individual who has abandoned the quest for success by retreating into a world where "striving" and "accomplishment" are no longer attributes.[232] Undoubtedly a compulsively criminogenic element also exists within this vagrant subculture whose reason for occupying such a status is volitional rather than auto-psychological or sociological in origin.[233]

Enforcement of Vagrancy Statutes

The widespread enforcement of vagrancy statutes is indicated by the fact that between 1940 and 1946 vagrancy arrests accounted for from 5.7 per cent to 8.8 per cent of all arrests made in the United States.[234] Arrests for vagrancy, which include related offenses such as disorderly conduct, drunkenness, and suspicion constitute a much larger proportion of all

230. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

231. *E.g.*, Smith v. Hill, 285 F. Supp. 556 (E.D.N.C. 1968).

232. G. SYKES & T. DROBEK, LAW AND THE LAWLESS: A READER IN CRIMINOLOGY, 217-18 (1969).

233. *See generally* W. DAWSON, THE VAGRANCY PROBLEM (1910); H. GILMORE, THE BEGGAR (1940).

234. Foote, *supra* note 213, at 613.

arrests.[235] In 1967 there were 106,747 arrests for vagrancy, constituting 2.0 per cent of all arrests reported for that year.[236]

Government Interests and Constitutional Prohibitions

In determining the validity or necessity of regulating the conduct of vagrants, the individual freedoms guaranteed by the Constitution must be balanced against the social and governmental necessity for the preservation of peace and order. The reasons underlying the punishment of vagrancy have not always been a legitimate exercise of governmental power. Though not often openly avowed, the following are typical of the motives underlying the actual application of vagrancy statutes, notwithstanding what the legislative purposes for the statutes may have been:

(1) prevention of crime;
(2) discouragement of voluntary unemployment in order to lessen the welfare burden on the community;
(3) humanitarian commitment of those who would harm themselves or others but who have committed no specific crime;
(4) banishment as a matter of administrative convenience on the part of local officials;
(5) perpetuation of the Protestant work ethic, in that all who choose not to make a positive contribution to society are punished;
(6) suppression of those who deviate from accepted societal norms as regards physical appearance;
(7) prevention of the general corrupting effect that is thought to be exerted upon social morals by the presence of a vagrant element;
(8) general societal aversion to relatively extreme abnormalities in life styles or philosophies.

Clearly the prevention of crime is of sufficient social import to justify the imposition of criminal sanctions against *conduct* that threatens the well-being of the community. In addition, humanitarian commitment may serve a valid governmental function in that it prevents infringement of the rights of the general public by the affected individual and serves to protect the individual from himself. This is particularly true where the detention is genuinely rehabilitative rather than punitive in character and the potential harm sought to be avoided is relatively serious.

Undue crowding of welfare rolls, while a legitimate area of governmental concern, is not a legitimate subject for penal sanctions. Banishment definitely appears subject to constitutional objections as an unlawful restriction of free movement. The remainder of the alleged motives are also beyond the generally accepted scope of the criminal law.

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235. UNIFORM CRIME REPORTS 105-17 (1951) provide the following percentages when the related crimes are included: 1951, 39.4%; 1950, 40.2%; 1949, 41.8%; 1948, 42.8%; 1947, 43.1%; 1946, 42.6%; 1945, 43.7%; 1944, 42.6%; 1943, 45.3%.

236. UNIFORM CRIME REPORTS 117 (1967).

STATUTORY SOLUTIONS

The need for enactment of a new uniform state-wide statute for regulation of vagrancy and related offenses is indicated by the fact that of fourteen municipal ordinances sampled at random, eleven contained language either similar[237] or identical[238] to that in the statute declared unconstitutional in *Lazarus*.

California[239] and Illinois[240] have enacted disorderly conduct statutes to regulate vagrancy and related offenses after earlier statutes were declared unconstitutional. The principal virtues of statutes of this type are that they can be more narrowly drawn and they punish conduct rather than an individual's mere status or condition. The drafters of the Model Penal Code have also rejected the concept of status criminality.[241]

CONCLUSIONS AND RECOMMENDATIONS

The interests of both society and the individual are best served by reliance on traditional principles of "conduct criminality." That is, criminal statutes should punish specific acts as they occur rather than a status or a potential for criminal activity. While it may be argued that conduct criminality statutes fail to prevent crime because they allow the commission of offenses before sanctions may be imposed, "status statutes" have not been conclusively shown to be any more effective as crime preventatives. As has been noted, no convincing causal relationship has been established between the "status" of vagrancy and criminal activity.

Given the above, the crucial factor in favor of adopting conduct criminality statutes is superior protection of individual liberties. First, they provide comprehensible standards that satisfy due process-fair notice requirements. They also prevent violations of due process caused by arbitrary application since they lend themselves more readily to effective judicial supervision.

The function that status criminality statutes have performed in discouraging indigence and punishing "economic nuisances" should no longer be considered a valid legislative aim. The economic criminality concept de-

237. *See, e.g.*, LEESBURG, FLA., CODE OF ORDINANCES §18-25 (1953); PALM BEACH, FLA. CODE OF ORDINANCES §21-84 (1958); ST. PETERSBURG, FLA., CODE §§25.55, .73 (1963).

238. *See, e.g.*, BARTOW, FLA., CODE OF ORDINANCES §17-33 (1955); DAYTONA BEACH, FLA., CODE OF ORDINANCES §28-59 (1955); DELAND, FLA., CODE OF ORDINANCES §21-19 (1954); FT. LAUDERDALE, FLA., CODE OF ORDINANCES §28-53 (1953); KEY WEST, FLA., CODE OF ORDINANCES §21-71 (1958); LAKELAND, FLA., CODE ch. 26, §45 (1950), NEW SMYRNA BEACH, FLA., CODE OF ORDINANCES §16-43 (1958); TALLAHASSEE, FLA., CODE §23-41 (1957).

239. CAL. PENAL CODE §647 (West 1968).

240. ILL. CRIM. CODE §26-1 (1961).

241. *See* MODEL PENAL CODE §250.12, Comment 1, at 60 (Tent. Draft No. 13, 1961). Although rejecting status criminality, the drafters have adopted a "suspicious loitering" statute (§250.12) that provides: "[A] person who loiters or wanders without reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes."

veloped in pre-Elizabethan England is neither rational nor relevant in modern society.

If, in addition to deterrence, the aim of penal legislation is to rehabilitate criminals in order to prevent future crime, this purpose is best accomplished by longer sentences attendant upon conviction for the consummation of more serious offenses. It is surely questionable whether the short periods of incarceration typically punishing vagrancy offenses serve any rehabilitative function at all. By virtue of the fact that prohibitions contained in penal statutes should bear a close relationship to the evil sought to be avoided, and since vagrancy laws apparently do not effectively serve either a deterrent or a rehabilitative function, the need for the continued existence of such laws should be closely reexamined.

The desirable result of a properly drawn conduct criminality statute would be the punishment of those members of vagrancy status groups who have engaged in criminal conduct. The preventative function could then be served because the unlawful element would be identifiable, and the rehabilitative goal could be accomplished through apprehension and detention of the lawbreakers.

Following are certain specific recommendations deemed necessary to handle the problem of vagrancy and related offenses in a manner consistent with both the Constitution and the needs of a modern society:

(1) A vagrancy statute should not be enacted to replace Florida Statutes, section 856.02.

(2) Individual, narrowly drawn conduct criminality statutes should be utilized exclusively to punish those aspects of the vagrancy concept that are presently the legitimate subject of penal legislation, The use of presently existing statutory provisions should be sufficient,[242] except perhaps with respect to begging. Even conduct criminality statutes prohibiting begging are not justifiable at the present time. Since begging is an activity that is innocent in itself, the degree of societal harm to be anticipated from current levels of begging is negligible. If a begging statute is thought necessary, a narrowly drawn conduct criminality statute such as that contained in the California disorderly conduct statute should be adopted.[243]

(3) The recently enacted "Florida Stop and Frisk Law"[244] should be allowed to perform the crime preventative function formerly served by

242. *See, e.g.*, FLA. STAT. §§877.03 (disorderly conduct), 796.01-.07 (prostitution); 798.02 (lewd and lascivious behavior); 856.01 (drunkenness either from drugs or alcohol); 849.01 - .46 (gambling); 811.17, .18, 856.02, .03 (receivers of stolen or embezzled property) (1967).

243. "Every person who . . . accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" shall be guilty of disorderly conduct. CAL. PEN. CODE §647 (c) (West 1968).

244. Fla. Laws 1969, ch. 69-72 authorizes a law enforcement officer to temporarily detain and question a person under circumstances that reasonably indicate such person has committed, is committing, or is about to commit a criminal offense, and permits search of the person detained to the extent necessary to disclose if said person is armed, when the officer reasonably believes that such person is armed with a dangerous weapon. The law further provides that said person shall not be detained more than is reasonably necessary for such search unless an arrest is made.