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Constitutional Law: The Belated Demise of a Vagrancy Statute

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CONSTITUTIONAL LAW: THE BELATED DEMISE OF A VAGRANCY STATUTE

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

Eight defendants were convicted in municipal court of violating the vagrancy ordinance of the city of Jacksonville.[1] Their convictions were affirmed by the circuit court in a consolidated appeal, and the First District Court of Appeal dismissed their petition for writ of certiorari.[2] The United States Supreme Court granted certiorari and, reversing the convictions, HELD, the Jacksonville vagrancy ordinance void for vagueness.[3] Thus, for the first time in its history the Supreme Court held a vagrancy statute unconstitutional.[4]

The crime of vagrancy originated in 14th century England, with the passage of the Statutes of Laborers.[5] These statutes made the act of wandering a crime,[6] since they required the laboring population to dwell in designated areas and to work for specified wages.[7] In the ensuing years, however, the law of vagrancy underwent considerable change. Vagrancy statutes were utilized not only to control the wandering unemployed but also to curb

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1. 405 U.S. 156 n.1 (1972), *citing* JACKSONVILLE, FLA., CODE §26-57 (1965), which provides: "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses." Class D offenses at the time of the convictions were punishable by 90 days imprisonment, $500 fine, or both.

2. Brown v. Jacksonville, 236 So. 2d 141 (1st D.C.A. Fla. 1970). The district court denied certiorari on the authority of Johnson v. State, 202 So. 2d 852 (Fla. 1967), which held Florida's vagrancy statute constitutional.

3. 405 U.S. 156 n.2 (1972).

4. *See* Annot., 25 A.L.R.3d 801 (1969).

5. 23 Edw. 3 c. 1 (1349); 25 Edw. 3 c. 1 (1350). *See* 3 R. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 203 (1883).

6. 3 R. STEPHEN, *supra* note 5, at 267. The definition of "vagrant" at common law was "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).

7. Due to far-reaching social and economic changes in England as well as to the advent of the Black Plague in 1349, which created an acute labor shortage, a free class of laborers arose that was able to exact high wages for work and would wander from town to town in search of better employment. As an adjunct to this free class of laborers the pauper, one who cannot or will not maintain himself, became a problem. The Statutes of Laborers were enacted to cope with these wandering laborers. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-60 (1936).

the activities of probable criminals.[8] The conduct of wandering, therefore, was no longer required for violation of the law, but the mere status of pauper or vagabond became criminal.[9]

Although in the 19th century the English law of vagrancy shifted from the status criminality concept back to a requirement of criminal conduct,[10] the earlier concept had been firmly established in the new American states.[11] Due to a belief that paupers and unemployed wanderers were potential criminals,[12] American vagrancy laws punished individuals because of their status or present condition.[13] In addition, the laws were expanded to cover a host of new acts.[14]

Florida's vagrancy statute[15] and municipal ordinances resembling it[16] have been called "anachronistic survivors of a bygone era."[17] Florida's statute was previously declared unconstitutionally vague and overbroad by a three-judge federal district court.[18] This decision, however, was not binding on

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8. Note, *Vagrancy — A Study in Constitutional Obsolescence*, 22 U. FLA. L. REV. 384, 389-90 (1970).

9. *Id.* at 391. For an extensive discussion of the concept of status criminality in vagrancy law *see* Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962).

10. In the 17th century England began to take a more humanitarian view of the poor and criminal vagrancy law was separated from poor relief legislation. Vagrancy law shifted from punishing status to punishing specific criminal acts. These changes were reflected in the Vagrancy Act of 1824. *See* Note, *supra* note 8, at 391.

11. Hicks v. District of Columbia, 383 U.S. 252, 256 (1966) (Douglas, J., dissenting). Mr. Justice Douglas pointed out the obvious incongruity of transplanting an English anti-migratory law to America, a country that invited and required vast migrations of emigrants. *Id.* at 256.

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

13. Hicks v. District of Columbia, 383 U.S. 252, 256 (1966) (Douglas, J., dissenting).

14. *Id.*

15. FLA. STAT. §856.02 (1971): "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 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 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 around 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 or gaming houses, 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, and upon conviction shall be subject to the penalty provided in §856.03."

16. *See, e.g*, DAYTONA BEACH, FLA., CODE OF ORDINANCES §29-16 (1971); JACKSONVILLE, FLA., CODE §26-57 (1965); NEW SMYRNA BEACH, FLA., CODE OF ORDINANCES §16-43 (1958); ST. PETERSBURG, FLA., CODE §25.73 (1963); TAMPA, FLA., CODE §26-83 (1970).

17. Note, *supra* note 8, at 392.

18. Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969).

state courts,[19] and Florida's vagrancy statute has been held constitutional by the Florida supreme court.[20]

In the instant case the United States Supreme Court held Jacksonville's vagrancy ordinance was unconstitutionally vague on its face and therefore violative of procedural due process as required by the fourteenth amendment.

The concept of vagueness of a penal statute rests on the constitutional principle that procedural due process requires both fair notice of prohibited conduct and proper standards for administrative and judicial enforcement.[21] The underlying principle of the fair notice requirement is that no man should be held criminally liable for conduct that he could not reasonably understand to be proscribed.[22] The instant Court found the terms used in the Jacksonville ordinance were so "general and all-inclusive" as to be vague[23] and, therefore, failed to give a person of ordinary intelligence fair notice that his conduct was forbidden.[24]

The ordinance was also found to be lacking in proper standards for administrative and judicial enforcement.[25] This shortcoming also resulted from the use of vague terms to describe the criminal offense. Vagueness appears to be a common vice of vagrancy statutes, which is due not to inadvertence but to a purposeful design.[26] Relieved from the tight restraints of definitive standards, the police have wide discretion in the application of the statutes. In fact, the express purpose of vagrancy law is not the punishment of offenders but the protection of the public by prevention of crime.[27] Vagrancy statutes

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19 Brown v. Jacksonville, 236 So. 2d 141, 142 (1st D.C.A. Fla. 1970).

20. Johnson v. State, 202 So. 2d 852 (Fla. 1967). The vagrancy conviction of Johnson was later overturned by the United States Supreme Court due to lack of evidence, but the Court never reached the merits of the constitutionality of FLA. STAT. §856.02 (1971). Johnson v. State, 391 U.S. 596 (1968). The holding of the Florida supreme court in *Johnson* was later affirmed in Smith v. State, 239 So. 2d 250 (Fla. 1970).

21. Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968).

22. United States v. Harriss, 347 U.S. 612, 617 (1954).

23. The Court held the following terms were unconstitutionally vague: "common night walkers," "habitual loafers," "persons able to work but habitually living on the earnings of their wives or minor children," and "persons wandering or strolling around from place to place without any lawful purpose or object." 405 U.S. 156, 161-62 (1972).

24. *Id.* at 162. The Court cited as authority the case of Lanzetta v. New Jersey, 306 U.S. 451 (1939), in which a vagrancy type statute that punished persons who were members of a gang was challenged. The United States Supreme Court held the statute unconstitutionally vague in that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 453. This "men of common intelligence" test, first stated in Connally v. General Constr. Co., 269 U.S. 385 (1926), emphasizes precise notice to the layman himself. While in the past it has appeared that the Court was withdrawing from the strictness of this test, the present case indicates the test still influences the Court's decisions. *See* Note, *supra* note 9, at 122 n.116.

25. 405 U.S. 156, 170 (1972).

26. *Id.* at 166. The phrase quoted by the Court and often cited by other courts when referring to this purposeful vagueness first appeared in Winters v. New York, 333 U.S. 507, 540 (1948): "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense."

27. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 143 (1969). For other purposes or

are used to arrest and detain "suspicious" persons whom the police, in their discretion, believe have committed or will commit crimes.[28] While in the absence of a warrant police may arrest an individual only upon probable cause,[29] the vagueness of the vagrancy law allows police, under color of legal right, to arrest an individual for suspicion only.[30] In the instant case the Court found the lack of definitive standards in the Jacksonville ordinance gave police too much discretion in applying the vagrancy law. This "unfettered discretion" encouraged erratic, arbitrary, and discriminatory enforcement.[31] Due to the lack of ascertainable standards of guilt, the police, as well as judges and juries, are likely to rely on criteria outside the statute in determining the guilt or innocence of the defendant.[32]

The instant Court held the ordinance violated procedural due process because it failed to give fair warning and lacked ascertainable standards of guilt. Due process, however, is a multifaceted concept and its requirement of reasonableness is reflected not only in questions of fair notice, but of overbreadth, excessive use of the police power, and equal protection, all of which are intimately related.[33] While the Court explicitly decided the instant case on fair notice and proper standards grounds, it implicitly expressed its opinion as to these other due process aspects as well.

The Court intimated but did not hold that the ordinance, due to its vagueness, was overbroad. Under procedural due process the danger of overbreadth in a penal statute is that constitutionally protected conduct may be stifled. People, rather than risking prosecution, will abstain from conduct that is apparently proscribed by the statute.[34] The Court observed the ordinance was broad enough to prohibit a number of activities, which are not only innocent by modern standards but are actually part of the very amenities of life for which Americans strive.[35] While not expressly guaranteed by the Constitution or the Bill of Rights, the Court implied that such amenities were part of the rights or freedoms that the state had no business controlling.[36]

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functions for which vagrancy statutes are used *see* Note, *The Vagrancy Statute: To Be or Not To Be?*, 15 S.D.L. REV. 351 (1970); Note, *supra* note 8, at 412.

28. This *sub rosa* use of vagrancy law is discussed in Comment, *Vagrancy-Loitering Laws: An Antithesis to Recent Jurisprudential Trends*, 35 TENN. L. REV. 617, 625 (1968).

29. U.S. CONST. amend. IV; U.S. CONST. XIV, §1; *see* Whitely v. Warden, 401 U.S. 560 (1971).

30. *See* Note, *Vagrancy and Related Offenses*, 4 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 291, 295 (1969); Note, *supra* note 9, at 129.

31. 405 U.S. 156, 168-69 (1972).

32. *See* Note, *Vagrancy and Related Offenses*, 4 HARV CIV. LIV.-CIV. RIGHTS L. REV. 291, 296 (1969).

33. *See* Note, *supra* note 8, at 401.

34. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960).

35. The activities that the Court considered "amenities of life" are nightwalking, loafing, strolling, living off the earnings of one's wife or children, and other activities proscribed by the ordinance. 405 U.S. 156, 164 (1972).

36. *Id.* at 165.

Thus, through dicta, the Court seems to have returned to the concept of substantive due process and under a new guise.[37]

Intimately connected with the lack of adequate standards and the resulting discretion vested in police, another vice of the ordinance was the opportunity afforded for denial of equal protection of the law. The Court apparently rejected the causal connection between the vagrant status as defined in the ordinance and future criminal conduct as a presumption "too precarious for a rule of law."[38] Without this causal relationship, the Court recognized the possibility that police would enforce the ordinance discriminatively against the poor, minority groups, and undesirables.[39] Moreover, there was some indication that the Court believed racial discrimination influenced some of the arrests in the instant case.[40]

Conspicuously absent from the Court's opinion was the concept of vagrancy as a status crime.[41] Vagrancy normally does not involve an act or omission, but condemns the passive act of merely "being."[42] The Supreme Court recently invalidated a penal statute that criminalized the status of a drug addict[43] and questioned the validity of another statute that made alcoholism a crime.[44] There was at least some indication that vagrancy statutes might suffer from the same defect,[45] but the Court did not discuss this issue.

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37. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court held that the right of privacy fell within the "penumbra" emanating from a number of constitutionally protected rights and was, therefore, protected from infringement by the state. While the Court openly rejected its earlier concept of substantive due process, Mr. Justice Black, in his dissenting opinion, pointed out that the Court was actually returning to the natural law due process philosophy to strike down a state law. *Id.* at 522.

38. 405 U.S. 156, 171 (1972). One authority believes there is "little correlation between pauperism and serious criminality," and indicates that the police themselves arrest vagrants not as a means for suppressing future criminality but in an attempt to solve past crimes. *See* Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 627-28 (1956). Another author, however, believes it is not unreasonable to believe that a vagrant, a person who has no visible means of support, will turn to criminal conduct to survive. *See* Comment, *supra* note 28, at 622-23.

39. 405 U S. 156, 169 (1972). *See* Hicks v. District of Columbia, 383 U.S. 252 (1966) (Douglas, J., dissenting), where Mr. Justice Douglas pointed out that vagrancy laws do not reach the idle rich but just the idle poor, and to make idle pauperism a crime is to encourage convictions of unpopular minorities. *Id.* at 257. For a brief discussion on selective enforcement of vagrancy laws, especially against Blacks, *see* Note, *supra* note 9, at 131-33.

40. In the statement of the facts of the instant case Mr. Justice Douglas noted that defendants Papchristou and Calloway were white females and their companions when arrested, Melton and Johnson, were black males. The arresting officer denied the racial mixture played a part in the arrest of the foursome. 405 U.S. 156, 158 (1972).

41. *See generally* Note, *supra* note 9.

42. *See* Note, *supra* note 8, at 392.

43. Robinson v California, 370 U.S. 660 (1962) (statute held invalid as cruel and unusual punishment).

44. Powell v. Texas, 392 U.S. 514, 554 (1968) (Fortas, J., dissenting).

45. *See* Hicks v. District of Columbia, 383 U.S. 252, 257 (1966) (Douglas J., dissenting). Mr. Justice Douglas stated he could "not see how economic or social status can be made a crime any more than being a drug addict can be." *Id.* at 257.

The effect of the present decision is not limited to Jacksonville's ordinance, but touches Florida's vagrancy statute[46] and the many similar municipal ordinances.[47] In *Smith v. Florida*,[48] decided by the Supreme Court the same day as the instant case, the judgment of the Florida supreme court upholding Florida's vagrancy statute was vacated and remanded in light of the instant decision. Thus, the Court made clear that section 856.02 of the Florida statutes suffered from the same flaws as the Jacksonville ordinance.

Florida, therefore, is without a valid vagrancy statute. While the instant Court found the Jacksonville ordinance too vague, it did not set any guidelines for a vagrancy law that would meet constitutional standards. Thus, it is an appropriate time to reconsider the necessity of a vagrancy law and what valid function it may serve.

Vagrancy laws are widely used by the police to justify arresting, searching, questioning, and detaining persons whom they suspect have committed or may commit crimes. These functions, however, are fulfilled in large part by the stop-and-frisk law recently enacted by the Florida Legislature.[49] Those aspects of vagrancy that are properly the subject of regulation can be regulated through individual and narrowly drawn criminal statutes.[50] Furthermore, the elimination of vagrancy statutes would lighten considerably the burden on the state's judicial machinery. As the Court in the instant case pointed out, over 100,000 arrests were made in 1970 for vagrancy alone.[51]

The Florida Legislature has the opportunity to rid itself of archaic feudal laws that have no place in our modern society. Indeed, it seems somewhat anomalous that Florida, while encouraging people from all over the nation to sojourn to its cities and resorts for vacations, also makes idleness and loafing a crime.[52] History should provide a beacon to guide us in the solution of our present problems, not a light that blinds us so that we ignore present realities.

ROBERT D. GATTON

46. FLA. STAT. §856.02 (1971).

47. *See, e.g.*, Codes cited note 16 *supra*.

48. 405 U.S. 156, 172 (1972). In *Smith* two defendants were convicted of vagrancy for being "persons wandering or strolling around from place to place without any lawful purpose or object." The Florida supreme court rejected challenges of vagueness and overbreadth and held FLA. STAT. §856.02 (1971) to be constitutional. Smith v. State, 239 So. 2d 250 (Fla. 1970).

49. FLA. STAT. §901.151 (1971).

50. *See* Note, *supra* note 8, at 414-15.

51. 405 U.S. 156, 169 n.15 (1972).

52. *See* Territory of Hawaii v. Anduha, 48 F.2d 171, 172 (9th Cir. 1931).