# DISCRETION AND THE RULE OF LAW: THE SIGNIFICANCE AND ENDURANCE OF VAGRANCY AND VAGRANCY-TYPE LAWS IN ENGLAND, THE BRITISH EMPIRE, AND THE BRITISH COLONIAL WORLD

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*This article explores the history of vagrancy laws in England, the British Empire, and the British colonial world, the significance of those laws, the various challenges that were made to vagrancy laws in the twentieth century, and the limits of those challenges to date. While vagrancy laws preceded the nineteenth century, the 1824 Vagrancy Act in England set a new model, which proved extremely influential around the world over the following centuries. Between the early nineteenth and the early twentieth centuries, vagrancy laws were adopted or reformulated almost everywhere the British left a footprint. The laws that were adopted covered a broad range of (what the authorities considered) offenses and offensive ways of being, including impoverishment, idleness, begging, hawking, public gambling, sex work, public indecency, fortune-telling, traditional religious practices, drunkenness, homosexuality, cross-dressing, socializing across racial groups, being suspicious, and many other activities as well. They were adopted for a range of purposes: to control labor and limit workers' bargaining positions, including after the abolition of slavery; to define the boundaries of civilized, industrious, and moral society; and to "clean up the streets" and reinforce urban boundaries. Most overarchingly, vagrancy laws served as a practical and rhetorical means through which the discretionary power of the authorities, as enforced through the police and magistracy, was expanded. Far from constituting an object of challenge for*

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*'rule of law' advocates, expansion in such discretionary authority was closely bound up with the expansion of the rule of law in theory and practice. While vagrancy laws began to be challenged in the mid-twentieth century, including through a decades-long anti-vagrancy law campaign in the United States that had significant success, they remain part of the law of numerous states around the world. In addition, even where explicit vagrancy laws have been abolished, vagrancy-type laws—laws that have granted the police discretionary authority to commit arbitrary detention, of the poor in particular—remain deeply embedded in the criminal law regimes of all former British jurisdictions. Overcoming the vagrancy law legacy will require recognizing and taking measures to reform the arbitrary, class-discriminatory police power vagrancy laws have helped entrench in common law legal orders.*

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# I. INTRODUCTION

Vagrancy and vagrancy-type laws remain extensively utilized around the world today. In the United States, homeless people are fined and arrested under an extensive collection of laws.[1] In Bangladesh, Pakistan, Sri Lanka, Hong Kong, and Malaysia, individuals are frequently arrested for being homeless and/or begging.[2] The situation is the same in India, where vulnerable minorities, including transgender individuals, are among those targeted.[3] In Guyana, 'loiterers'[4] are fined and imprisoned when unable to pay fines.[5] In Cape Town, urban authorities have criminalized the homeless in order to ensure they don't interfere with the city's more affluent residents.[6]

Vagrancy laws, and 'vagrancy' as such, are hard to define for the simple

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1. The following sources demonstrate the criminalization of homeless people in the U.S.: Ryan Little et al., *In many cities, it's illegal to beg for food or money*, Nowhere to Go Project, CSN MARYLAND (June 29, 2020) https://homeless.cnsmaryland.org/2020/06/29/illegal-to-beg-for-food/; Ryan Little et al., *Cities try to arrest their way out of homeless problems*, ABC NEWS (June 30, 2020); Andrew Weber, *Austin Says Arrests At Homeless Camps Will Not Be 'Typical' As Police Ramp Up Enforcement of Ban*, KUT 90.5 (AUSTIN'S NPR STATION) (June 15, 2021) https://www.kut.org/crime-justice/2021-06-15/city-says-arrests-at-homeless-camps-will-not-be-typical-as-apd-ramps-up-camping-ban-enforcement.

2. For examples of the criminalization of homeless people across the globe, see *Police arrest 33 homeless persons in Colombo*, ADADERANA (Feb. 10, 2014) http://www.adaderana.lk/news.php?nid=25702; Jennifer Ngo, *More than 400 mainland beggars arrested in Hong Kong over five years*, SOUTH CHINA MORNING POST (Feb. 4, 2016) https://www.scmp.com/news/hong-kong/law-crime/article/1909212/more-400-mainland-beggars-arrested-hong-kong-over-five; Bipul Debnath, *Begging Profession,* THE INDEPENDENT (BANGLADESH) (July 14, 2017) https://m.theindependentbd.com/arcprint/details/103831/2017-07-14; Andy Chua, *Taking the homeless off the streets*, THE STAR (MALAYSIA) (Oct. 15, 2019) https://www.thestar.com.my/metro/metro-news/2019/10/15/taking-the-homeless-off-the-streets; *1,269 'professional beggars' arrested in Rawalpindi, 60% 'healthy and fit'*, GEO NEWS (PAKISTAN) (Mar. 4, 2021) https://www.geo.tv/latest/338049-1269-professional-beggars-arrested-in-rawalpindi-60-healthy-and-fit; Shakeel Anjum, *Drive against professional beggars launched in capital*, THE NEWS (PAKISTAN) (Apr. 17, 2021) https://www.thenews.com.pk/print/821355-drive-against-professional-beggars-launched-in-capital; and *4,408 beggars arrested in 33 days*, THE NEWS (PAKISTAN) (Oct. 17, 2021) https://www.thenews.com.pk/print/901015-4-408-beggars-arrested-in-33-days.

3. *See* Mohammed Tarique & Vijay Raghavan, *India's war on its poor*, OPEN DEMOCRACY (Oct. 3, 2011) https://www.opendemocracy.net/en/5050/indias-war-on-its-poor/ (describing the Indian state's treatment of the poor); A REPORT ON THE HUMAN RIGHTS VIOLATIONS AGAINST TRANSGENDERS IN KARNATAKA, 2014 (Prerana Kodur & Gowthaman Ranganathan eds., 2015) (reporting on the violence transgender people face in Karnataka); Safwat Zargar, *In Kashmir, a police crackdown leaves migrant beggars staring at an uncertain future*, SCROLL (INDIA) (May 26, 2019), https://scroll.in/article/922550/in-kashmir-a-police-crackdown-leaves-migrant-beggars-staring-at-an-uncertain-future (discussing laws criminalizing beggars in Kashmir).

4. In this article single quotation marks are used to highlight and problematize particular terms.

5. *See Five charged with loitering*, STABROEK NEWS (Feb. 25, 2019), https://www.stabroeknews.com/2019/02/25/news/guyana/five-charged-with-loitering/ (discussing the penalties faced by individuals charged with loitering in Guyana).

6. *See* Brett Herron, *Cape Town's torment of homeless people reaches new heights*, POLITICSWEB (SOUTH AFRICA) (Oct. 19, 2021), https://www.politicsweb.co.za/politics/torment-of-homeless-people-achieves-new-heights—b (considering Cape Town's tough treatment of homeless people).

reason that laws explicitly designated as 'vagrancy' laws often enacted extensive, non-homogenous penalizations. The nature of such laws can perhaps be best introduced by considering the 1824 Vagrancy Act,[7] probably the single most important vagrancy law in the centuries-long global history of such measures discussed further below, which was passed following a period of exceptional unrest in Britain.[8] The 1824 Vagrancy Act included numerous different substantive clauses. Broadly, these can be classified as including those which penalized: (i) the poor, homeless, and indigent;[9] (ii) those deemed immoral;[10] and (iii) those deemed threatening or criminal.[11] In addition, the 1824 Vagrancy Act imposed limitations on freedom of movement and allowed for deportations, linking the idea of vagrancy to that of (iv) itinerancy as well.[12] A "vagrant" was hence understood to be poor, immoral, criminally suspicious, and itinerant at the same time. In addition to explicit vagrancy laws, tracking the broader vagrancy law tradition requires attention to "vagrancy-type" laws as well. "Vagrancy-type" law refers to all those laws that do not utilize the language of "vagrancy" but nonetheless penalize the same sorts of activities, or, more broadly, fulfill a functionally similar role.[13]

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7. 5 Geo. IV c. 83 (1824).

8. For more, see Part II.1 below (discussing the history of vagrancy laws in nineteenth century England).

9. *See* 5 Geo. IV c. 83, § 3 (allowing for the punishment, *inter alia*, of "every person being able wholly or in part to maintain himself or herself, or his or her Family, by work or by other Means, and wilfully refusing or neglecting so to do"; "every Person returning to and becoming chargeable in any Parish, Township, or Place" and "every Person wandering abroad, or placing himself or herself in any public Place . . . to beg or gather Alms, or causing or procuring or encouraging any Child or Children so to do"); § 4 (allowing for the punishment, *inter alia*, of "every Person wandering abroad and lodging in any Barn or Outhouse, or in any deserted or unoccupied Building, not having any visible Means of Subsistence, and not giving a good Account of himself or herself").

10. *See id.* § 3 (allowing for the punishment, *inter alia*, of "every Common Prostitute wandering in the public Streets or public Highways, or in any Place or public Resort, and behaving in a riotous or indecent Manner"); § 4 (allowing for the punishment, *inter alia*, of "every Person pretending or professing to tell Fortunes, or using any subtle Craft, Means, or Device, by Palmistry or otherwise, to deceive and impose on any of His Majesty's Subjects"; "every Person wilfully exposing to view, in any . . . public place, any obscene . . . Picture"; "every Person wilfully, openly, lewdly, and obscenely exposing his Person in any Street, Road, or public Highway, or in the View thereof, or in any Place of public Resort, with Intent to insult any Female"; and "every Person playing or betting in any . . . public Place . . . at any Game or pretended Game of Chance").

11. *See id.* § 4 (allowing for the punishment, *inter alia*, of "every Person having in his or her Custody or Possession any Picklock Key, Crow, Jack, Bit, or other Implement, with Intent to break into any [place], or being armed with any . . . Weapon . . . with intent to commit any felonious Act"; "every Person being found in any [place] for any unlawful Purpose"; and "every suspected Person or reputed Thief, frequenting any [place] with Intent to commit Felony").

12. *See id.* § 20 (allowing persons convicted under the act "to be removed to the Parish of his or her last legal Settlement").

13. The term "vagrancy-type" law comes from two mid-twentieth century articles—*Use of*

This article explores the history of vagrancy laws in Britain, the British Empire, and the British colonial world from the early nineteenth century through the present.[14] Over the course of that period vagrancy laws have played multiple roles. They were used (either in reality or according to the accounts of the defenders and propagators of such laws) to control and limit freedom of movement; to force individuals to work, to diminish the wages workers could bargain for and expect,[15] and to build a pro-work culture; to police the boundaries of respectability, including by targeting numerous forms of activity deemed socially threatening or immoral;[16] to minimize crime, by allowing for the preemptive apprehension of suspicious persons before they had a chance to commit any crimes;[17] to police the boundaries of cities, and to 'beautify' and 'sanitize' their streets by removing the poor from view;[18] and to ensure public order generally, including by justifying the detention of political dissidents.[19]

What enabled and enhanced vagrancy laws' ability to play these diverse roles was their essential ambiguity. This ambiguity was built both on the range of their substantive penalizations, as well as on the breadth and vagueness of the individual penalizations included in the broader set of anti-vagrancy measures. Perhaps most exemplary in this context were clauses found in both vagrancy and vagrancy-type laws authorizing law enforcement

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*Vagrancy-Type Laws for Arrests and Detention of Suspicious Persons*, 59 YALE. L.J. 1351 (1950); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956)—which challenged such laws published in the United States.

14. In doing so, this article draws on extensive insightful work that has been done on the vagrancy law legacy to date. For several essays on the global history of vagrancy, see A. L. BEIER, CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 36–55 (A. L. Beier & Paul Ockobock eds., Ohio University Press 2008) (considering examples off vagrancy law and practice from different global contexts and historical moments).

15. As Chambliss has put it, vagrancy laws were designed to ensure owners could secure labour "at a price [they] could afford to pay." William Chambliss, *A Sociological Analysis of the Law of Vagrancy*, *in* 12 SOC. PROBS., L., AND SOC'Y 67, 69 (A. Kathryn Stout, R. A. Dello Buono & William Chambliss eds., Oxford Univ. Press 2004).

16. On the regulation of morality in nineteenth century Britain and the British Empire, see generally STEFAN PETROW, POLICING MORALS: THE METROPOLITAN POLICE AND THE HOME OFFICE (1994) and DEANA HEATH, PURIFYING EMPIRE: OBSCENITY AND THE POLITICS OF MORAL REGULATION IN BRITAIN, INDIA AND AUSTRALIA (2010).

17. *See* MARC NEOCLEOUS, THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER (2000) (exploring the concept of social order and providing a critique of police powers).

18. *See* ALLISON BASHFORD, IMPERIAL HYGIENE: A CRITICAL HISTORY OF COLONIALISM, NATIONALISM, AND PUBLIC HEALTH (2004) (exploring the history of public health policies, nationalism, and race in Australia and the British Empire).

19. *See* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) (discussing the mid-twentieth century history of vagrancy laws in the United States).

authorities to detain those simply deemed "suspicious."[20] As a result, vagrancy and vagrancy-type laws granted extensive discretionary power to the authorities. These broad and vague vagrancy laws, augmented in particular times and places by one additional component or another, remained the norm over the course of the late nineteenth and early twentieth centuries, in which vagrancy laws were used to accomplish all of the aims outlined above, with local and temporal variations according to the needs of the moment.[21]

Vagrancy laws faced new challenges in the twentieth century, however. The most dramatic challenge to such laws took place in the United States, where mounting criticism during the 1950s and 60s helped lead to a series of judicial decisions where traditional vagrancy laws were forcefully challenged and found unconstitutional.[22] What United States courts recognized at that point was an aspect of vagrancy laws long hidden in plain sight: that such laws intrinsically and unavoidably contravened the basic principles of legal clarity, certainty, and predictability, and that they granted extensive arbitrary discretionary authority to law enforcement personnel.[23]

While the United States was not the only jurisdiction in which vagrancy laws were challenged in the period, such challenges were not the norm—in many jurisdictions around the world, vagrancy laws of an unreconstructed sort remained in effect.[24] Even when vagrancy laws were challenged, moreover, reforms were limited, as other closely related laws remained on the books, complemented by new legal measures passed to fill the perceived gaps in police power.[25] While, on the one hand, vagrancy laws have never

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20. *See infra* Part II.

21. *See infra* Part III.

22. Important challenges in the law reviews at the time include *Use of Vagrancy-Type Laws*, *supra* note 13; Forrest Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Foote, *supra* note 13; William Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE. L.J. 1 (1960); Gary Dubin & Richard Robinson, *The Vagrancy Concept Reconsidered: Problems and abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 136 (1962); Anthony Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULLETIN 205 (1967).

23. For a comprehensive account of the struggles of the period, see GOLUBOFF, *supra* note 19.

24. *See* discussion *infra* Part V.

25. On the persistence and reconstruction of such powers in the United States, see generally T. Leigh Anderson, *Another Casualty of the War Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493 (1993); Gary Stewart, *Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998); Dan Kahan & Tracey Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Katherine Beckett & Steve Herbert, *The Punitive City Revisited: The Transformation of Urban Social Control*, *in* AFTER THE WAR ON CRIME: RACE, DEMOCRACY AND A NEW RECONSTRUCTION (M.L. Frampton et al. eds., 2008); & National Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2015), https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf.

entirely recovered, remaining subject to popular criticism and opprobrium as well as legal challenges, in practice, both explicit vagrancy laws and laws closely aligned to and descended from the vagrancy law tradition remain widespread and highly impactful.[26]

This article will explore the permutations in the meanings, application, and fate of vagrancy laws over the last two centuries. At the same time, the article aims to bring out one aspect of such laws that has remained the same. Over and above the more particular roles that vagrancy laws have played, they all share one overarching purpose: to enhance the discretionary authority of the police in particular and the state in general. Crucially, moreover, this aspect of vagrancy laws did not develop in opposition to the general expansion of legal authority in the nineteenth century but rather in close alignment with it, as a central means through which the rule of law was expanded. In this context, the expansion of vagrancy laws, modern police services, magistrates' courts, powers of summary jurisdiction, and legal positivism were all closely aligned, both as a matter of temporal development and in terms of functional effect. The conjoined nature of these developments invites serious reflection on the meaning of the 'rule of law' in contemporary legal orders. In particular, exploring the history of vagrancy law calls upon legal scholars to recognize that, despite the formal emphasis the idea of the 'rule of law' places on the limitation of discretion, in reality the development of the rule of law could as readily be characterized as involving the expansion of discretion as its narrowing. Insofar as vagrancy laws remain a major part of contemporary legal orders, this contradiction remains strongly present and can be observed in the uncertainty with which different jurists and institutions approach such laws today.

This article has three substantive parts. Part II gives a practical account of how the evolution of vagrancy law and the 'rule of law' were closely aligned by considering the early modern and modern history of vagrancy law in England, the British Empire, and the British colonial world up through the inter-war period. The section begins with a consideration of England's 1824

26. For international challenges in the United States, Kenya, and Nigeria, see generally UN Habitat, The Right to Adequate Housing (2009); Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/66/265 (Aug. 4, 2011), paras. 29–43; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America (2014), para. 12; Anthony Njenga Mbuti v. Attorney General [2015] No. 45 of 2014 (High Ct. Kenya); Dorothy Njemanze & others v. Federal Republic of Nigeria, Case No. ECW/CCJ/APP/17/14, ECOWAS Court of Justice (Oct. 12, 2017); McEwan and others v. Attorney General [2018] CCJ 30 (AJ); Request for Advisory Opinion by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Others Human Rights Instruments Applicable in Africa, Advisory Opinion No. 1 of 2018, African Court on Human and Peoples' Rights (Dec. 4, 2020); Lacatus v. Switzerland, App. No. 14065/15, ECtHR (Jan. 19, 2021).

Vagrancy Act, accurately dubbed by one scholar "one of the most flexible, useful and criminal making statutes of the century."[27] The section goes on to detail the wide dissemination of vagrancy laws in the period, observing their dissemination to, and frequent reiteration in, every corner of the British Empire. The section also observes the close connection between vagrancy laws and the core institutions through which the 'rule of law' took form in the lives of everyday individuals, particularly the police and low-level judiciary.

Part III considers the relationship between vagrancy laws and the idea of the rule of law on a theoretical level. Between 1885 and 1915, A. V. Dicey published eight versions of his influential *Introduction to the Study of the Law of the Constitution.*[28] In it, he popularized the terminology of the 'rule of law,' which, *inter alia*, he defined as a legal system opposed to every sort of arbitrary infringement of liberty.[29] As the power of arbitrary detention contained in vagrancy law plainly violated individual liberty, one might expect that Dicey would have highlighted and condemned such laws. In contrast, however, while Dicey attempted to assert some limits relative to high-profile exercises of arbitrary authority,[30] his work, and the concept of the 'rule of law' he laid out, paid no attention to the extensive arbitrary discretion embodied in and advanced by vagrancy laws, thereby helping to obscure the discretionary inequality at the heart of the 'rule of law' project.

Dicey's work, in short, ignored and obscured the existence and impact of vagrancy laws. At the same time, the impact of Dicey's work relative to vagrancy laws was two-sided, as by emphasizing the illegitimacy of arbitrary discretionary authority, Dicey helped prepare the ground for challenges to vagrancy law in the years to come, despite his own lack of attention to such issues. Challenges to vagrancy laws became increasingly sharp as the twentieth century progressed. Nowhere were those challenges more forcefully articulated than in the United States, where vagrancy laws came to be attacked on the basis that they contradicted the central 'rule of law' values of clarity and precision. Years of academic and legal challenges ultimately resulted in vagrancy law being found unconstitutional by the Supreme Court in *Papachristou v. City of Jacksonville*.[31] The victory

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27. DAVID JONES, CRIME, PROTEST, COMMUNITY AND POLICE IN NINETEENTH-CENTURY BRITAIN 206–07 (1982).

28. *See generally* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (8th ed. 1915) (identifying the basic principles of English constitutional law and providing an account of the rule of law).

29. *Id.* at 120.

30. In particular, Dicey explored suspensions of habeas corpus, immunity acts and martial law. *See id.* at 228–37, 284–94.

31. 405 U.S. 156 (1972).

represented by *Papachristou* was incomplete and partial, however. While vagrancy laws were rolled back in several jurisdictions, vagrancy-type laws remained on the books and/or were introduced to fill the lacuna.[32] In addition, the victory of *Papachristou* was jurisdictionally limited, as in numerous states around the world vagrancy measures remained significant components of law and practice into the twenty-first century.[33] The global presence of vagrancy laws has more recently come to face serious challenge, however, first and foremost in Africa, where diverse civil society groups and activists have brought forward a series of challenges in both national and supranational courts.[34] The first wave of vagrancy law challenges in the mid-twentieth century, the persistence of vagrancy laws around the former British Empire, and the second wave of vagrancy law challenges in the twenty-first century are explored in Part IV.

The conclusion summarizes some of the findings of this investigation. Considered broadly, both optimistic and pessimistic lessons may be taken from the exploration of vagrancy laws in the Anglo-world over the last two hundred or so years undertaken below. On the optimistic side, despite the lack of challenge, or even much elite legal attention at all, to vagrancy laws for more than one hundred years in which they were extensively disseminated and relied upon, the post-World War II period has seen such laws come to be roundly criticized on the basis that they conflict both with fundamental principles of legality and with a wide range of human rights guarantees. On the pessimistic side, the repeal of vagrancy laws in numerous jurisdictions might not represent a pure triumph. Rather—as was recognized might occur by ACLU lawyer Ernest Besig when vagrancy laws were first coming to be challenged in the United States[35]—while vagrancy laws may have come under greater challenge, it is far from clear that the broader vagrancy law legacy has been diminished in strength. From this perspective, even though 'vagrancy' as a term may be gradually disappearing, the underlying impacts and functions of vagrancy law may be understood to

32. In Hong Kong, for example, the 1977 repeal of the vagrancy law was shortly followed by the adoption of a new, more aggressive law targeting 'loitering.' Law Revision (Miscellaneous Amendments), Ordinance No. 70 of 1977; Crimes Amendment No. 2 Ordinance, Ordinance No. 37 of 1979.

33. For examples in Bahamas and Zimbabwe, see Bahamas Vagrancy Act (1939) and Zimbabwe Vagrancy Act, Act 40 of 1960. *See generally* Christopher Roberts, *Vagrancy and Vagrancy-Type Laws in Colonial History and Today*, https://www.law.cuhk.edu.hk/app/wp-content/uploads/2022/10/Vagrancy-and-Vagrancy-Type-Laws-in-Colonial-History-and-Today.pdf (providing a brief overview of the historical evolution of vagrancy laws in several European empires, detailing vagrancy laws currently on the books, and highlighting ways through these laws violate human rights obligations).

34. *See* discussion *infra* Part IV.3.

35. *See* GOLUBOFF, *supra* note 19, at 42–73, 334.

have been baked into contemporary Anglo legal orders. Challenging the vagrancy law legacy on this level will require a level of commitment to reform that has been little in evidence to date.

## II. VAGRANCY AND VAGRANCY-TYPE LAWS IN ENGLAND, THE BRITISH EMPIRE AND THE BRITISH COLONIAL WORLD, C. 1800-1938

### A. Vagrancy Laws in England

Vagrancy laws have a long history prior to the nineteenth century. The English vagrancy law tradition is typically traced to the Statutes of Labourers that were passed in the mid-fourteenth century, which were enacted to address the social transformation provoked by the Black Death.[36] While those laws did not explicitly refer to 'vagrants' as such, they did possess other characteristics that have been common to 'vagrancy' laws throughout their history—utilizing criminal penalties to limit wages and mobility and to punish idleness.[37] The new laws were heavily relied upon—one scholar in fact goes so far as to suggest they were "the most zealously enforced" laws of Medieval England.[38] Like later vagrancy laws, these early statutes were linked to an expansion in state authority, insofar as they were enforced by justices of the peace in particular.[39] This was particularly true of the 1414 Statute of Labourers, which gave justices of the peace summary power to

36. *See* Statute of Labourers, 23 Edw. III § 1 (1349) (Eng.) (imposing controls on the labor force); Treason Act, 25 Edw. III § 2 (1351) (Eng.) (defining and penalizing treason). For more see L.R. Poos, *The Social Context of Statute of Labourers Enforcement*, 1 LAW & HIST. REV. 27, 29–37 (1983) (discussing the historical context surrounding the Statute of Laborers). Subsequent laws along the same lines include 1 Ric. II c. 6 (1377) (Eng.); 2 Ric. II. c. 8 (1378) (Eng.); 7 Ric. II c. 5 (1383) (Eng.); & 12 Ric. II c. 3 (1388) (Eng.). For an argument that measures taken in the wake of the Black Death in England and elsewhere in Western Europe should be traced not to conflicts over labor but rather to broader social concerns, see generally Samuel Cohn, *After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe*, 60 ECON. HIST. REV. 457 (2007).

37. *See* A. L. Beier, *"A New Serfdom": Labor Laws, Vagrancy Statutes, and Labor Discipline in England, 1350–1800*, *in* CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVES 35 (A.L. Beier & Paul Ocobock eds., 2008) (exploring late medieval and early modern labor legislation that that sought to discipline the labor force).

38. E. B. Fryde, *Peasant Rebellion and Peasant Discontents*, *in* AGRARIAN HISTORY OF ENGLAND AND WALES V (1348–1500) 755 (Edward Miller ed., 1991). *See also* Beier, *supra* note 37, at 43 ("[G]reat efforts were made to implement the legislation"). For more on ideas of and the governance of labor in the late medieval period, see generally Kellie Robertson, THE LABORER'S TWO BODIES: LABOR AND THE "WORK" OF THE TEXT IN MEDIEVAL BRITAIN, 1350–1500 (2006). For more on early forms of poor relief, closely connected to such issues, see generally MARJORIE KENISTON MCINTOSH, POOR RELIEF IN ENGLAND, 1350–1600 (2012).

39. *See* Beier, *supra* note 37, at 36 (highlighting the prominent role played by justices of the peace in enforcing vagrancy and vagrancy-like laws).

punish vagrants.[40]

Emphasis on 'vagrants' and 'vagabonds' as such developed further in the sixteenth century, including through acts passed in 1530,[41] 1535,[42] 1547,[43] 1572,[44] 1576,[45] 1597,[46] and 1609,[47] and the 1662 Settlement and

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40. Dyer's Case, 2 Hen. V, fol. 5, pl. 26 (1414) (Eng.). Subsequent laws in the vagrancy law tradition included Vagabonds and Beggars Act, 11 Hen. VII c. 2 (1494) (Eng.), and Creating Vagabonds Act, 19 Hen. VII c. 12 (1503) (Eng.).

41. Vagabonds Act, 22 Hen. VIII c. 12 (1530) (Eng.) (amending the punishment for vagabondage from the stocks to whipping and providing for those unable to work due to sickness, age or disability to become licensed beggars).

42. Punishing Sturdy Vagabonds and Beggars, 27 Hen. VIII c. 25 (1535) (Eng.) (adding the death penalty for repeat offenders).

43. Vagrancy Act, 1 Edw. VI c. 3 (1547) (Eng. & Wales) (articulating in its preamble something of the rationale that would underpin vagrancy laws going forward, declaring that "idleness and vagabondry is the mother and root of all thefts, robberies, and all evil acts, and other mischiefs."). The act was also notable for allowing vagabonds to be branded and converted into slaves. *Id*. *See also* C.S.L. Davies, *Slavery and the Protector Somerset; The Vagrancy Act of 1547*, 19 ECON. HIST. REV. 533, 533 (1966) (noting that vagrancy legislation provided for the imposition of slavery on those who refused to work).

44. Vagabonds Act, 14 Eliz. I c. 5 (1572) (Eng. & Wales) (providing for the registration and oversight of the poor).

45. Act for Setting of the Poor on Work, and For the Avoiding of Idleness, 18 Eliz. I c. 3 (1576) (Eng. & Wales) (requiring towns to create "a competent stock of wool, help, flax, iron and other stuff" for the poor to work on and establishing houses of correction for those who refused to work).

46. Vagrancy Act, 39 Eliz. I c. 4 (1597) (Eng. & Wales) (introducing penal transportation as a punishment and alternative to execution). The year 1597 also saw transportation to the colonies begin to be deployed as a punishment for vagrants. *See* David Hitchcock, *"Punishment Is all the charity that the law affordeth them": Penal Transportation, Vagrancy, and the Charitable Impulse in the British Atlantic, c.1600-1750*, 12 NEW GLOB. STUD. 195, 199 (2018) (examining the policy of penal transportation created during the first British empire).

47. Vagabonds, 7 Jac. I c. 4 (1609) (Eng. & Wales) (providing for the construction of houses of correction to punish vagabonds and beggars).

Removal Act.[48] 'Gypsies' were among those heavily targeted in the period.[49] The 1562/3 Statute of Artificers[50] also formed a centerpiece of labor legislation over the coming centuries. It allowed, *inter alia*, for the imprisonment and punishment as vagabonds of those leaving service without a letter from their previous employer.[51] In the subsequent period, "it became an established principle to associate labor violations with vagrancy," with the punishment of all those out of work as vagrants seen as "one of the 'chief charges' of justices of the peace."[52] As Beier, a leading scholar of the history of British vagrancy laws, observes, the forced labor obligation of the Statute of Artificers, paired with the understood duty of Justices of the Peace to penalize the idle as vagrants, continued to be emphasized in justices' manuals until 1830.[53]

Attempts to address the problem of vagabondage or vagrancy—in other words, to better control the movement and freedom of the potentially laboring population and to reduce their bargaining position—continued through the eighteenth century, during which two dozen or so different laws aiming to regulate the problem were passed.[54] Laws brought into effect in

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48. Settlement and Removal Act, 14 Car. II c. 12 (1662) (establishing the parish to which a person belongs and clarifying which parish was responsible for him should he become in need of relief). For more on vagrancy in the sixteenth and seventeenth centuries, see generally Davies, *supra* note 43 (discussing the motives, existence, and effects of the Vagrancy Act of 1547); John Pound, POVERTY AND VAGRANCY IN TUDOR ENGLAND (1971) (exploring poverty and vagrancy in Tudor England); A. L. Beier, *Vagrants and the Social Order in Elizabethan England*, 64 PAST & PRESENT 3 (1974) (considering the nature of vagrancy law and vagrants in Elizabethan England); Paul A. Slack, *Vagrants and Vagrancy in England, 1598–1664*, 27 ECON. HIST. REV. 360 (1974) (exploring the status and mobility of vagabonds in early modern England); A. L. Beier, MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND 1560–1640 (1985) (discussing the origins, growth, and structure of vagrancy in early modern England); Phillip Verran Thomas, Vagrancy in Elizabethan England and the Response of the Privy Council, with Particular Reference to Five Towns (1994) (Master's thesis, University of Adelaide) (on file with the University of Adelaide Library) (investigating vagrancy in Elizabethan England and steps the Privy Council took in response); LINDA WOODBRIDGE, VAGRANCY, HOMELESSNESS, AND ENGLISH RENAISSANCE LITERATURE (2001) (considering the place and role of the vagrant in English renaissance literature and the different purposes it served); ROGUES AND EARLY MODERN ENGLISH CULTURE (Craig Dionne & Steve Mentz eds., 2004) (exploring references to vagrants and rogues in early modern English literature and culture).

49. *See* David Cressy, *Trouble with Gypsies in Early Modern England*, 59 HIST. J. 45, 58 (2016) (explaining early modern references to 'Gypsies' in England and the policy measures adopted concerning them).

50. Statute of Artificers, 5 Eliz. I c. 4 (1562) (Eng. & Wales) (regulating workers' ability to assume and transfer employment).

51. *See id.* § 8 (requiring servants to obtain a 'Certificate' or 'Testimonial' to depart their Service, and imposing potentially severe penalties if they failed to do so).

52. *See* Beier, *supra* note 37, at 46 (citing Sir Thomas Smith, DE REPUBLICA ANGLORUM 141 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583).

53. *See id.* at 46 (noting that manuals for justices included the Statute of Artificers and "indicated that vagrancy charges could be brought against offenders").

54. *See* Nicholas Rogers, *Vagrancy, Impressment and the Regulation of Labour in Eighteenth-*

1714,[55] 1740,[56] and 1744[57] were particularly significant, laying the groundwork for the approach that would be applied throughout the nineteenth century, including by dividing vagrants into three evocatively named categories, the "idle and disorderly," "vagabonds and rogues," and "incorrigible rogues."[58] Further reforms were made by the Vagrancy Act of 1792.[59]

In the following several decades, English authorities relied on a combination of new laws, new institutions, aggressive prosecutions, and parastatal violence to suppress dissent. The 1790s saw such measures adopted on all fronts in combating what government saw as revolutionary fanatics, though they might be better described as democratic advocates.[60] The 1810s saw the deployment of "12,000 troops, an army as large as the one Wellington had in the Peninsula" to combat Luddite unrest,[61] as well as the draconian Destruction of Stocking Frames[62] and Peace Preservation[63] Acts of 1812 and the Habeas Corpus Suspension[64] and Seditious Meetings[65] Acts of 1817. When tens of thousands gathered at St. Peter's Field in Manchester to call for democratic reforms in 1818, the authorities responded

*Century Britain*, 15 SLAVERY & ABOLITION 102, 104 (1994) ("[B]etween 1700 and 1824 as many as twenty-eight statutes were passed on the subject of vagrancy."). For more on vagrancy in the seventeenth and eighteenth centuries, see DAVID HITCHCOCK, VAGRANCY IN ENGLISH CULTURE AND SOCIETY, 1650–1750 (2016).

55. Vagrancy Act, 13 Ann. c. 26 (1713) (Gr. Brit.).

56. 13 Geo. II c. 24 (1740) (Gr. Brit.).

57. Justices Commitment Act, 17 Geo. II c. 5 (1743) (Gr. Brit.).

58. Various elites, meanwhile, called for further measures, including implementation of a formal pass system or even the use of metal collars to mark vagrants (foreshadowing later developments in Africa). *See* Rogers, *supra* note 54, at 106.

59. 32 Geo. III c. 45 (1792) (Gr. Brit.). For more on vagrancy law in the eighteenth century, see generally AUDREY ECCLES, VAGRANCY IN LAW AND PRACTICE UNDER THE OLD POOR LAW (2012) (exploring vagrancy law in the first half of the eighteeneth century); Sarah Nicolazzo, *Henry Fielding's The Female Husband and the Sexuality of Vagrancy*, 55 THE EIGHTEENTH CENTURY 335 (2014) (interpreting *The Female Husband* "for what it reveals about the epistemological and formal structure of vagrancy laws"); Sarah Nicolazzo, Vagrant Figures: Law, Labor, and Refusal in the Eighteenth-Century Atlantic World (2014) (Ph.D. dissertation, University of Pennsylvania) (on file with ScholarlyCommons) (exploring the intersection between vagrancy, police power, and economic rationality in the eighteenth century).

60. *See* Christopher Michael Roberts, *Experiments with Suppression: The Evolution of Repressive Legality in Britain in the Revolutionary Period*, 43 LOYOLA L.A. INT'L & COMPAR. L. REV. 125, 134 (2020) (explaining how English authorities developed various new strategies to suppress republican revolutionaries).

61. STANLEY H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND, 1780–1850 178 (1988).

62. Destruction of Stocking Frames Act, 52 Geo. III c. 16 (1812) (UK).

63. Preservation of the Peace Act, 52 Geo. III c. 17 (1812) (UK).

64. Treason Act, 57 Geo. III c. 3 (1817) (UK).

65. Seditious Meetings Act, 57 Geo. III c. 19 (1817) (UK).

with force, killing eighteen and injuring many more.[66] Shortly thereafter, the government passed a raft of repressive measures, often referred to as the 'six acts' of 1819.[67]

The authorities adopted a new tack in the 1820s, driven by Bentham and his disciples, who advocated for sweeping legal reforms.[68] Amendments of the period reduced the severity of punishments, including by gradually reducing the number of crimes for which the death penalty could be imposed, marking the beginning of the end of the older exemplary-punitive approach.[69] While criminal punishments were becoming less harsh, other changes to the law, such as reforms that allowed new criminal charges to be pursued in local quarter session hearings, rather than in assize courts, together with increased government support for prosecutions, helped enable such penalties to be more widely applied.[70] Bentham and the Benthamites also pushed for the provisions of the law in general, and the criminal law in particular, to be reissued in simplified, clarified form. These reforms helped limit the potential scope of the law, and made it more publicly accessible. At the same time, they also made the law easier to apply. This effect was augmented by the reduction in penal sanctions, which made charges easier to pursue and convictions easier to obtain by easing prosecutors' doubts relative to pursuing prosecutions, encouraging witnesses to come forward,

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66. *See generally* ROBERT POOLE, PETERLOO: THE ENGLISH UPRISING (2019) (providing a history of the Peterloo massacre that took place at St. Peter's Field in Manchester in 1819).

67. *See* KATRINA NAVIEKAS, PROTEST AND THE POLITICS OF SPACE AND PLACE 1789–1848 (2015) (discussing the mass movements in support of a more democratic polity and greater rights in England in the late eighteenth and early nineteenth centuries); Nathan Bend, *Sanctioned by the Government? The Home Office, Peterloo and the Six Acts*, 95 BULLETIN JOHN RYLANDS LIBRARY (2019) (discussing the 'six acts' passed after the Peterloo massacre).

68. *See generally* Philip Schofield, *Jeremy Bentham, the French Revolution and Political Radicalism*, 30 J. HIST. EUR. IDEAS 381 (2004) (discussing Bentham and his reformist ideas); Stephen Conway, *Bentham and the Nineteenth-Century Revolution in Government*, *in* JEREMEY BENTHAM (Frederick Rosen ed., 2007) (highlighting Bentham's impact on subsequent developments in law and policy); Emmanuelle de Champs, *Bentham and Benthamism*, 35 J. HIST. EUR. IDEAS 391 (2009) (discussing Bentham and the movement he inspired).

69. For sources that overview the development of criminal law in 18th and 19th century England, see generally LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 Vol. 2 (1957) (DOUGLAS HAY, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT (1975); JOHN HOSTETTLER, THE POLITICS OF CRIMINAL LAW REFORM IN THE NINETEENTH CENTURY (1992); V.A.C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868 (1994); PETER KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820 (2000); Phil Handler, *Forging the Agenda: The 1819 Select Committee on the Criminal Laws Revisited*, 25 J. LEGAL HIST. 249 (2004); Phil Handler, *Judges and the Criminal Law in England 1808–61*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW (Paul Brand & Joshua Getzler eds., 2012).

70. For sources which explain how lawyers came to dominate the trial space in the 18th century, see generally *Criminal Law Reform: England*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE (2002); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2005).

and making juries more comfortable returning guilty verdicts.[71]

This background context was one in which vagrancy law in particular could flourish. As governing authorities linked the disturbances of the 1810s to the increasing numbers of homeless and unemployed persons, Parliament initiated a series of inquiries between 1815 and 1821, which resulted in calls for more forceful vagrancy laws.[72] The first reform came in 1821, when the previous typical punishment for vagrancy of seven days' detention was replaced by a minimum punishment of a month's detention with hard labor.[73]

By far the most critical measure, and the most significant act in the history of British (and arguably global) vagrancy laws, was the 1824 Vagrancy Act.[74] The 1824 Vagrancy Act cast an extremely broad net, to such an extent that in practice, any person of insufficient means could be made to fit the bill. The 1824 Act penalized not only more traditional categories of vagrants such as the impoverished, those who refused to work, beggars, and the homeless, but also unlicensed peddlers, prostitutes, fortune-tellers, public indecency, family desertion, public gambling, potential burglars and robbers, as well as those simply acting suspiciously.[75] Those convicted might be sentenced to a month to a year in prison, typically with hard labor, and potentially to corporal punishment as well,[76] and/or deportation to the place from which they were deemed to have come.[77] While far short of the eighteenth century bloody code, the penalties of the act were severe in light of the fact they could, in practice, be imposed discretionarily.

The 1824 Act's procedural provisions were as significant as its broad and vague substantive provisions. To promote rigorous enforcement, the 1824 Act stipulated that any person could apprehend another under its terms, allowed for funds to be provided to those testifying against incorrigible rogues, allowed for the jailing of those who refused to testify, and penalized constables who refused to bring those brought to them, or who they found

71. *Accord* PALMER, *supra* note 61, at 287.

72. Andrew McLeod, *On the Origins of Consorting Laws*, 37 MELBOURNE U.L. REV. 103, 109 n. 37 (2013) (citing Committee on the State of Mendicity in the Metropolis, Report, House of Commons Paper No 473, Session 1814–15 (1815); Select Committee on the State of Mendicity in the Metropolis, Report, House of Commons Paper No 396, Session 1816 (1816); Select Committee on the Existing Laws Relating to Vagrants, Report, House of Commons Paper No 543, Session 1821 (1821).

73. MORNING CHRONICLE 3 (Sept. 20, 1821).

74. 5 Geo. IV c. 83 (1824).

75. *See id.* §§ 3–4 (indicating that in terms of the penalization of the suspicious in particular, the Act provided both for the charge of "every Person being found in or upon any . . . Area, for any unlawful Purpose" and "every suspected Person or reputed Thief, frequenting any River . . . or any Street . . . or any Place of public Resort . . . with Intent to commit Felony").

76. *Id.* §§ 5, 10.

77. *Id.* § 20.

offending against the act, before a magistrate.[78] The act also allowed persons apprehending individuals under the act to search and seize any property they might have, to take such portion of it as necessary to pay for "the Expense of apprehending, conveying to the House of Correction, and maintaining such Offender during the time for which he or she shall have been committed." Finally, following in the footsteps of the Master and Servant Act[79] passed the year before, the Vagrancy Act expanded the circumstances in which misdemeanors could be tried as summary offences.[80]

Viewed holistically, what did the Vagrancy Act accomplish? In the first place, it continued to pursue the aims that had always been at the heart of the vagrancy law tradition: penalizing poverty, unemployment, and free movement, thereby leaving the poor little choice but to take up work, while weakening their bargaining position. In addition, the Vagrancy Act played an ideological role by suggesting any particular individual's poverty was not a function of their place within a broader social structure, but rather of their individual desire to avoid work. Further, the law helped underscore a connection between the categories of the poor and unemployed and the idea of immorality generally.[81]

The ideological, stigmatization-generating function of the law was enhanced by its breadth: by including more activities and ways of being, the authorities were able to increase the perceived threat of the category of 'vagrancy' as a whole, the sum total immorality of which might be understood as equivalent to the aggregate of that attached to the various constituent acts. Including 'prostitution' under the law's definition, for instance, suggested that 'prostitutes,' like vagrants, were responsible for their circumstances, on account of their laziness. In addition to stigmatizing those targeted, this served to divert attention from other modes of understanding the causal factors underlying recourse to sex work, and blunted the potential for non-carceral responses.

The ideological energy of the Vagrancy Act was mirrored and supported by the work of various 'charitable' associations. This work was

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78. *Id.* §§ 6, 9, 11.

79. 4 Geo. IV c. 34 (1823).

80. *See* David Philips, *Crime, Law and Ppunishment in the Industrial Revolution*, *in* THE INDUSTRIAL REVOLUTION AND BRITISH SOCIETY 166–69 (Patrick O'Brien & Ronald Quinault eds., 2012) ("The great extension of summary legislation endowed the new police forces of the towns with wide discretionary powers to arrest and prosecute people for broad ranges of behavior in public").

81. In doing so, the Vagrancy Act built on a tradition that had been developing for some time. *See generally* EDWARD BRISTOW, VICE AND VIGILANCE: PURITY MOVEMENTS IN BRITAIN SINCE 1700 (1977) (exploring the nature and evolution of moral reform movements in late eighteenth and nineteenth century England); M.J.D. ROBERTS, MAKING ENGLISH MORALS: VOLUNTARY ASSOCIATION AND MORAL REFORM IN ENGLAND, 1787–1886 (2004); HEATH, *supra* note 16.

carried out both by organizations that had been around for some time, such as the Society for the Suppression of Vice, as well as organizations founded in the law's wake, such as the Society for the Diffusion of Useful Knowledge.[82] The foundation of the Society for the Diffusion of Useful Knowledge was linked to the development of a new field of academic and social study, ethnography.[83] As Mitchell observes, French scholar Georg Bernhard Depping played a critical role in the early development of the idea of ethnography.[84] In Depping's use, the term referred to the "moral part" of the study of geography and history in general, and the study of "indolence versus industry" in particular.[85] The Society for the Diffusion of Useful Knowledge was an ethnographic institution in this original sense, in that it dedicated its work to the task of promoting industriousness and combatting indolence, including through trainings in productiveness for the poor and working classes—thereby reinforcing the idea that levels of wealth were the product of personal characteristics and hard work, rather than structural conditions.[86]

The 1824 Vagrancy Act was immediately put into effect, with various young men 'loitering' on the streets of London and elsewhere being charged based on suspicion alone,[87] while the penalizations of fortunetelling and palmistry were widely enforced against 'gypsies.'[88] The application of the law was initially limited by the small size of law enforcement agencies.[89] After the Duke of Wellington became Prime Minister in 1828, however, reforms oriented towards more effective enforcement quickly followed.

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82. For more on the work of the Society, see generally HAROLD SMITH, THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE, 1826–1846: A SOCIAL AND BIBLIOGRAPHICAL EVALUATION (1974); *"Really Useful Knowledge:" Radical Education and Working-Class Culture 1790–1848*), *in* WORKING-CLASS CULTURE: STUDIES IN HISTORY AND THEORY, (John Clarke, Chas Crichter & Richard Johnson eds., 1979).

83. On the early history of ethnography, see generally HANS VERMEULEN, EARLY HISTORY OF ETHNOGRAPHY AND ETHNOLOGY IN THE GERMAN ENLIGHTENMENT (2008).

84. TIMOTHY MITCHELL, COLONISING EGYPT 106 (1988) (citing GEORGE BERNHARD DEPPING, EVENING ENTERTAINMENTS (1817)).

85. *Id.*

86. In addition to its work in England, the Society eventually expanded its efforts abroad as well, including by funding Edward Lane's 1860 study of the "Egyptian character," *Manners and Customs of the Modern Egyptians*, which commented *ad nauseum* on the purportedly indolent nature of Egyptians. EDWARD LANE, MANNERS AND CUSTOMS OF THE MODERN EGYPTIANS 105–06 (1860).

87. *See* Paul Lawrence, *The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England Since 1750*, 57 BRIT. J. CRIMINOL. 513, 518–19 (2017) (arguing for the connection between vagrancy law and preventive policing in eighteenth and nineteenth century England).

88. *See* Danielle Boaz, *Fraud, Vagrancy and the 'Pretended' Exercise of Supernatural Powers in England, South Africa and Jamaica*, 5 LAW & HIST. 55, 55–58 (2018) (noting that "the sections of the Vagrancy Act proscribing fortune-telling or palmistry were regularly enforced against 'gypsies'").

89. CLIVE EMSLEY, CRIME AND SOCIETY IN ENGLAND, 1750–1900, at 239 (2018).

Together with his Home Secretary, Robert Peel, Wellington pushed the Metropolitan Police Act of 1829[90] through Parliament. The act provided for the appointment of two commissioners of police[91] and for a force of nearly 1,000 persons to be recruited and placed under their command—a force some ten times larger than the previous force of constables, and one with a much more hierarchical structure.[92] The aim of the new force was 'prevention,' which, under the Metropolitan Police Act, gave the police the power

> to apprehend all loose, idle, and disorderly Persons . . . disturbing the Public Peace, or whom he shall have cause to suspect of any evil Designs, and all Persons whom he shall find between Sunset and the Hour of Eight in the Forenoon lying in any Highway, Yard, or other Place, or loitering therein, and not giving a satisfactory Account of themselves . . . .[93]

In short, 'prevention' in practice meant targeting "loose, idle, and disorderly Persons" suspected "of any evil Designs" or "lying" or "loitering" in public places—in effect, a restated definition of vagrancy.

Over the following decades, the new police force enabled the penalization of vagrancy—augmented by an 1838 amendment,[94] which extended vagrancy law to cover indecent prints—to be more rigorously enforced.[95] An 1839 report of the Constabulary Force Commission reinforced the perspective that the poor were responsible for their own lot in life, which, contra the idea that crime might be understood as the product of socio-economic circumstances, pronounced that after "investigat[ing] the origin of the great mass of crimes committed for the sake of property," it "f[ou]nd the whole ascribable to one common cause, namely, the temptations of the profit of a career of depredation, as compared with the profits of honest and even well paid industry."[96] To counter the threat posed by the criminal poor and progressive agitators, the Commission called for stronger law and

90. 10 Geo. IV c. 44 (1829).

91. *See id.* § I.

92. On the previous approach to policing, *see* EMSLEY, *supra* note 89, at 222–29.

93. 10 Geo. IV c. 44, § VII.

94. 1 & 2 Vict. c. 38 (1838).

95. *See generally* DAVID PHILIPS & ROBERT STORCH, POLICING PROVINCIAL ENGLAND 1829–1856: THE POLITICS OF REFORM (1999) (discussing policing in the period); EMSLEY, *supra* note 89 (discussing the same).

96. THE MAKING OF THE MODERN POLICE, 1780–1914, at 128 (2014) (citing First Report of the Commissioners Appointed to Inquire as to the Best Means of Establishing an Efficient Constabulary Force in the Counties of England and Wales P.P. 1839 XI) [hereinafter First Report of the Commissioners]. The Commission's description of the criminal as a willful, malicious non-labourer was mirrored by others in the period. Henry Mayhew, for instance, whose serial publications on the lives of the working people of London in the *Morning Chronicle* in the 1840s were hugely popular, credited Chadwick's report as "the most trustworthy and practical treatise on the 'criminal classes,'" and supported his contention that there existed a large class of criminal poor, who possessed a "repugnance to continuous labour." HENRY MAYHEW & JOHN BINNY, THE CRIMINAL PRISONS OF LONDON 243 (1862).

order measures.[97] Among other steps, this call was answered by a new Metropolitan Police Act, passed in August 1839.[98] The act expanded the jurisdiction and financing of the London police,[99] provided that police constables would have exclusive authority to serve and execute summonses and warrants,[100] and provided for penalties to be imposed on constables who neglected their duties.[101] In addition, the act authorized the police to take into custody anyone whose name and residence were not known[102] and to apprehend without a warrant

> all loose, idle, and disorderly Persons whom [the constable found] disturbing the public Peace, or whom he shall have good Cause to suspect of having committed or being about to commit any Felony, Misdemeanor, or Breach of the Peace, and all Persons whom he shall find between Sunset and the Hour of Eight in the Morning lying or loitering in any Highway, Yard, or other Place, and not giving a satisfactory Account of themselves.[103]

In short, like its 1829 predecessor, the 1839 Metropolitan Police Act made clear that one primary function of the police was to address vagrancy.

The enhanced governance capacity delivered by the new police service was complemented by magistrates' comfort in applying the vagrancy law broadly. Magistrates in the period—typically operating on an unpaid, volunteer basis, and always from 'middle' or upper-class backgrounds—often deemed workers who came before them in labour disputes as "vagabonds," refusing at times to let them speak in their own defense and rejecting any claims they brought, including in cases where the magistrates were personally implicated.[104] Magistrates also used vagrancy charges as a ground to summarily detain "reputed thieves," with or without substantial proof of that reputation.[105] Such actions against vagrants were generally supported in the press. An 1848 piece in the *Morning Chronicle*, for instance, described vagrancy as "the frightful evil, or complication of evils, against which society in this country . . . has to contend" and accused vagrants of "destroy[ing] all workhouse discipline by their riotous conduct and indecent

97. First Report of the Commissioners, *supra* note 96.

98. Metropolitan Police Act 1839, 2 & 3 Vict. c. 47 (Eng).

99. *Id.* §§ II–III, V–VI, XX–XXIII.

100. *Id.* § XII.

101. *Id.* § XIV.

102. *Id.* § LXIII.

103. *Id.* § LXIV.

104. *See* CHRISTOPHER FRANK, MASTER AND SERVANT LAW: CHARTISTS, TRADE UNIONS, RADICAL LAWYERS AND THE MAGISTRACY IN ENGLAND, 1840–1865, 210–11 (2010) (discussing an 1893 incident involving David Rose, a magistrate at the time, dismissing union members and workers involved in labor disputes as "idle vagabonds").

105. *Id.* at 16 n.42.

conversation [and] bring[ing] filth, vermin, and pestilence into the temporary home of the honest English labourer."[106]

Vagrancy penalizations and related charges, such as drunkenness, prostitution, public disorder, and nuisance, accounted for the majority of state detentions in England from the mid-century onward.[107] In addition to the poor and unemployed, vagrancy laws were relied upon to penalize numerous other suspect individuals. In the 1870s, vagrancy laws were a favorite means to prosecute sex workers, spiritualists, and astrologers.[108] 1898 amendments to the law added the penalization of public solicitation for immoral purposes.[109] In 1901 alone, approximately four percent of the English male population was either arrested or summoned for one offense or another, the majority on charges of minor crimes associated with the vagrancy law tradition, including drunkenness, street trading, and vagrancy as such.[110]

## B. Vagrancy and Vagrancy-Type Laws in the British Empire and the British Colonial World

### 1. Vagrancy and Vagrancy-Type Laws in Early Nineteenth Century South Asia

Beyond England, the British spread vagrancy laws everywhere they went around the world. In India, the East India Company adopted several regulations between the 1790s and 1810s which allowed magistrates to apprehend persons suspected of being "vagrant[s]" or otherwise "disorderly and ill-disposed," and to confine or expel them if they could not provide

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106. MORNING CHRONICLE 4 (Sept. 20, 1848).

107. *See* MARTIN WIENER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830-1914, 14–15, 50–51, 150–55 (1990) (discussing the types of charges under which persons were arrested and detained during the Victorian period). Wiener also observes that "the number of summonses issued in London rose faster than the population until the early 1870s," indicating that "[c]learly, during the first half of the century and beyond, governmental intolerance for popular immorality and disorderliness, however minor, was on the rise." *Id.* at 51.

108. *See* PETROW, *supra* note 16, at 130–58 (detailing how vagrancy laws were used to enforce various 'morality' prosecutions); Boaz, *supra* note 88, at 58–59 (describing sections of the Vagrancy Act that penalized spiritual practices).

109. Vagrancy Act 1898, § 1, 61 & 62 Vict. c. 39 (Eng.).

110. *See* V.A.C. Gatrell, *The Victorian State: Order or Liberty?*, *in* THE MAKING OF BRITAIN: THE AGE OF REVOLUTION 89, 96 (Lesley M. Smith ed., 1987) (explaining that English males in 1901 had a one in twenty-four chance of being arrested or summoned for an offense); V.A.C. Gatrell, *Crime, Authority and the Policeman-State*, *in* THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN 1750-1950: VOLUME 3: SOCIAL AGENCIES AND INSTITUTIONS 243, 269 (F.M.L. Thompson ed., 1990) (showing that in 1908, twenty-nine percent of arrests or summons in England were for drunkenness, sixteen percent were for violations of economic/public space governance regulations, and ten percent were for vagrancy).

security.[111] To render these laws easier to enforce, measures such as 1812 and 1818 regulations in Bengal, 1819 regulations in Madras, and 1827 regulations in Bombay extended the authorities' ability to employ preventive detention without trial and with no right of habeas corpus, including of those deemed to be 'robbers' of various sorts.[112] Police forces were gradually introduced across the Presidencies (Madras, Bombay, and Calcutta) in the early nineteenth century. After new police forces were in place, new criminal penalties were often introduced as police regulations. The 1811 police regulations in Madras, for instance, penalized people for refusing to work when unemployed as well as for vagrancy explicitly.[113] Similar laws and regulations were introduced in Bombay in 1814 and Calcutta in 1819.[114] In Ceylon, meanwhile, a Vagrancy Ordinance was introduced in 1841,[115] the early years of Ceylon's first coffee boom, during which planters brought in thousands of South Indian migrant laborers.[116]

India's Thuggee Act of 1836,[117] while terminologically distinct from vagrancy law, nonetheless shared key components with the vagrancy law tradition.[118] While the Thuggee Act theoretically targeted more serious harm than typically associated with vagrancy, namely homicidal robbery, "thuggee" could readily be thought of as a particularly serious, Indian form of vagabondage. Brief yet forceful, the Thugee Act stipulated that anyone

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111. RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA 32 (1998) (noting that vagrancy laws were increasingly relied upon as the British judicial system in India expanded). According to one early regulation, for instance, the police were expected to apprehend "Geedur mars, Malachees, Syrbejuahs, or other description of vagrants . . . lurking about . . . without any ostensible means of subsistence." *Id.* at 44 (citing Banaras Regulation 17 of 1795 § 10). Bengal Regulation 6 of 1810 meanwhile penalized zamindars (powerful local authorities and landowners) who neglected to pass along information concerning the crimes of "Dacoits, Cozuaks, Thugs, Buddecks and other descriptions of public robbers." *See* KIM A. WAGNER, THUGGEE: BANDITRY AND THE BRITISH IN EARLY NINETEENTH-CENTURY INDIA 44 (2007) (noting that this regulation represented the first time these four categories were distinguished in the context of indigenous crime).

112. *See id.* 188–90 (discussing how Bengal Regulation 8 of 1818 initially only allowed for the indefinite detention of dacoits, but was expanded by Regulation 3 of 1819, which covered other classes of robbers as well).

113. *See* Michael Anderson, *India, 1858–1930: The Illusion of Free Labor*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 422, 428–29 (Douglas Hay & Paul Craven eds., 2004) (identifying desertion, disobedience, insolence, neglect of duty, and refusal to work when unemployed as acts warranting punishment under the Madras "Police Regulations").

114. *Id*. at 429.

115. Vagrants Ordinance, 1841, No. 4 (Ceylon).

116. *See* NIRA WICKRAMASINGHE, SRI LANKA IN THE MODERN AGE: A HISTORY OF CONTESTED IDENTITIES 34–35 (2006) (Noting how in the period "thousands of [South] Indian labourers began to make an annual journey to the coffee plantations in the central and southern regions of Sri Lanka").

117. Thuggee and Dacoity Suppression Act XXX (1836) (India).

118. *See* SINGHA, *supra* note 111, at 222–23 (noting that while there are similarities between thuggee and vagrancy regulations, attempts by law enforcement authorities to target mendicants through thuggee laws were resisted by higher authorities, in contrast to vagrancy law).

"proven" to belong "to any gang of Thugs" could be sentenced to life imprisonment with hard labor.[119] However, the Thuggee Act left "thuggee" undefined, an essential vagueness that, as was the case with vagrancy laws, served to enhance law enforcement authorities' discretionary powers.[120] Also, like vagrancy laws, while "thuggee" gestured towards certain activities, it was essentially a status crime, with conviction as a "Thugee" possible on the basis of suspicion alone.[121] The thuggee laws were also similar to vagrancy laws in that they were accompanied by various measures designed to strengthen enforcement. These included the creation and development of a new, specialized police force, the Thagi and Dacoity Department,[122] as well as various procedural measures provided for by Thuggee-related acts, which allowed magistrates to commit individuals for trial before competent criminal courts;[123] made convicted individuals competent to testify;[124] extended the jurisdiction of courts to try the crimes of "murder by Thuggee" and of "receiving goods stolen by Thuggee;"[125] allowed persons convicted of thuggee or dacoity to be transported for purposes of detention to better secure their confinement;[126] allowed for the penalty of transportation for life to be imposed;[127] and helped ease certain practical and procedural issues pertaining to detention.[128]

The similarity between Thugee and vagrancy laws was functional and ideological as well as practical. Like vagrancy laws, Thuggee laws presented

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119. Thuggee and Dacoity Suppression Act XXX § 1 (1836) (India).

120. A later measure, Act 3 of 1848, somewhat addressed this lacuna by defining a thug as "a person . . . habitually associated with . . . others for the purpose of committing, by means . . . likely to cause death . . . the offence of child-stealing or the offence of Robbery not amounting to Dacoity." For more, see NANCY GARDNER CASSELS, SOCIAL LEGISLATION OF THE EAST INDIA COMPANY: PUBLIC JUSTICE VERSUS PUBLIC INSTRUCTION 38 (2010) (describing the historical development of anti-"thug" legislation). By the time Act 3 of 1848 was passed 'thuggee' charges were no longer heavily relied upon, however.

121. *See* THOMAS R. METCALF, IDEOLOGIES OF THE RAJ 123 (1994) (noting that to secure a conviction, it was sufficient to show an individual was a member of a thuggee gang). In particular, it was sufficient to show an individual was a member of a thuggee gang (itself, of course, a highly questionable sort of charge), rather than to show they had committed any particular crime, to secure a conviction. *See* THOMAS METCALF, IDEOLOGIES OF THE RAJ 123 (1994)

122. Sandria Freitag, *Crime in the Social Order of Colonial North India*, 25 MODERN ASIAN STUD. 227, 236–37 (1991).

123. Thuggee and Dacoity Suppression Act XVIII (1837) (India).

124. Thuggee and Dacoity Suppression Act XIX (1837) (India). Macaulay was instrumental in having this rule framed universally, rather than as applicable to the thuggee context only. For more, see SINGHA, *supra* note 54, at 217–20.

125. Thuggee and Dacoity Suppression Act XVIII (1839) (India).

126. Thuggee and Dacoity Suppression Act XVIII (1843) (India).

127. Thuggee and Dacoity Suppression Act XIV (1844) (India); Thuggee and Dacoity Suppression Act X (1847) (India).

128. Thuggee and Dacoity Suppression Act V (1847) (India).

their primary purpose as the maintenance of public order, but in practice, were equally oriented towards limiting freedom of movement and enhancing the population's extractable economic value—though, unlike British vagrancy laws, which had long been used to force individuals into wage labor, Indian Thuggee laws forced communities into peaceful, regular cultivation and commercial exchange, so that they might be taxed.[129] Thugee laws also emulated vagrancy laws in that they targeted certain ethnographic groups, although British thinking on 'Thuggee' went further along such lines, as testified to by the manner in which the authorities constantly discovered new forms of Thuggee—including Magapunnisatic Thugs, involved in child-trafficking, Tushma-Baz Thugs, involved in gambling, and various categories of wandering mendicants, including Dathura Poisoners, Tin Naimi, Gosain, Bairagi, Jogi, Kan Phuttie, Thorie, and Panda Bramin Thugs.[130] Finally, the anti-thuggee campaign was similar to the anti-vagrancy campaign insofar as it has been motivated by a fear of the unknown and a desire to impose labels onto an evolving, newly encountered social reality.[131] As Bayly argues, the anti-thuggee campaign arose in part from an "information panic: the feeling of the fledgling colonial administration that it knew nothing of local society and that the locals were combining to deny it information."[132]

2. Vagrancy and Vagrancy-Type Laws in the Caribbean, Mauritius, and Southern Africa Following Emancipation

Laws explicitly targeting vagrants were adopted elsewhere around the British Empire in the early nineteenth century as well. In December 1831 and January 1832 a slave uprising in Jamaica was suppressed by militia and soldiers, in the course of which approximately 5,000 persons were killed, the majority executed after the rebellion.[133] The events led to two Parliamentary

129. As Lloyd puts it, the aim was to suppress "wild and savage cults," in order to develop a "society of civilized, taxable cultivators." Tom Lloyd, "Thugee" and the Margins of the State in Early Nineteenth-Century Colonial India, Presentation at the University of Edinburgh conference on "Mutiny at the Margins: New Perspectives on the Indian Uprising of 1857" (July 2007). *See also* Kim Wagner, *Thuggee and Social Banditry Reconsidered*, 50 HISTORICAL J. 353, 359 (2007) (noting Thuggee laws' aim of fixing communities in place).

130. Lloyd, *supra* note 129.

131. *See* C.A. BAYLY, EMPIRE AND INFORMATION: INTELLIGENCE GATHERING AND SOCIAL COMMUNICATION IN INDIA, 1780–1870, at 174 (1996) (highlighting the lack of information possessed by the authorities in early colonial India ).

132. *Id.*

133. *See* Mary Reckford, *The Jamaica Slave Rebellion of 1831*, 40 PAST & PRESENT 108, 122 (1968) (revealing that out of the 626 slaves tried after the rebellion, 312 were executed); MARY TURNER, SLAVES AND MISSIONARIES: THE DISINTEGRATION OF JAMAICAN SLAVE SOCIETY, 1787–1834 (1998); MICHAEL CRATON, TESTING THE CHAINS: RESISTANCE TO SLAVERY IN THE BRITISH WEST INDIES 293–98 (1982).

inquiries, which helped lead to the passage of the Slavery Abolition Act,[134] officially abolishing slavery in the British Empire. The act received assent in August 1833 and took effect on 1 August 1834.[135]

For many colonial elites, the prohibition of slavery presented a challenge: how could they ensure "former slaves," now "'relieved of the fear of this Driver and his lash,' . . . be induced to continue hated plantation labour?''[136] In the Caribbean, the short-term answer was to impose "a transitional phase of near-slavery termed 'apprenticeship' [in which] the former slaves were to work without pay for their masters for three-fourths of the work-week, free to earn wages for the remaining time only."[137] This was enabled by the Slavery Abolition Act itself, which provided, "for the Preservation of Peace throughout the . . . Colonies," that

> the various colonies should have the power to prepare regulations for the Maintenance of Order and good Discipline amongst the . . . apprenticed Labourers, and for ensuring the punctual Discharge of the Services due by them to their respective Employers, and for the Prevention and Punishment of Indolence . . . and for the Prevention or Punishment of Vagrancy . . .[138]

The new apprenticeship laws included a variety of punitive provisions. In St. Kitts, for instance, among other penalties, apprentices found guilty of "indolent, careless or negligent" work were forced to provide extra free labor; those absent for anything more than a brief time were subject to confinement with hard labor for a week and fifteen lashes; those absent for two days or more in a week were declared vagabonds and subject to confinement with hard labor for two weeks and fifteen lashes; and those absent for a week were subject to a month's confinement with hard labor and thirty lashes.[139] In short, as one commentator put it, freed formerly enslaved

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134. Slavery Abolition Act of 1833, 3 & 4 Will. 4 c. 73.

135. Commencement was delayed until 1 December 1834 in the Cape of Good Hope, and 1 February 1835 in Mauritius. "Territories in the Possession of the East India Company," Ceylon and Saint Helena, meanwhile, were exempted from the act. *Id.* § 64. Those exceptions were repealed in 1843. For more, see William Green, *James Stephen and British West India Policy*, *1834-1847*, 13 CARIBBEAN STUD. 33, 44 (1974) (exploring Stephen's role in relationship to the reforms of the period); Anthony De V. Philips, *Emancipation Betrayed: Social Control Legislation in the British Caribbean (with Special Reference to Barbados), 1834-1876*, 70 CHICAGO-KENT L. REV. 1349, 1363 (1995) (describing the post-emancipation apprenticeship system).

136. Susan Campbell, *Carnival, Calypso, and Class Struggle in Nineteenth Century Trinidad*, 26 HIST. WORKSHOP J. 1, 4 (1988).

137. *Id.* According to the standards of the time, "three-fourths" of the week was forty-five hours, moreover. Juanita De Barros, *Urban British Guiana, 1838–1924: Wharf Rats, Centipedes, and Pork Knockers*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1955 323, 325 (Douglas Hay & Paul Craven eds., 2005).

138. Slavery Abolition Act of 1833 § 16.

139. Robert Shelton, *A Modified Crime: The Apprenticeship System in St. Kitts*, 16 SLAVERY & ABOLITION 331, 335 (1995) (citing An Act for the Abolition of Slavery in this Island, and for the

persons were caught "within a web of restrictive legislation."[140]

On top of the 'apprenticeship' system, authorities in the Caribbean passed a series of laws regulating workers' lives outside work, including vagrancy laws. Jamaica took early action with its 1833 "Act to Restrain and Punish Vagrancy."[141] In the Bahamas, "[a]n Act to prevent the resort of Rogues, Vagabonds, and other Idle and Disorderly Persons to the Bahama Islands"[142] was brought into effect in November 1833 and amended in 1836.[143] A vagrancy law was also enacted in St. Kitts, which allowed anyone deemed a vagrant—defined broadly to include all those of inadequate means as well as those squatting on plantation grounds or the like—to be arrested, imprisoned with hard labour for three months, fined, and lashed thirty-nine times, with enhanced penalties for repeat offenders.[144] In Antigua, "An Act for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, Incorrigible Rogues and other Vagrants in this Island," generally following along the lines of the 1824 English Vagrancy Act, was passed on 31 July 1834.[145]

These developments were accompanied by reforms to judicial systems and law enforcement. As the governor of Jamaica put it in 1834, it was necessary to reform such systems "to suit them to the approaching times" so as to "render [the security of the country] equal to the exigencies of the times."[146] Among other things, the governor called for "arrangements . . . for dividing the island into circuits, and for the more frequent sitting of criminal courts;" for changes to the "very defective state of prison discipline" as well as to the "system of parish constables," who were to be placed "under the immediate control of the magistracy" and to be made "liable to fine, or instant dismissal, for any misconduct, or neglect of duty;" for "the establishment of weekly courts of petit sessions, to be held before not less than two magistrates" that could help administer the new master and servant

Establishment of a System of Apprenticeship for a Limited Time in Lieu Thereof, 1834 (St. Christopher).

140. WILLIAM LAURENCE BURN, EMANCIPATION AND APPRENTICESHIP IN THE BRITISH WEST INDIES 170 (1937).

141. CO 140/126 (1836), fol. 17. *See* DIANA PATON, THE CULTURAL POLITICS OF OBEAH: RELIGION, COLONIALISM AND MODERNITY IN THE CARIBBEAN WORLD 122 (2015) (highlighting the close connection between vagrancy and obeah penalizations).

142. Act No. 838, 4 Will. 4 c. 11 (1833).

143. Act No. 918, 6 Will. 4 c. 6 (1836).

144. *See* Shelton, *supra* note 139, at 336.

145. An Act for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, Incorrigible Rogues and other Vagrants in this Island, (July 31st, 1834), *in* THE SESSIONAL PAPERS PRINTED BY ORDER OF THE HOUSE OF LORDS OR PRESENTED BY ROYAL COMMAND IN THE SESSION 1847-8 *Vol. XXXVI*, Appendix: Antigua, Vagrancy. PATON, *supra* note 141 at 122; Green, *supra* note 135, at 38.

146. CO 140/125 (1834), fol. 6.

law;" and, should finances allow, for the "raising [of] a police force."[147] Meanwhile, a committee appointed by the Jamaica House of Assembly to look into "the best mode of promoting the industry of the manumitted slaves," after finding that "very few" former slaves "will work for such rates of wages as sugar cultivators can afford to pay," and that their "idleness and contempt of authority [were] daily becoming more apparent and alarming," called in response for "a more numerous, and competent magistracy."[148]

The end of the apprenticeship system on 1 August 1838 led to a new wave of regulation. In addition to new master and servant laws, "tenancy at will" laws required those living on estates to work a certain number of hours per week, punished those living elsewhere, and used advance wages and employers' stores to bind workers through cycles of debt.[149] This period saw the passage of several new vagrancy laws. An Order-in-Council on Vagrancy was issued on 7 September 1838 relative to British Guiana, Mauritius, St. Lucia, and Trinidad.[150] The order aimed to replace more restrictive locally passed provisions with a comparatively liberal approach, which was reflected in reduced penalties.[151] The act also specifically confined jurisdiction over such issues to stipendiary magistrates—a provision with the progressive attention of removing power from the hands of plantation owners and plantation owner-aligned magistrates, which enhanced the power of the developing professional magistracy in practice.[152]

The relative leniency of the Colonial Office vagrancy law model was resented by local authorities and not followed in the non-Crown colonies.[153] A period of scuffles over this and other issues saw local interests win out, giving local authorities a freer hand in shaping local legislation.[154] In the following period, harsher laws were brought into effect. The vagrancy law

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147. *Id.*

148. *Id.* at fols. 148-51. *See also* CO 140/130 (1839), fols. 75–80.

149. O. Nigel Bolland, *Systems of Domination After Slavery: The Control of Land and Labor in the British West Indies After 1838*, 23 COMP. STUD. SOC'Y & HIST. 591, 607–08 (1981); Campbell, *supra* note 136, at 6.

150. *See* CO 140/130 (1839), Appendix II; Order-in-Council of Sept. 7, 1838, London Gazette for the Year 1838. British Guiana, Mauritius, St. Lucia and Trinidad were Crown colonies, and hence the law could be set directly by the metropole through an Order-in-Council, without the need for an act of Parliament.

151. *Id.* §§ 1–3, 7.

152. Bolland, *supra* note 149. *See also* Green, *supra* note 135, at 44 (granting Stipendiary Magistrates exclusive jurisdiction over matters pertaining to the emancipated and the proprietary classes); Philips, *supra* note 135, at 1363 (explaining how the Stipendiary Magistrates were appointed from London to manage the apprentices and legislation designed to help ensure emancipation took effect).

153. Green, *supra* note 135, at 39.

154. *See id.* at 39–41(showing that defiance by the Jamaica Assembly helped lead to a situation in which West Indian assemblies gained more power).

in the Bahamas was amended in 1839,[155] and again in 1844[156] and 1846.[157] In Jamaica, "An Act for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, and Incorrigible Rogues"[158] was brought into effect in December 1839 and amended the year after.[159] In Barbados, "An Act for the Suppression and Punishment of Vagrancy"[160] was brought into effect in January 1840, following shortly on the heels of Barbados's Consolidated Police Act, and was accompanied by the "Act for the better Government and Ordering of the Poor of this Island, and the Prevention of Bastardy," which granted vagrancy law-like powers, including allowing the authorities to apprehend roving persons and to return them to their places of settlement.[161] In 1843, Colonial Secretary Lord Stanley allowed the Crown colonies to amend the terms on vangrancy contained in the 1838 Order-in-Council in the more restrictive direction favored by plantation owners.[162]

Vagrancy laws grew harsher still in numerous jurisdictions in the 1850s. Antigua brought in a new vagrancy law in 1851.[163] Following and in response to an uprising in March 1858, Antigua amended that law, expanding its ability to harass and detain poorer members of the community found in public spaces,[164] motivated by the "growing danger posed by 'degenerate idlers' and 'rabble-rous[ers],'" or, as Governor Hamilton put it, the "existence, in the heart of the chief town, of a numerous rabble, physically strong, ready at any time for any act of violence, and habitually using threat of violence."[165] Various other reforms aimed at strengthening

155. Act No. 975, 3 Vict. C. 3 (1839) (Jam.).

156. Act No. 1101, 7 Vict. C. 3 (1844) (Jam.).

157. Act No. 1152, 9 Vict. C. 12 (1846) (Jam.).

158. Act No. 3315, 3 Vict. C. 18 (1839) (Jam.).

159. Act No. 3408, 4 Vict. C. 42 (1840) (Jam.).

160. Act No. 70 (1840).

161. Philips, *supra* note 135, at 1370–71.

162. *See* Green, *supra* note 135, at 41–42 (providing an overview of the historical timeline leading to amendments more favorable to planters).

163. An Act to Repeal a Part of the Second Clause of an Act, entitled "An Act for the Punishment of Idle and Disorderly Persons, Rogues, and Vagabonds, Incorrigible Rogues, or Other Vagrants in this Island" (Mar. 27, 1851); PATON, *supra* note 141, at 123.

164. An Act to Extend the Provisions of an Act, entitled "An Act for the Punishment of Idle and Disorderly Persons, Rogues, and Vagabonds, Incorrigible Rogues, or Other Vagrants in this Island" (Apr. 24, 1858).

165. NATASHA LIGHTFOOT, TROUBLING FREEDOM: ANTIGUA AND THE AFTERMATH OF BRITISH EMANCIPATION 188 (2015) (citing CO 7/110, Governor Hamilton to Edward Bulwer Lytton, MP (July 28, 1858)).

Antigua's judicial system,[166] the police,[167] and the security forces more broadly[168] were passed in the late 1850s as well. In Mauritius, Acting Governor Major-General Hall referred to vagrancy as a "monster evil" responsible for "the loss . . . of labour," "moral and social mischief," and "much crime on the island" in the colony's 1854 annual report.[169] In 1859, Mauritius' police force was substantially reformed.[170] The following decades saw anti-vagrancy measures expanded and reinforced: Ordinance 4 of 1864 stipulated that desertion should be considered an act of vagrancy,[171] while Ordinance 31 of 1867 affirmed police powers to deal with desertion, illegal absence, and vagrancy.[172] In the Cape Colony, meanwhile, a harsh new master and servant law was adopted in 1856, in which "severe contract restrictions and punishments for laziness and desertion" effectively "establish[ed] a form of vagrancy legislation."[173] In 1869, the adjacent Southern African colony of Natal implemented the "Law for the Punishment of Idle and Disorderly Persons and Vagrants."[174] In 1879, the Cape Vagrancy

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166. Including, for example, An Act to Regularize the Court System passed on November 29, 1849, An Act to Establish a Court of Appeal passed on June 24, 1852, and An Act Aimed at Improving the Administration of Criminal Justice passed on September 8, 1857. *See* CO 8/28, folios 46–7, 145–50; CO 8/29, folios 62–67.

167. Including Acts to Support the Police passed on May 31, 1849, June 3, 1852 and June 9, 1852, and An Act Adding a Mounted Police Force passed on April 10, 1858. *See* CO 8/28, folios 4–6, 118–19, 142–43; CO 8/29, folio 73.

168. Including, for example, An Act to Raise a Volunteer Militia Force passed on Arp. 24, 1858. *See* CO 8/29, folio 83.

169. *See* Richard Allen, *Vagrancy in Mauritius and the Nineteenth-Century Colonial Plantation World*, *in* CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 140, 145 (A.L. Beier & Paul Ocoock eds., 2008) (citing Major-General Hall to the Rt. Hon. Sidney Herbert, PP 1856 XLII [2050] 178 (May 3, 1855)).

170. *See* Mauritius Police Library, CENTENARY: 1859–1959 (1959) (highlighting the substantial reform of the Mauritian police force that took place in 1859).

171. *See* Allen, *supra* note 169, at 144 (describing a local ordinance in Mauritius defining desertion as a form of vagrancy).

172. *See id.* (describing a local ordinance in Mauritius that consolidated and reaffirming police powers to deal with desertion, illegal absence, and vagrancy).

173. Robert Ross, *Emancipations and the economy of the Cape Colony*, 14 SLAVERY & ABOLITION 131, 141–42 (1993).

174. Law No. 15 of 1869. In addition to various provisions modeled on England's 1824 law, the act allowed municipalities to impose curfews on "every coloured person found wandering abroad" after dark who failed to "giv[e] a good account of himself or herself." *Id.* As initially proposed, the law allowed for males convicted of assault on white females to be branded on their foreheads, and for the bodies of males executed for crimes against white females to be publicly suspended in iron cages—punishments clearly intended to be applied against Africans, and measures which "anticipated the comprehensive urban segregation measures so characteristic of twentieth-century South Africa." *See* Jeremy Martens, *Polygamy, Sexual Danger and the Creation of Vagrancy Legislation in Colonial Natal*, 31 J. IMPERIAL & COMMONWEALTH HIST. 24, 28–29 (2003) (discussing a measure proposed in Natal to severely punish black men convicted of raping white women). *See also* Norman Etherington, *Natal's Black Rape Scare of the 1870s*, 15 J. S. AFR. STUD. 36 (1988) (discussing the rape scare in Natal during the 1860-70s).

Amendment Act was passed in the Cape Colony, giving property owners and their representatives the right to apprehend persons found wandering across their property or loitering near a dwelling place or shop without a pass.[175]

3. Vagrancy and Vagrancy-Type Laws in Australia and New Zealand in the Mid-Nineteenth Century

In Australia, vagrancy laws were a key component of the social fabric since the early days of colonization. Prior to the early 1830s, numerous individuals were prosecuted under English vagrancy law, despite ambiguity concerning the law's applicability.[176] In New South Wales, 1811 police regulations allowed for the detention of "suspicious person[s]" abroad after 9:00 pm, and obliged the police to detain any drunken, idle, or disorderly person, together with all those who lacked means of obtaining a livelihood.[177] These provisions were entrenched through the New South Wales Police Act of 1833.[178] Further laws penalizing vagrancy, whether in laws explicitly labeled vagrancy laws or in various police regulations, were adopted in New South Wales in 1835,[179] Van Diemen's Land in 1838,[180] South Australia in 1844,[181] Victoria in 1852, 1854 and 1865,[182] Western Australia in 1861,[183] and New Zealand in 1866.[184]

While the 1835 New South Wales Vagrancy Act largely followed established tradition, it notably included a novel provision stipulating:

> [E]very person not being a black native or the child of any black native who being found lodging or wandering in company with any of the black natives of this Colony shall not being thereto required by any Justice of the Peace give a good account to the satisfaction of such Justice that he or

175. Vagrancy Amendment Act No. 23 of 1879 (S. Afr.) (amending Act No. 22 of 1867, which had required that Africans entering the colony, as well as those moving livestock, obtain passes).

176. *See* McLeod, *supra* note 72, at 114–19 (describing the application of English vagrancy laws in Australian colonies, and disagreement regarding their applicability due to their lack of tailoring to local conditions).

177. *See id.* at 114.

178. *See* Sydney Police Act 1833 (N.S.W.) (Austl.) (regulating the police and criminally penalizing various activities).

179. 6 Will. IV No. 6 (1835). The 1835 act would become part of the law of New Zealand as well, through the 1840 Extension of New South Wales Laws to New Zealand Act. 3 Vict. No. 28 (1840).

180. Regulation of Police and Preservation of Peace Act, 2 Vict. No. 22 (1838). Among other things, Van Diemen's Land's Vagrancy Act required those "arriving from a Penal Settlement, in the sister Colony . . . to register his name and place of residence at the Police-office," or be subject to six months' imprisonment. BENT'S NEWS AND TASMANIAN THREE-PENNY REGISTER 4 (Apr. 29, 1837).

181. An Ordinance for Regulating the Police in South Australia 1844 (S. Austl.).

182. An Act for the Better Prevention of Vagrancy and Other Offences 1852 (Vict.) (Austl.); Town and Country Police Act 1854 (Vict.) (Austl.); The Police Offences Statute 1865 (Vict.) (Austl.).

183. An Ordinance for Consolidating and Amending the Laws Relating to the Police in Western Australia, and Removing and Preventing Nuisances and Obstructions Therein 1861 (W. Austl.).

184. Vagrant Act, 30 Vict. No. 40 (1866).

> she hath a lawful fixed place of residence in this Colony and lawful means of support and that such lodging or wandering hath been for some temporary and lawful occasion only and hath not continued beyond such occasion . . .[185]

In short, in addition to its standard broad scope, vagrancy law in New South Wales was extended to cover associating with members of Australia's aboriginal society. Like the law in England, the law in New South Wales also authorized any person to apprehend another, penalized constables who failed to enforce the law with sufficient zeal, allowed for the goods of those apprehended to be seized and sold to pay any costs incurred, and permitted the compulsion of witnesses.[186]

As in the former slave labor-reliant colonies, vagrancy legislation became harsher in Australia in the 1850s. Attempts were made to pass a new vagrancy law in New South Wales in 1849 and 1850.[187] Some were supportive, with one article deeming that there was not another act "of a more beneficial tendency towards the general peace and good of society," as while

> [t]he hordes of these 'Vags,' as they in their own peculiar phraseology designate the clan, have been of late to a very considerable extent broken up and their associations destroyed through the vigilance and perseverance of our efficient police . . . [t]hey have not . . . been effectually destroyed [due to] the laxity of the late existing enactments for the suppression of Vagrancy.[188]

The *Colonial Times* suggested the 'severe provisions' of the new law, however, were strong enough to "thin the ranks of those who prefer sloth and indolence to sobriety and industry."[189] While the act was initially disallowed by London, leading to scorn in the local press,[190] metropolitan resistance was overcome the following year, and a new Vagrancy Act passed.[191] The Act upped the traditional penalties, imposing up to two years' detention with hard labor on both the idle and disorderly and rogues and vagabonds.[192] In addition, the Act included a provision designed to facilitate adjudication of such issues, providing that "all proceedings to be had before any Justice or Justices of the Peace under the provisions of this Act shall be had and taken in a summary way and no such proceeding shall be quashed for want of form

185. 6 Will. IV No. 6 (1835), § 2.

186. *Id.* § 6, 10

187. *See infra* notes 188–90 and accompanying text.

188. COLONIAL TIMES 4 (Dec. 18, 1849).

189. *Id.*

190. THE FREEMAN'S JOURNAL 6 (Oct. 10, 1850).

191. Act No. IV (1851).

192. *Id.* §§ 2–3. In addition, the Act added "habitual drunkards" to the list of those deemed idle and disorderly. *Id.* § 2.

or removed by *certiorari* or otherwise into the Supreme Court."[193]

4. Vagrancy and Vagrancy-Type Laws in the Post-Emancipation United States

Some of the most notorious vagrancy laws of the nineteenth century were put in place in the United States following the Civil War, when planters bound together to control newly freed labor. Inspired in part by measures instituted by the British following emancipation in the Caribbean,[194] lawmakers in the South passed a variety of measures to control the emancipated population, including measures requiring workers seeking employment to furnish papers from previous employers.[195] While certain harsh "Black Acts" passed immediately after the Civil War were overturned during Reconstruction, some survived. The Freedmen's Bureau, meanwhile, the organization initially established to support free labor, implemented rules that in effect "created a system of compulsory contract," including rules criminally punishing vagrancy.[196] The period also saw measures requiring

193. *Id.* § 15. This new, stricter vagrancy law was significantly relied upon, including against women. As of 1858, 42 percent of women in prison were there on vagrancy charges, following trials in which they were characterized as "unaccompanied," "licentious," and as of "ill repute." *See* Christina Twomey, *Courting Men: Mothers, Magistrates and Welfare in the Australian Colonies*, 8 WOMEN'S HIST. REV. 231, 239 (1999) (discussing how vagrancy charges were a common means through which women were inprisoned in nineteenth century Victoria). On the use of vagrancy laws to target women in the period see also PAULA BYRNE, CRIMINAL LAW AND COLONIAL SUBJECT: NEW SOUTH WALES 1810–1830 (1993); Joy Damousi, *"Depravity and Disorder": The Sexuality of Convict Women*, 68 LABOUR HIST. 30, 34 (1995) (describing historical views concerning the moral degradation of poor convict women).

194. *See* Thomas C. Holt, *"An Empire over the Mind": Emancipation, Race, and Ideology in the British West Indies and the American South*, *in* REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD, (J. Morgan Kousser & James M. McPherson eds., 1982) 283, 294 (describing how the measures adopted in the antebellum American South took inspiration from previous British approaches in the Caribbean); Peter Kolchin, *Reexamining Southern Emancipation in Comparative Perspective*, 81 J. S. HIST. 7, 33 n. 38 (2015) (considering post-Civil War reforms in the United States in comparative context).

195. *See* Ralph Shlomowitz, *Planter combinations and black labour in the American South, 1865-1880*, 9 SLAVERY & ABOLITION 72 (1988) (describing measures used by planters to exploit and control the labor of former slaves).

196. *See* Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1285 (1992); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1977, 199–201 (1988); WILLIAM A. COHEN, at FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 11–13 (1991). *See also* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880, at 167 (Henry Gates, ed., Oxford Univ. Press Inc. 2007) (1935) (describing the significance of, and the challenges faced by, reconstructionists); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 53–59 (1965); Pete Daniel, *The Metamorphosis of Slavery, 1865–1900*, 66 J. AM. HIST. 88, 96 (1979) (describing the adoption of repressive laws designed to extract labor and control populations after the formal end of slavcery); Beverly Forehand, Striking Resemblance: Kentucky, Tennessee, Black Codes and Readjustment, 1865–1866 (May 1, 1996) (Master's Thesis, Western Kentucky University) (TopSCHOLAR) (describing post-reconstruction Kentucky and Tennessee laws that attempted to ensure economic, social and racial

compulsory labor from the criminally detained, including those detained on vagrancy charges.[197] Following the end of Reconstruction, more vagrancy laws were passed, along with other similarly-motivated measures, such as (anti-)enticement laws and measures that mandated workers to obtain discharge certificates from past employers.[198] The American South wasn't the only place in which vagrancy laws thrived during this period—harsh vagrancy laws were passed in several other states in the postwar decades as well.[199]

Vagrancy laws took on further life and new direction in the United States in the 1870s, when 'Tramp' acts, which redefined the central crime of vagrancy "from begging to wandering without work," were passed in 40 of the 44 states.[200] The 'Tramp' acts, heavily enforced in practice,[201] imposed heavier criminal penalties than similar preceding measures, and provided enforcement support to local authorities.[202] Despite being denounced as "fugitive slave laws" by labor organizations, the 'Tramp' acts remained a cornerstone of the developing "freedom of contract" ideology.[203]

Between 1890 and 1910, new vagrancy laws were passed in almost every state in the American South.[204] These laws were heavily relied upon during the period, including as a means of rounding up individuals during harvest time and forcing them to pick crops.[205] Turn of the century vagrancy

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hierarchy); Stewart, *supra* note 25, at 257–61 (discussing the link between vagrancy laws and the Black Codes).

197. *See* William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 55–56 (1976) (describing the use of involuntary prison labor for public projects in almost all former Confederate states); COHEN, *supra* note 196, at 32–34, 221–28 (noting that vagrancy laws had antebellum roots).

198. *See* Cohen, *supra* note 197, at 36–42 (describing enticement statutes that remained active law until World War II, as well as contract-enforcement statutes requiring employers to grant discharge certificates to laborers who left their service).

199. *See* Stanley, *supra* note 196, at 1274 (noting that vagrancy laws were passed in Massachusetts in 1866, in Pennsylvania in 1871, 1876 and 1879, in Illinois in 1874 and 1877, and in New York in 1880 and 1885). As an example of the extent to which vagrancy and related charges were utilized in the period, in 1880, 62.5 percent of non-traffic arrests in several of the country's largest cities were under drunkenness, disorderly conduct, vagrancy and suspicion charges. ERIC MONKKONEN, POLICE IN URBAN AMERICA 1860–1920 103 (1981).

200. David Montgomery, *Wage Labour, Bondage, and Citizenship in Nineteenth-Century America*, 48 INT'L LABOUR HIST. 6, 19 (1995); *see also* Frank Tobias Higbie, *Between Romance and Degradation: Navigating the Meanings of Vagrancy in North America, 1870-1940*, *in* CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 250 (Beier & Ocobock eds., 2008) (discussing the origins and social meaning of the 'Tramp' acts).

201. Stanley, *supra* note 196, at 1281.

202. Montgomery, *supra* note 200, at 19.

203. *Id.* at 24.

204. Cohen, *supra* note 197, at 48; COHEN, *supra* note 196, at 239–44.

205. *See* Cohen, *supra* note 197, at 50 (noting that in Memphis, a new policy allowed Blacks brought

laws were complemented by other measures, such as "surety" laws, which created a system whereby individuals fined for misdemeanors might pay off those fines directly through their labor.[206] While the Supreme Court of the United States found such laws ran afoul of the Thirteenth Amendment in 1914,[207] a similar system continued to flourish in practice.[208]

Before and after World War I, besides serving as a measure heavily relied upon to detain African Americans in the South, vagrancy law was extensively deployed to round up workers and counter the threat posed by the Industrial Workers of the World.[209] When the Great Depression hit, theoretically the high unemployment rate would have diminished the need for coercive measures to ensure labor supply; in reality, the exceptionally low wages offered often led to low worker turnout.[210] To counter the labor shortage, in some localities the police continued to "functio[n] as a labor agency for local planters," arresting and/or threatening to arrest local workers who refused to sell their labor for the scanty wages.[211] Particularly in the South, African Americans "provided a ready pool of involuntary labor that could be tapped whenever whites faced any sort of labor emergency."[212] In Miami, city authorities on occassion forced prisoners—including "vagrants" arrested specially for that purpose—to undertake trash collection task.[213] Vagrancy laws were also frequently relied on throughout the period to criminalize labor activists, often on the basis of their political ideas alone.[214]

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before a police-court judge on vagrancy charges "to go free provided they would accept jobs offered by farmers who have set up a cry over scarcity of 'hands'").

206. *See id.* at 53–54 (describing the nature of surety laws).

207. United States v. Reynolds, 235 U.S. 133, 150 (1914).

208. *See* Cohen, *supra* note 197, at 54–55 (noting that the Reynolds decision invalidated Alabama surety laws, but did not end the practice of recruiting labor from jails in the South).

209. *See generally* Dennis Hoffman & Vincent Webb, *Police Response to Labor Radicalism in Portland and Seattle, 1913–19*, 87 OREGON HIST. Q. 341 (1986) (describing early twentieth century police use of vagrancy laws to respond to labor protests in the Pacific Northwester); James Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) (describing the ways the police used vagrancy laws to stifle labor union movements in 1922 and called for imprisonment of any person found loitering); Ahmed White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLORADO L. REV. 667 (2004) (explaining how the enforcement of vagrancy ordinances effectively criminalized labor organzing).

210. *See* Cohen, *supra* note 197, at 51 (noting that worker shortages were often caused by planters' attempts to keep wages low).

211. *Id.* (noting that police in Arkansas promised they would "make a house-to-house canvas" to supply the labor force Phillips County planters needed).

212. *Id.*

213. *See id.* at 52.

214. *See* GOLUBOFF, *supra* note 19, at 20–23; Laura Weinrib, *The Vagrancy Law Challenge and the Vagaries of Legal Change*, 43 L. & SOC. INQUIRY 1669, 1672–73 (2018) (emphasizing the political function of vagrancy laws in the period).

5. Vagrancy and Vagrancy-Type Laws in Canada, Australia, New Zealand, the Caribbean and Asia in the Late Nineteenth and Early Twentieth Centuries

In Canada, prior to confederation in 1867, vagrancy was penalized on the provincial and municipal levels.[215] A national law addressing vagrancy was among the first measures passed by the new federal government, in the form of the 1869 "Act respecting Vagrants."[216] The law was amended in 1874, 1881, and 1886.[217] Vagrancy was later included among the crimes penalized by the 1892 Criminal Code, which classified as vagrants those without "visible means of maintaining [themselves and] without employment;" those "able to work" but "wilfully refus[ing] or neglect[ing] to do so;" beggars; prostitutes, brothel-keepers, and individuals frequently resorting to such establishments; loiterers; and those causing public disturbances, including due to drunkenness.[218] These vagrancy charges were heavily enforced.[219] In Vancouver, for instance, the site of a large and diverse number of migrant workers in the late-nineteenth century, vagrancy and drunkenness were the most common charges in the turn of the century period.[220]

As observed above, vagrancy law was well-entrenched across Australia by the mid-nineteenth century.[221] On January 1, 1901, the Australian

215. Prashan Ranasinhe, *Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953–1972*, 48 OSGOODE HALL L.J. 55, 61 (2010).

216. An Act Respecting Vagrants, 1869, c. 28 (Can.).

217. *See* An Act to Amend "An Act Respecting Vagrants," 1874, c. 43 (Can.) (increasing the term for which an offender might be imprisoned to six months); An Act to remove doubts as to the power to imprison with hard labour under the Act Respecting Vagrants, 1881, c. 31 (Can.) (establishing that imprisonment might be with or without hard labor, at the discretion of the convicting magistrate or justices); An Act Respecting Offences against Public Morals and Public Convenience, 1886, c. 157 (Can.) (amending the 1869 Act Respecting Vagrants).

218. *See* Canadian Criminal Code, 55–56 Vict. c. 29 (1892), §§ 207–08 (defining "vagrant" and establishing the penalty for vagrants).

219. *See generally* James Pitsula, *The Treatment of Tramps in Late Nineteenth-Century Toronto*, 15 HIST. PAPERS/COMMUNICATIONS HISTORIQUES 116 (1980) (describing measures adopted in late nineteenth century Toronto in response to the "tramp menace"); Jim Phillips, *Poverty, Unemployment, and the Administration of Criminal Law: Vagrancy Laws in Halifax, 1864–1890*, *in* ESSAYS IN THE HISTORY OF CANADIAN LAW: NOVA SCOTIA (Philip Girard & Jim Phillips eds., 1990) (establishing that vagrancy offenses were the most common offenses for which people were imprisoned in late nineteenth century Halifax); David Bright, *Loafers are not going to Subsist upon Public Credulence: Vagrancy and the Law in Calgary, 1900–1914*, 36 LABOUR/LE TRAVAIL 37 (1995) (documenting the vagrancy charges in late nineteenth and early twentieth century Canada).

220. *See* Madison Heslop, *Rogues of Vancouver*, THE METROPOLE (Mar. 5, 2020)., https://themetropole.blog/2020/03/05/rogues-of-vancouver/ (explaining that vagrancy and drunkness were the most common cause for arrest in Vancouver).

221. *See supra* Part II.2.iii.

colonies federated into the Commonwealth of Australia.[222] As Kimber has observed, "the laws of vagrancy were strengthened . . . following the federation."[223] In New South Wales, for example, a new Vagrancy Act was passed in 1902.[224] The 1902 Act penalized those with insufficient means of support, beggars, grifters, gamblers, prostitutes, habitual drunkards, and non-aboriginals found in the company of aboriginal persons, as well as those unable to give a good account of themselves.[225] To facilitate enforcement, the Act permitted citizens to conduct arrests, allowed for the money and goods of any person convicted to be seized and used to pay for the costs involved in detaining the person in question, and penalized constables who neglected their duty to arrest vagrants.[226] The 1902 Act was complemented by the 1908 New South Wales Police Offences (Amendment) Act,[227] which re-penalized those with inadequate means of support, public drunkenness and "riotous, indecent, offensive, threatening, or insulting" behavior.[228] In 1909, approximately 41,000 persons were charged under the terms of the 1908 New South Wales Police Offences (Amendment) Act.[229] Vagrancy was further penalized in the inter-war period, including by the Northern Territory's 1923 Summary Offences Act, New South Wales' 1929 Vagrancy (Amendment) Act,[230] and the Australian Capital Territory's 1930 Police Offences Act.[231]

In New Zealand, existing vagrancy provisions were reinforced in the early twentieth century by the 1901 Police Offences Amendment Act, which included a provision specifically purporting to enable the authorities to detain individuals they wanted to charge with vagrancy, but could not "because they invariably had enough money on them to demonstrate visible

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222. Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Vic. c. 12, § 9 (U.K.).

223. Julie Kimber, *Poor Laws: A Historiography of Vagrancy in Australia*, 11 HIST. COMPASS 537, 541 (2013).

224. New South Wales Act No. 74, 1902.

225. *Id.* at §§ 4–5.

226. *Id.* at §§ 9, 12(4), 13.

227. New South Wales Act No. 12 of 1908.

228. *Id.* at § 6 (inserting § 8A–C).

229. *See* Julie Kimber, *Poor Laws: A Historiography of Vagrancy in Australia*, 11 HIST. COMPASS 537, 541–42 (2013) (citing Ken Buckley, OFFENSIVE AND OBSCENE: A CIVIL LIBERTIES CASEBOOK 245–49 (1970) (describing the manner in which the Police Offences (Amendment) Act was deployed in the period)).

230. For more on that act and its penalization of "consorting," see Alex Steel, *Consorting in New South Wales: Substantive Offence or Police Power?*, 26 UNIV. NEW S. WALES L.J. 567 (2003).

231. *See* ELIZABETH EGGLESTON, FEAR, FAVOR OR AFFECTION (1976); CHARLES ROWLEY, A MATTER OF JUSTICE (1978); CHRIS CUNNEEN, CONFLICT, POLITICS AND CRIME: ABORIGINAL COMMUNITIES AND THE POLICE (2001) (describing how vagrancy laws were increasingly and disproportionately used to target the aboriginal population from the 1950s onward). Further penalizations came through the 1966 Vagrancy and Summary Offences Acts. Act No. 7393/1966; Act No. 7405/1966.

means of support."[232] The provision achieved this end by penalizing not vagrancy nor prostitution as such, but rather "habitually consort[ing] with reputed thieves or prostitutes or persons who have no lawful means of support."[233] While the provision met some resistance, with one representative observing that it would allow "almost anybody [to] be arrested," thereby "putting the liberty of perhaps an innocent man under the control of a policeman," it was ultimately passed without amendment.[234] The law was emulated across Australia in the following decades.[235] A 1908 Police Offences Act consolidated offences pertaining to vagrancy, rules designed to ensure "good order," and measures to prevent public "nuisance," public "obstruction," "indecency," "drunkenness," "obscenity," "offensive publications," "riot," and various other offences.[236] The 1927 Police Offences Act also included provisions penalizing vagrancy.[237]

In the Caribbean, pre-existing vagrancy laws were supplemented by additional legislation, including some measures that took on unusual, context-specific features. Obeah, a form of spiritual practice, which had been penalized by vagrancy laws in the Caribbean since earlier in the century, remained a particular target.[238] The 1893 Summary Jurisdiction (Offences) Act passed in British Guiana, meanwhile, penalized cross-dressing as a form of vagrancy.[239] Besides vagrancy law, master and servant and migration laws also contained penalizations with little difference from vagrancy law in practice. The 1899 Trinidad Immigration Ordinance, for instance, penalized

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232. McLeod, *supra* note 72, at 126–27 (citing New Zealand, Parliamentary Debates, House of Representatives (July 10, 1901 & Aug. 24, 1900)).

233. 1 Edw. VII No. 8 (1901), § 4.

234. *See* McLeod, *supra* note 72, at 127 (citing Mr. Herries, New Zealand, Parliamentary Debates, House of Representatives (July 10, 1901)).

235. *See id.* at 126 (describing how New Zealand's consorting law formed the model for consorting laws in Australia). The law was perhaps itself influenced by similar provisions passed in the 1870s in St. Louis and in Barnesville, Ohio. *See id.* at 127–28 (detailing the existence of similar offenses in the United States prior to the enactment of the New Zealand law).

236. Act No. 146 (1908).

237. *See* New Zealand Police Offences Act, 1927, ss 49–52 (listing "vagrants" and "[p]ersons armed by night or wearing disguises" under "Idle and Disorderly Persons"). Application of this law in practice was accompanied by several procedural devices designed to facilitate enforcement. *See generally* Gerard Curry, *A Bundle of Vague Offences: The Vagrancy Laws with Special Reference to the New Zealand Experience*, 1 ANGLO-AM. L. REV. 523 (1972) (discussing the historical enforcement of vagrancy laws in New Zealand).

238. *See* Boaz, *supra* note 88, at 66–71 (discussing how numerous individuals have been prosecuted for practicing obeah,and the manner in which "the criminalization of obeah was intricately intertwined with labour disputes").

239. *See generally* Janeille Zorina Matthews & Tracy Robinson, *Modern Vagrancy in the Anglophone Caribbean*, 1 CARIBBEAN J. CRIMINOLOGY 123 (2019) (describing a nineteenth century vagrancy law that criminalized cross-dressing, which was still enforced in Guyana in the twenty-first century).

unlawful absence and desertion, and allowed the police or employers' agents to arrest suspected migrant laborers if the latter were found outside their place of employment without a ticket of leave.[240] The enforcement of these laws and ordinances intensified at the turn of the century, exemplified by an increase in the penalization of juvenile vagrants in Jamaica[241] and of obeah throughout the region.[242]

In India, vagrancy and vagrancy-type laws were augmented by new measures in the latter part of the nineteenth century. The 1869 European Vagrancy Act[243] targeted European vagrants, partially out of fear that they might bring disrepute and diminished respect to the white race.[244] The 1871 Criminal Tribes Act[245] built on the thuggee tradition as well as other coercive, restrictive, and surveillance-oriented measures that had been implemented locally, especially in the Punjab.[246] Master and servant and migration laws passed in this period included vagrancy-law like provisions that allowed workers to be detained, including by their employers' agents, should they leave their jobs.[247] Numerous regional vagrancy-type laws were

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240. Walton Look Lai, INDENTURED LABOR, CARIBBEAN SUGAR: CHINESE AND INDIAN MIGRANTS TO THE BRITISH WEST INDIES, 1838–1918 63–64 (1993). The 1891 Immigration Ordinance in Guiana provided similarly. *Id.*

241. *See* Shani Roper, *"A Depraved Class": Regulating Juvenile Delinquency through Legislation in Colonial Jamaica 1881-1904*, 10 J. HIST. CHILDHOOD & YOUTH 62, 74 (2017) (describing how juveniles were sent to industrial schools in Kingston, and the costs associated).

242. *See* Boaz, *supra* note 88, at 66–71 (providing an overview of prosecution trends relative to the offense of obeah).

243. Act 21 of 1869 (Sept. 18, 1869), amended by Act 28 of 1871 and Act 9 of 1874.

244. *See generally* David Arnold, *European Orphans and Vagrants in India in the Nineteenth century*, 7 J. IMPERIAL & COMMONWEALTH HIST. 104 (1979) (providing a detailed discussion of "poor whites" and the "colonial bottom drawer of orphans, vagrants, prostitutes, convicts and lunatics"); Aravind Ganachari, *'White Man's Embarrassment': European Vagrancy in 19th Century Bombay*, 37 ECON. & POL. WKLY. 2477 (2002) (discussing official sentiment and responses to European vagrancy in India).

245. Act 21 of 1869 (Sept. 18, 1869), amended by Act 28 of 1871.

246. Sanjay Nigam, *Disciplining and Policing the 'Criminals by Birth,' Part 2: The Development of a Disciplinary System, 1871–1900*, 27 INDIAN ECON. & SOC. HIST. REV. 257, 258–59 (1990); Freitag, *supra* note 122; METCALF, *supra* note 121, at 123; Andrew Major, *State and Criminal Tribes in Colonial Punjab: Surveillance, Control and Reclamation of the 'Dangerous Classes'*, 33 MOD. ASIAN STUD. 657, 658 (1999); Jessica Hinchy, *Obscenity, Moral Contagion and Masculinity:* Hijras *in Public Space in Colonial North India*, 38 ASIAN STUD. REV. 274, 280 (2014).

247. Bengal Act 6 of 1865 and Inland Emigration Act 1 of 1882; Rana P. Behal & Prabhu P. Mohapatra, *Tea and Money versus Human Life: The Rise and Fall of the Indenture System in the Assam Tea Plantations 1840–1908*, 19 J. PEASANT STUD. 142, 149 (1992); Prabhu P. Mohapatra, *Assam and the West Indies, 1860–1920: Immobilizing Plantation Labor*; *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITIAN AND THE EMPIRE, 1562–1955 455, (Douglas Hay & Paul Craven eds., 2004); Michael Anderson, *India, 1858–1930: The Illusion of Free Labor*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITIAN AND THE EMPIRE, 1562–1955 422, (Douglas Hay & Paul Craven eds., 2004); ELIZABETH KOLSKY, COLONIAL JUSTICE IN BRITISH INDIA: WHITE VIOLENCE AND THE RULE OF LAW 155–57 (2010).

passed in the new century, including, for instance, the 1911 Punjab Municipal Act, which penalized begging.[248] In Ceylon, several legal measures amending the vagrancy law regime went into effect during the turn of the century period, including Ordinances 7, 17, and 19 of 1889, Ordinance 12 of 1891, Ordinance 3 of 1894, and Ordinance 3 of 1904.[249] The 1907 Houses of Detention Ordinance, meanwhile, allowed magistrates to order vagrants confined to houses of detention.[250]

In Hong Kong, vagrancy was penalized under Ordinance No. 11 of 1845, Ordinance 7 of 1846, and Ordinance 8 of 1858, while Ordinance 9 of 1857 required Chinese persons to obtain passes in order to move around at night.[251] As elsewhere, vagrancy laws were increasingly enforced as the nineteenth century progressed. In 1882, for instance, some 685 persons were detained in Victoria Gaol on the grounds of being "rogues and vagabonds," gamblers, or simply "suspicious and dangerous characters."[252] A new vagrancy law went into effect in 1897,[253] which penalized begging, prostitution, lacking visible means of subsistence, and being without work.[254] In addition, the Act allowed magistrates to summarily order all those deemed likely to be "a charge upon the public funds or private charity" to be expelled from the colony, unless they were British subjects or had been "ordinarily resident" in the colony for seven years.[255]

In the Straits Settlements, the 1872 Summary Criminal Jurisdiction Ordinance allowed for vagrants, expansively defined, to be arrested without

248. Punjab Municipal Act § 151 (1911).

249. John D. Rogers, *Cultural and Social Resistance: Gambling in Colonial Sri Lanka*, *in* CONTESTING POWER: RESISTANCE AND EVERYDAY SOCIAL RELATIONS IN SOUTH ASIA 175, 197 (Douglas E. Haynes & Gyan Prakash eds., 1991); NIRA WICKRAMASINGHE, SRI LANKA IN THE MODERN AGE: A HISTORY OF CONTESTED IDENTITIES 34–35 (2006).

250. Ceylon Houses of Detention Ordinance § 4 (1907).

251. For more, see Mark S. Gaylord & Harold Traver, *Colonial Policing and the Demise of British Rule in Hong Kong*, 23 INT'L J. SOCIO. OF L. 23, 27 (1995); Gary Chi-hung Luk, *Occupied Space, Occupied Time: Food Hawking and the Central Market in Hong Kong's Victoria City During the Opium War*, 11 FRONTIERS OF HIST. IN CHINA 400, 417 (2016)*;* Ivan Lee, *British Extradition Practice in Early Colonial Hong Kong*, 6 L. & HIST. 85, 96-7 (2019) (describing the contrasting use of vagrancy and transportation in early colonial Hong Kong). *See also* CHRISTOPHER MUNN, ANGLO-CHINA: CHINESE PEOPLE AND BRITISH RULE IN HONG KONG, 1841–1880 (2d ed., 2009) (describing legal developments in early British Hong Kong).

252. Alain Le Pichon, *Crime and its Punishment in Victorian Hong Kong*, 12 FRENCH J. BRIT. STUD. 1, 3 (2003).

253. Vagrancy Ordinance, 1897, 50 & 51 Vict.

254. *Id.* §§ 2–8, 22.

255. *Id.* §§ 2, 22. Christopher M. Roberts & Hazel W.H. Leung, *Governance Through Vagrancy Law in Hong Kong, 1841–1941*, *in* ENGLISH LAW AND COLONIAL CONNECTIONS: HISTORIES, PARALLELS, AND INFLUENCES 1, 12 (Cerian Grifiths & Lukasz Korporowicz eds., *forthcoming*).

a warrant.[256] Similar to Hong Kong authorities, Straits Settlements authorities doubled-down on existing vagrancy law penalizations in the early-twentieth century by passing a new Vagrancy Ordinance in 1906.[257] The Minor Offences Ordinance, passed shortly thereafter, also penalized vagrancy.[258] Under the 1906 Vagrancy Ordinance, anyone appearing to have no visible means of subsistence could be arrested without warrant and sentenced to up to three months' imprisonment by a Police Court.[259] The Police Court had broad discretion to declare persons brought before it as vagrants, following which declaration they might be detained and put to work for up to a year, after which they might face repatriation if they were not British subjects born in the Straits Settlements.[260] The ordinance also sought to immunize orders issued under its terms from legal challenges by stipulating that "[t]he order of a Police Court declaring any person to be a vagrant shall be *prima facie* evidence that he was a vagrant from the date mentioned in such order."[261] Next door in the Federated Malay States, meanwhile, vagrancy was penalized *inter alia* by the 1893 Vagrancy Ordinance, the 1898 Small Offences Enactment, and the 1902 Decrepit Vagrants Enactment.[262]

6. Vagrancy and Vagrancy-Type Laws in Africa in the Late Nineteenth and Early Twentieth Centuries

British power in East Africa increased in the 1880s and 90s, leading to the establishment of protectorates in Zanzibar in 1890 and in Buganda in 1894, and to the establishment of the East Africa Protectorate in 1895. Even before their power was consolidated, the British implemented a vagrancy law in the region, in the form of an 1889 Order-in-Council.[263] Among other things, the British argued that the expansion of their power was necessary to abolish the practice of slavery in the region. Following the 1833 Slave Emancipation Act, however, the British replaced slavery with a dense set of master and servant, pass and vagrancy laws, measures British colonial authorities argued were necessary to ensure an "orderly evolution . . . from

256. Summary Criminal Jurisdiction Ordinance 1872, 35 & 36 (Vict.), § 27; STRAITS SETTLEMENTS GOVERNMENT GAZETTE 749–55 (Oct. 11, 1872).

257. Vagrancy Ordinance 1906, 6 Edw. 7.

258. Minor Offences Ordinance 1906, 6 Edw. 7.

259. Vagrancy Ordinance 1906, 6 Edw. 7, §§ 12, 15.

260. *Id.* §§ 4, 9.

261. *Id.* § 11(1).

262. *See Fact Sheet: Act 183 The Destitute Persons Act 1977*, FOOD NOT BOMBS, https://www.loyarburok.com/wp-content/uploads/2014/06/Destitute-Persons-Act-Fact-Sheet-FNBKL.pdf (last visited Feb. 24, 2023) (providing a list of ordinances on vagrancy from 1872 to 1977).

263. FREDERICK COOPER, FROM SLAVES TO SQUATTERS: PLANTATION LABOR AND AGRICULTURE IN ZANZIBAR AND COASTAL KENYA, 1890–1925 39 (1980).

slavery to freedom [and] from license to law" as well as to "save [the freed population] from themselves."[264] Thus, in addition to formally ending slavery, the 1897 Abolition Decree in Zanzibar required former slaves to demonstrate they had a place to stay and a means of support, failing which they might be punished as vagrants.[265] In practice, such measures exerted pressure on formerly enslaved persons to remain in their former, plantation-owner provided accommodations, and to continue supplying their labor in order to pay for those accommodations.[266]

Vagrancy laws continued to provide a favored means of policing the local population and forcing local persons to work on the tasks and terms desired in the following decades. In 1901, the Slavery Commissioner of Pemba ordered the police to round up "all vagrants and masterless men" and to force them to pick cloves,[267] and hundreds were, in fact, arrested for vagrancy every year in Pemba and Zanzibar between 1897 and 1902.[268] A new vagrancy decree issued in Zanzibar in 1905 complemented the traditional punishment of detention with hard labor, requiring those released from detention to work for two months on government projects.[269] This stipulation effectively made vagrancy law into a means of forcibly recruiting public labor, leading one judge at the time to observe that "if much labour were required, it would be General Raikes' duty, as Head of Police, to instruct his men to arrest as many men as possible."[270]

Vagrancy regulations were also enacted in 1898 in Mombasa, in 1900 in the East African Protectorate as a whole, and in 1902 in Nairobi and Uganda.[271] In addition to the usual three-month detention plus hard labor, foreigners could be made to work until they had earned enough to pay for

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264. *Id.* (referencing the Report on Pemba by J.P. Farler, PP 1898, LX, 559, p. 60).

265. Abolition Decree, Zanzibar (1897), Art. 4 ("Any person whose right to freedom shall have been formally recognized . . . shall be bound on pain of being declared a vagrant to show that he possesses a regular domicile and means of subsistence, and where such domicile is situated on land owned by any other person, to pay the owner of such land such rent . . . .").

266. *See* COOPER, *supra* note 263, at 75–76 (explaining that staying with their former slaveowners provided formerly enslaved persons with access to land, homes, food, and to their communities).

267. *Id.* at 111 (citing Farler, Slavery Report, 1901, PP 1903, XLV, 955, p. 11).

268. *Id.* at 113. Penalties for those detained under vagrancy laws also increased in this period. *Id.* at 116.

269. *Id.* at 116.

270. *Id.* (citing Report by Judge Smith respecting Efficiency of Sultan's Courts of Zanzibar, 2 June 1905, FOCP 8691, p. 78).

271. *Id.* at 25; David Anderson, *Kenya, 1895–1939: Registration and Rough Justice*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1965 498, 500 (Douglas Hay & Paul Craven eds., 2004); Justin Willis, *Thieves, Drunkards and Vagrants: Defining Crime in Colonial Mombasa, 1902–1932*, *in* POLICING THE EMPIRE: GOVERNMENT, AUTHORITY, AND CONTROL, 1830–1940, at 219 (David M. Anderson & David Killingray eds., 2d ed. 2017).

their repatriation.[272] Other similar measures were later enacted, such as the Native Porters and Labour Regulations of 1902, the Master and Servants Ordinance of 1906, the Native Registration Ordinance of 1915, and the 1920 Native Registration Amendment Ordinance, which forced Africans to carry their identity documents, known as *kipande*, in metal cases attached to chains worn around their necks.[273] All of these laws broadly served the same goal of forcing local people into work in the formal economy, on substantially reduced terms than those they might otherwise have been able to bargain for.

Shortly after establishing the protectorate of Northern Nigeria in 1897, the British government again had to determine how to address the institution of slavery. Governor Lugard, worrying that the flight of slaves from their captors might undermine British efforts to establish control, "issued secret instructions that slaves were to be discouraged from absconding." In his view, discouraging self-emancipation was positive, insofar as those seeking to flee were seeking "to lead a life of vagrancy in Lokoja, or of comparative idleness in the surrounding country."[274] Slavery was subsequently gradually abolished following proclamations issued in 1901.[275] Slaves were required to obtain their freedom through a sanctioned means, such as by purchasing it, however.[276] Should slaves flee, Special Memo 10 (Slavery) of 1902 defined them as vagrants, who were to be denied rights to land and freedom of movement.[277] The memo jusitifed the necessity of such a policy as it ensures "that these farm servants or serfs [w]ould not leave their traditional employment in agriculture, and be induced to flock into the big cities as 'free' vagrants without means of subsistence," and suggested that local authorities should "do their best to discourage wholesale assertion of 'freedom' by such persons."[278]

This authorities' concern of the emergence of a 'vagrant' population—in other words, an emancipated slave population resistant to continuing to supply their labor on poor terms—was soon reflected in a vagrancy law, passed in 1904[279] and adopted into the 1904 Criminal Code of Northern Nigeria as Chapter XXIA. As the historians Lovejoy and Hogendorn note,

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272. Annual Colonial Report No. 519 East Africa Protectorate, Report for 1905–06, p. 36 (1907).

273. COOPER, *supra* note 263, at 25; Anderson, *supra* note 271; Willis, *supra* note 271.

274. PAUL E. LOVEJOY & JAN S. HOGENDORN, SLOW DEATH FOR SLAVERY: THE COURSE OF ABOLITION IN NORTHERN NIGERIA 1897–1936, at 38 (1993).

275. *Id.* at 71–79. *See also* Gregory Blue, *Slow Death for Slavery: The Course of Abolition in Northern Nigeria, 1897–1936*, 7 J. WORLD HIST. 149 (1996) (providing additional context concerning the slow abolition of slavery in Northern Nigeria).

276. LOVEJOY & HOGENDORN, *supra* note 274, at 71–79.

277. *Id.*

278. *Id.*

279. Act No. 23 of 1904.

the law provided

> a powerful weapon at the disposal of the colonial state. It allowed British officers to look the other way when emirate officials were apprehending fugitive slaves, and it provided legal cover for Residents when they became involved in such cases. Returning fugitive slaves to their masters was illegal; arresting vagrants and giving them the option of a prison term or a return to their masters was not illegal. When combined with restrictions on access to land, the vagrancy law made it very difficult indeed for slaves on the loose.[280]

Support for the policy continued in the following years. In 1911 Orr, a British official, claimed that the approach authorized by the law was necessary "in order to prevent vagabondage and the occupation of land by a horde of masterless runaway slaves, who sought to profit by the Government policy towards slavery by living a life of idleness and lawlessness."[281]

In North Africa too, the British rolled out vagrancy laws. While vagrancy laws of various sorts preceded British entry into Egypt, one author observed that "even stricter means of surveillance and systems of punishment . . . [were] directed toward those members of the itinerant poor who were deemed to be suspect" during the British occupation.[282] In Sudan, the 1899 Penal Code was notable for penalizing a new sort of "habitual vagabond," the "catamite," defined as "any male person who 1) dresses or is attired in the fashion of a woman in a public place or 2) practices sodomy as a means of livelihood or as a profession."[283] That penalty was emulated in Northern Nigeria as well.[284]

Vagrancy laws remained heavily enforced in Africa during the inter-war period. In Kenya, a new Vagrancy Ordinance was passed in 1920, which allowed for poor Africans to be detained and forced into work, repatriated, or imprisoned.[285] The law was emulated by other British colonies in the region in the following years.[286] The law was amended by the 1925 Vagrancy (Amendment) Ordinance, which penalized Africans found moving around

280. LOVEJOY & HOGENDORN, *supra* note 274, at 86.

281. *Id.* (citing CHARLES ORR, THE MAKING OF NORTHERN NIGERIA 202–03 (1911)).

282. Mike Ener, *Prohibitions on Begging and Loitering in Nineteenth-Century Egypt*, 39 DIE WELT DES ISLAMS 339 (1999).

283. HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM 20–22 (Dec. 17, 2008) (citing Sudan Penal Code § 448(2)(e) (1899)).

284. *Id*.

285. Anderson, *supra* note 271; Willis, *supra* note 271.

286. Among other jurisdictions, the law was emulated in Uganda, Zanzibar, Northern Rhodesia, Brunei, Hong Kong, Johore, Kedeh, Sarawak, and the Straits Settlements, despite criticism from the ILO. *See* Andrew Burton & Paul Ocobock, *The "Travelling Native": Vagrancy and Colonial Control in British East Africa*, *in* CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 271, 273–74 (Beier & Ocobock eds., 2008) (discussing the use of vagrancy laws in British colonial East Africa).

after 6:00 pm.[287] In South Africa, the inter-war period saw the passage of numerous measures clearly close in spirit to the vagrancy law tradition, insofar as the limited freedom of movement in the name of control and more effective labor extraction, such as the 1923 Native (Urban Areas) Act.[288] In South West Africa, one of the first steps South African authorities took after assuming control of the territory was the 1920 Vagrancy Proclamation,[289] which was soon complemented by a variety of other repressive measures oriented towards controlling the labor and movement of the native population.[290] The system in South West Africa was so regularized that farmers in need of labor would wait around outside the courthouse, knowing that there they could acquire workers in exchange for meagre compensation.[291]

### C. Conclusion

As the above documents, the vagrancy law tradition that developed in Britain did not remain limited to the island. Rather, it spread to every corner of the British Empire, as well as to the British settler colonies established in North America and Oceania. The 1824 Vagrancy Act and related measures penalized a wide range of activities, for an array of interrelated purposes, including in order to extract labor and to establish social control. At its heart, the expansion of vagrancy law was closely linked to the expansion in the discretionary power of law enforcement authorities, towards which aim it was closely accompanied by expansions in the police forces and the magistracy, institutions which both enforced vagrancy law and drew institutional legitimacy from their role in fighting the 'vagrant' within society. Notably, these developments took place even as the severity of the criminal law as a whole was reduced and as the procedural rights of defendants were expanded,[292] developments that led one historian, Peter King, to declare the early nineteenth century as the period in which the

287. Robert Home, *Township Laws and Urban Governance in Kenya*, 56 J. AFRICAN L. 175 (2012); Mercy Muendo, *Kenyans are still oppressed by archaic colonial laws*, THE CONVERSATION (Mar. 16, 2017), https://theconversation.com/kenyans-are-still-oppressed-by-archaic-colonial-laws-73880. *See generally* COOPER, supra note 263 (discussing forms of labor and urban control in Kenya during the period). The Witchcraft Ordinance of 1925 provided a compliment to the vagrancy law. *See id.*

288. Act 21 of 1923.

289. Proclamation 25 of 1920 (July 1, 1920).

290. Robert Gordon, *Unsettled Settlers: Pacification and Vagrancy in Namibia*, *in* ETHNOGRAPHY IN UNSTABLE PLACES: EVERYDAY LIVES IN CONTEXTS OF DRAMATIC POLITICAL CHANGE 63 (Carol Greenhouse et. al., eds., 2002).

291. *Id.* at 52.

292. One example is legislation that allowed defence counsel to address the jury on behalf of their clients. 6 & 7 Will. IV c. 114 (1836).

"golden age of discretion" in England ended.[293] While it is true that one sort of discretion may have been diminishing, however, attention to vagrancy law makes clear another sort of discretion was expanding.[294]

## III. THE ABSENCE OF VAGRANCY LAWS FROM DICEY'S VISION OF THE RULE OF LAW

As the previous section details, vagrancy and vagrancy-type laws were long-established, ubiquitous, and heavily relied upon across England, the British Empire, and British colonial world by the early twentieth century. In every iteration, vagrancy laws authorized arbitrary and discretionary powers; that they did so was, in fact, central to their appeal. As the attention of public law scholars increasingly turned to recognizing the illegitimacy of such forms of law and power across the period, one might have expected that vagrancy laws would therefore come under serious attack and critique.

In reality, however, public law theorists paid little to no attention to vagrancy and vagrancy-type laws in the turn of the century period. When writers did attend to such laws, moreover, they were often supportive. Despite—or perhaps better, closely linked to—his general preference for a laissez-faire approach to legality, American legal theorist Christopher Tiedeman took the view that vagrancy laws were justified due to the fact that the vagrant was "the chrysalis of every species of criminal."[295] In other words, 'vagrants' were a real category of person; while some might not yet have engaged in serious crime, they were likely to do so in the future; hence, a firm, preemptive, and carceral approach towards such individuals was justified.[296] For other public figures of the period too, including the author

293. KING, *supra* note 69, at 1.

294. This was not only true in terms of the discretionary authority contained within the broad, vague penalizations authorized by vagrancy laws, but also in the expansion of the summary jurisdiction of magistrates in the period, including measures such as the Indictable Offences Act (11 & 12 Vict. C. 42 (1848)), the Summary Jurisdiction Act (11 & 12 Vict. C. 43 (1848)), and the Justices Protection Act (11 & 12 Vict. C. 44 (1848)). These laws are known collectively as the "Jervis Acts" after Attorney General John Jervis, who oversaw their passage. For more on the expansion of summary jurisdiction in the early nineteenth century, see Thomas Sweeney, The Extension and Practice of Summary Jurisdiction in England, c. 1790–1860 (1985) (Ph.D. dissertation, Cambridge University) (exploring the dramatic expansion in authorization of and reliance on summary judgment in early nineteenth century England); Bruce Smith, Circumventing the Jury: Petty Crime and Summary Justice in London and New York City, 1790–1855 (1996) (Ph.D. dissertation, Yale University) (examining the use of summary jurisdiction in London and New York City in the late eighteenth and early nineteenth centuries); Bruce Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 L. & HIST. REV. 146 (2005) (highlighting the use of summary proceedings in petty theft cases in late eighteenth and early nineteenth century England).

295. CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 116–17 (1886).

296. *Id.*

Bram Stoker, vagrants were a menace to be addressed—thus Stoker observed "[t]he 'Tramp' question is eternal. No age or country has been able to solve it satisfactorily," before speculating as to whether some form of public branding might be possible, and calling for tramps to "be sent to a Labor Colony set far away in the heart of some fastness."[297]

More common, however, was simple failure to mention the issue at all. The general lack of attention to vagrancy law in the period may be seen, for instance, in Dicey's *Introduction to the Study of the Law of the Constitution*.[298] Dicey's work is valuable in this context for a few reasons. First, it was hugely influential in its time.[299] Second, it has been influential ever since, not least for popularizing the terminology of the "rule of law."[300] Third, Dicey had plenty of time to consider what to include in the volume, as the *Introduction* went through eight editions between 1885 and 1915.[301]

Finally, and perhaps most significantly, Dicey's work provides a valuable site for reflection due to the manner in which Dicey laid out the fundamental aspects of the "rule of law," which he presented as closely linked to the common law tradition.[302] First, the rule of law encompassed limitations on the executive's ability to arrest, detain, and expel.[303] In contrast to "almost every continental community," where "the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like," in Dicey's view the common law imposed tight limitations on the English government's ability to infringe personal liberty.[304] In fact, Dicey went so far as to observe that "[a]t the present day . . . the securities for personal freedom are in England as complete as laws can make them."[305] Elsewhere, Dicey expressed a similar point by observing that the first thing the rule of law required was "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power," meaning a system

297. Bram Stoker, *The American "Tramp" Question and the Old English Vagrancy Laws*, 190 N. AM. REV. 605, 605, 614 (1909).

298. *See generally* DICEY, *supra* note 28.

299. *See* Martin Loughlin, *AV Dicey and the Making of Common Law Constitutionalism*, 42 OXFORD J. LEGAL STUD. 366, 366 (2021) (underlinging the importance of Dicey's work relative to subsequent British constitutional thought).

300. *See id.* at 371 (explaining that judges operating within Dicey's framework have elevated the importance of the rule of law).

301. DICEY, *supra* note 28.

302. *See id.* (As Dicey put it, "the 'rule of law'" was "peculiar to England, or to those countries which, like the United States of America, have inherited English traditions").

303. *See id.* (outlining limitations of the ability of the executive power in England to arbitrarily deprive individuals of their liberty).

304. *Id.*

305. *Id.* at 133.

"exclud[ing] the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government."[306] Second, the rule of law was constituted by the authority of the ordinary courts over state officials, as it required that "every man, whatever be his rank or condition, [be] amenable to the jurisdiction of the ordinary tribunals."[307] Third, the rule of law required that "the general principles of [constitutional law arise as a] . . . result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."[308]

Dicey's vision of the rule of law had numerous shortcomings, including due to his limited vision of "democracy."[309] One of its greatest strengths, however, laid in the first characteristic Dicey defined as fundamental to the rule of law, namely resistance to the exercise of discretionary authority to deprive individuals of their liberty. Given this emphasis, one might have expected that Dicey would have devoted some attention to vagrancy laws, because they constituted an overt, unvarnished means through which the authorities acquired arbitrary power to deprive individuals of their liberty. Yet while Dicey alotted extensive attention to limitations on high profile deprivations of liberty,[310] he made no mention of how common law legal systems arbitrarily interfered with the liberty of poorer members of the population on an everyday basis. Dicey's blind spot might have been excusable were the everyday exercise of arbitrary, discretionary power to deprive citizens of their liberty not a practical, ongoing concern at the time Dicey was writing. As the previous exploration has made clear, however, nothing could have been further from the case.

What is the significance of Dicey's intervention in this regard? On the one hand, it should not be regarded as entirely negative. The vision of the rule of law Dicey worked hard to establish, as a legal order opposed to arbitrary infringements of liberty, was and remains one worth holding onto. It was, moreover, a vision which, if carried through to its logical conclusions, contained within it the resources upon which a powerful challenge to

306. *Id*. at 120.

307. *Id*. at 114.

308. *Id*. at 115.

309. *See id.* at xli (expressing disdain for extension of the franchise to both poorer members of the population and to women). In the introduction to the eighth version of his *Introduction*, Dicey made his disdain for a broad vision of democracy apparent, suggesting *inter alia* that expanding the franchise had "given votes . . . to citizens who . . . hardly perceive the risk and ruin involved in a departure from the rule of law," indicating his disdain for the women's suffrage movement, and for expressing his disapproval of workers' exercise of the rights to freedom of assembly and association. *Id.* at lix-lx, lxxvi-lxxxiv, lvii-lviii. His idea of the rule of law, therefore, was clearly one in and from which the interests of the entirety of the population were not reflected equally.

310. For a similar point, see Dylan Lino, *The Rule of Law and the Rule of Empire: A. V. Dicey in Imperial Context*, 81 MOD. L. REV. 739, 739 (2018).

vagrancy law might be mounted. While such a challenge would not take place in Dicey's lifetime, as the following section explores, that challenge would be made eventually, although more than a half century later and an ocean away.

On the other hand, Dicey's work has given rise to a more troubling legacy. It would have been worrying enough if vagrancy and vagrancy-type laws were heavily enforced while being viewed with a degree of suspicion by public law thinkers. The situation Dicey facilitated was worse, however. By ignoring everyday exercises of arbitrary detention while promoting the idea of the rule of law, Dicey helped to invisibilize vagrancy law. His theory thus rendered a form of ideological support to the violence and inequality inherent in such legal orders, helping make vagrancy law regimes harder to challenge. In addition, insofar as Dicey's work constituted an important touchstone in the development of constitutional law within the global common law tradition, the absence of any discussion of vagrancy law from his work helped normalize such an absence from subsequent public law texts. Finally, by not treating vagrancy law seriously, Dicey failed to recognize that the expansion in the scope and strength of the power of 'judicial' actors might be linked not only to the protection of individual liberty, but also to its arbitrary deprivation.

## IV. TWENTIETH AND TWENTY-FIRST CENTURY ATTEMPTS AT REFORM

### A. The First Wave of Challenges

While vagrancy laws remained an entrenched part of every common law regime when World War II ended, they came under serious attack in several jurisdictions over the following decades. Early glimmerings of dissent could be seen in England in the 1930s, thanks in no small part to the work of the newly-formed National Council for Civil Liberties.[311] In its 1936 decision in *Ledwith v. Roberts*, the Court of Appeal found it baseless to arrest a person who spent 25 minutes in a telephone booth, on the grounds that he was a suspicious person (under the terms of the 1824 Vagrancy Act) preparing to rob the phone.[312] Yet the holding was narrowed a few years thereafter by *Rawlings v. Smith*, in which the High Court found it justified to

311. Lawrence, *supra* note 87, at 520–22. For sources that explore the origins and history of the NCCL, see
André Keil, *The National Council for Civil Liberties and the British State During the First World War, 1916–1919*, 134 ENG. HIST. REV. 620 (2019); & BRIAN DYSON, LIBERTY IN BRITAIN 1934–1994: A DIAMOND JUBILEE HISTORY OF THE NATIONAL COUNCIL FOR CIVIL LIBERTIES (1994).

312. Ledwith v. Roberts [1936] 3 All E.R. 570 (C.A.).

arrest a man on suspicion after he tried several car door handles.[313] Thus, the 1824 Vagrancy Act continued to serve as a basis for arbitrary arrests in the home of Dicey's "rule of law" in the decades following his theoretical interventions. As Theobald Mathews, the Director of Public Prosecutions, observed in 1945, "one cannot tinker with the Vagrancy Acts. Their vocabulary and some of their penalties are obsolete, but on the other hand they are useful for dealing with common offences not covered elsewhere."[314]

An ocean away, in the United States, more significant challenges to vagrancy law arose. In the 1940s, vagrancy laws remained heavily enforced in the United States, where they were "regarded as essential preventives, providing a residual police power to facilitate arrest, investigation and incarceration of suspicious persons."[315] In the District of Columbia in 1941 police officials told Congress that one of their "principle needs" in order to effectively combat crimes was "strengthening of the existing vagrancy law."[316] Yet a series of Supreme Court decisions during and shortly after World War II started chipping away the legitimacy of vagrancy laws.[317] In *Lanzetta v. New Jersey* the Court struck down a New Jersey statute that prohibited being a "gangster" because it was unconstitutionally vague.[318] In *Thornhill v. Alabama* and *Carlson v. California* the Court knocked down loitering laws that were being used against unions.[319] In *Edwards v. California* the Court found a statute banning the entry of indigent persons into California unconstitutional.[320] In *Winters v. New York* the Court struck down a New York law penalizing the distribution of obscene publications reasoning that its overly vague wording infringed the First Amendment.[321] Dissenting from the judgment, Justice Frankfurter indicated that he read over-vagueness more narrowly, yet he considered vagrancy laws an exception, observing approvingly relative to *Lanzetta*

313. Rawlings v. Smith [1938] 1 K.B. 675.

314. Lawrence, *supra* note 87, at 525.

315. Foote, *supra* note 13, at 614.

316. *Id*. (citing H.R. Rep. No. 1248, 77th Cong., 1st Sess. 1 (1941)).

317. *See, e.g.*, Weinrib, *supra* note 214, at 1673 n. 9 (discussing challenges to vagrancy laws in the period).

318. *See generally* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (finding that the challenged provision violated the Fourteenth Amendment due to its vagueness). There were earlier precedents as well, including Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931) and People v. Belcastro, 190 N.E. 301 (Ill. 1934).

319. *See generally* Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that an Alabama law prohibiting labor picketing was invalid); Carlson v. California, 310 U.S. 106 (1940) (striking down a local ordinance that prohibited picketing).

320. *See generally* Edwards v. California, 314 U.S. 160 (1941) (holding that the statute in question was an unconstitutional barrier to interstate commerce).

321. Winters v. New York, 333 U.S. 507, 519–20 (1948).

> The case Involved a . . . statute . . . that seek[s] to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . 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.[322]

An important subsequent step came through the publication of a note highly critical of vagrancy laws in *Yale Law Journal* in 1950, which argued that vagrancy laws "offend traditional standards of criminal procedure," "burden defendants with a presumption of criminality," and "are so broadly phrased as to permit the police and trier of fact to determine the question of guilt according to their own moral and political standards."[323] In 1953, the Supreme Court decided *Edelman v. California.*[324] The case was not a victory for anti-vagrancy law advocates, as the Court upheld a conviction of the defendant, a long-time public advocate of progressive change, for being a "dissolute person."[325] Yet the majority tacitly recognized a possible critique of the underlying charge, indicating that they felt they could not reach the "serious constitutional questions" posed here because they had not been properly raised below.[326] Justices Black and Douglas, meanwhile, issued a powerful dissent, criticizing the penalization in question *inter alia* on the grounds of its vagueness and that it outlawed status, not conduct.[327] The same year Forest Lacey published a piece in *Harvard Law Review* that echoed the dissent's disapproval of the status-criminalizing nature of such laws, noting that vagrancy was a "crime in which the offense consists of being a certain kind of person rather than in having done or failed to do certain acts," which, he suggested, raised "important constitutional problems" and varied "significant[ly] . . . from usual criminal procedure."[328] Lacey further observed that it was "not clear that those persons subject to arrest on vagrancy charges are necessarily or even probably prospective criminals," and that "the breadth of the vagrancy statutes is such that the police are almost inevitably driven to an arbitrary selection of the persons to be prosecuted."[329] A few years later, Caleb Foote penned an insightful and

322. *Id.* at 540.

323. *Use of Vagrancy-Type Laws for Arrests and Detention of Suspicious Persons*, *supra* note 13, at 1352–53.

324. Edelman v. California, 344 U.S. 357 (1953); GOLUBOFF, *supra* note 19, at 27–37 (describing the history and background of the case).

325. *Id.* at 364.

326. *Id.* at 358.

327. *Id.* at 364–66.

328. Lacey, *supra* note 22, at 1203–04.

329. *Id.* at 1224.

highly critical portrayal of the use of vagrancy laws in Philadelphia.[330] Under the heading of "vagrancy-type laws" Foote included habitual drunkenness and disorderly conduct, both of which he perceived as producing similar effect as vagrancy charges in practice.[331] Among other critiques, Foote observed that vagrancy laws had in the past been used "to support arrests for activities the police desired to suppress," including labor organizing in particular.[332] In 1960, Justice Douglas weighed in to similar effect with a piece in the *Yale Law Journal*, in which he criticized, *inter alia*, the vagueness of such laws, their targeting of status, the arbitrary power they granted the authorities, the violations of due process rights, and their restriction on freedom of movement.[333] In 1962, Gary Dubin and Richard Robinson published another broad critique, in support of initiatives within the American Law Institute to "[jettison] the offense of 'vagrancy,' as largely obsolete . . . unconstitutionally vague, and restrictive of liberty."[334] Despite these critiques, vagrancy and related charges continued to account for a large share of non-traffic arrests nationwide, up to 75% in several major cities.[335]

As these critiques developed, so too did legal reform efforts. In 1958, under widespread pressure, the Californian legislature passed amendments to the state's vagrancy laws.[336] While the amendments removed antiquated expressions and amended the wording of the laws such that conduct rather than status was at least formally targeted, expansive discretionary power to arrest those deemed suspect was nonetheless left in police's hands.[337] The

330. Foote, *supra* note 13.

331. *Id.*

332. *Id.* at 629.

333. *See* William Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE. L.J. 1, 7–10 (1960) (explaining the problems that attorneys face in reading vagrancy statutes, including whether the statutory standard is overly vague when criminalizing "'habitual' loafers and those who 'knowingly associated' with people who have a criminal reputation"). Another critical piece, published a few years earlier, was Rollin Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958). Other related critical pieces issued in 1960 included Arthur Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960) and Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

334. Dubin & Robinson, *supra* note 22, at 136 n.196 (1962). Other significant pieces published in the following years include Amsterdam, *supra* note 22; Gerald Magaro, *Criminal Penalties for Vagrancy—Cruel and Unusual Punishment Under the Eighth Amendment*, 18 CASE W. RSRV. L. REV. 1309 (1967); Harold Engel, *Constitutional Law—Conviction as a Vagrant of Persons Who Are Unemployed and Who Are Able to Work and Who Have No Visible Means of Support Is an Overreaching of Police Power and a Denial of Due Process*, 14 HOW. L.J. 402 (1968).

335. *See* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 782 n.7 (1968) (noting that a arrests for "drunkenness, disorderliness, and vagrancy" made up over 75% of the arrests made in some major cities).

336. *See* GOLUBOFF, *supra* note 19, at 67–69 (detailing legislative amendments to California's vagrancy laws in the 1950s).

337. *Id.*

amendments were vetoed by the governor.[338] Reformers regained the momentum when the "common drunkard" clause of the state vagrancy law was struck down by the California Supreme Court as overly vague in 1960.[339] In the following year, a new revised vagrancy law went into effect.[340]

The mounting criticism in the 1950s paved the way for national judicial challenge. In its 1960 decision in *Thompson v. City of Louisville*, a case involving a defendant convicted under a loitering statute penalizing individuals "without visible means of support" and/or "unable to give a satisfactory account" of themselves, the Supreme Court found the law run afoul of due process because the defendant was convicted despite absence of evidence of guilt.[341] In its 1962 decision *Robinson v. California,* the Supreme Court invalidated a California statute that criminalized addiction as such.[342] In *Edwards v. South Carolina* the Court found the defendant's First Amendment rights had been violated as they were arrested under a law criminalizing breach of the peace during a civil rights protest.[343] In *Cox v. Louisiana* the Court struck down a law prohibiting public assemblies that had a tendency to breach peace on the grounds that it was too vague and broad.[344] In *Shuttlesworth v. City of Birmingham* the Court revereseed the conviction of a civil rights protestor, reasoning that the relevant sections in Birmingham's City Code that granted police broad powers to regulate sidewalk usage was vague.[345]

In the latter part of the 1960s vagrancy laws faced increasing challenge from state courts as well.[346] In 1967 the American Law Institute agreed in

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338. *Id.*

339. *See* In re Newbern, 350 P.2d 116, 124 (Cal. 1960) (finding several problems with the vague nature of the penalty in question).

340. *See* GOLUBOFF, *supra* note 19, at 70–71 (discussing the new vagrancy law).

341. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960). For more, see GOLUBOFF, *supra* note 19, at 74–111 (describing the background, proceedings, and outcome of *Thompson*).

342. Robinson v. Cal., 370 U.S. 660, 666–67 (1962).

343. Edwards v. S.C., 372 U.S. 229, 237 (1963).

344. Cox v. La., 379 U.S. 536, 558 (1965). *See also* Brown v. La., 383 U.S. 131, 143 (1966) (holding that a State "may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights").

345. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965). For more on the strong overlap between civil rights and vagrancy cases in the period, see GOLUBOFF, *supra* note 19, at 112–46 (describing the work by civil rights advocates to challenge vagrancy laws in the period).

346. *See* United States v. Margeson, 259 F. Supp. 256, 268 (E.D. Pa. 1966) (striking down a statute which criminalized persons who could not give a "good account of [themselves]"); Baker v. Bindner, 274 F. Supp. 658, 662 (W.D. Ky. 1967) (striking down a vagrancy statute because it did not provide "fair notice" and was "arbitrary as to its standards and . . . grossly susceptible of overreaching federal constitutional guarantees by lending itself for ready use by officials against those deemed to merit their displeasure"); Alegata v. Commonwealth, 231 N.E.2d 201, 211 (Mass. 1967) (striking down a statute criminalizing "disorderly" behavior); Fenster v. Leary, 20 N.Y.2d 309, 316 (N.Y. 1967) (holding that "it

principle to remove the Model Penal Code's vagrancy offense language. Yet drafters were uncertain what to do beyond that—as Goluboff recounts,

> In practice, the drafters worried that nobody would "pay the slightest bit of attention" to a Code that eliminated vagrancy law altogether . . . Fears about police capacity to control serious crime seemed to require some residual reservoir of authority, even if traditional vagrancy was increasingly illegitimate. The ALI thus concluded that if any part of the vagrancy laws was to be retained it should be a "suspicious loitering" provision . . . [in the alternative the] drafters . . . wondered whether instead of criminalizing suspicious behavior, they should treat the issue "as a matter of procedure, outside the Penal Code, relating to definition of police power to question and detain."[347]

A similar dynamic was unfolding in practice—in New York state, for instance, the penalization of vagrancy was replaced by the penalization of loitering, complemented by a new law expanding police powers to "stop and frisk."[348]

The following years saw further challenge to vagrancy laws nationwide. In 1971 the Supreme Court, in *Palmer v. City of Euclid*, found a city ordinance that penalized people found abroad at night unable to satisfactorily explain their business unconstitutional as applied to the defendant.[349] In *Coates v. City of Cincinnati* the court declared the unconstitutionality of a city ordinance penalizing loitering (applied against a political sidewalk assembly) due to breadth and vagueness.[350] Finally, in its 1972 decision

should by now be clear to our governmental authorities that the vagrancy laws were never intended to be and may not be used as an administrative short cut to avoid the requirements of constitutional due process in the administration of criminal justice"); Parker v. Municipal Judge, 427 P.2d 642, 646 (Nev. 1967) (indicating that "[t]he main constitutional attack on vagrancy laws is that they can be construed as crimes of status rather than conduct . . . arising out of idleness or indigency"); Ricks v. District of Columbia, 134 U.S. App. D.C. 201, 214 (D.C. Cir. 1968) (observing that "not even past violation of the criminal law authorizes one's subjection to innately vague statutory specifications of crime"); Smith v. Hill, 285 F. Supp. 556, 563 (E.D.N.C. 1968) (striking down an ordinance for failing to state a standard of guilt or forbid a specific act); Recks v. U.S., 414 F.2d 1111, 1119 (D.C. Cir. 1968) (striking down a statute allowing arrests based on mere suspicion of narcotics activity); Goldman v. Knecht, 295 F. Supp. 897, 906 (D. Colo. 1969) (striking down a statute demmed to lead to an "arbitrary process based on the personal views of the arresting officer or the philosophy of the court hearing the case."); Broughton v. Brewer, 298 F. Supp. 260, 271 (S.D. Ala. 1969) (striking down a statute that criminalized vagrancy ); Lazarus v. Faircloth, 301 F. Supp. 266, 272 (S.D. Fla. 1969) (finding that "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").

347. GOLUBOFF, *supra* note 19, at 201–02.

348. *Id.* at 202–04.

349. Palmer v. City of Euclid, 402 U.S. 544, 546 (1971) (observing that "everything appellant did was quite visible and there is no suggestion whatsoever that what he did was unlawful under local, state, or federal law").

350. Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (finding that the ordinance in question was "aimed directly at activity protected by the Constitution").

*Papachristou v. City of Jacksonville* the Court found a fairly typical vagrancy law void on the basis of vagueness and due to the manner in which it authorized arbitrary arrests.[351] Several lower court rulings followed suit.[352]

The wave of reform in the United States had effects elsewhere in the world. In Canada, the 1953-54 redrafting of the penal code reformed Canada's vagrancy law. The progressive impact of the reforms was limited, however, as the provisions penalizing begging and "wandering" with no visible means of subsistence were rewritten rather than removed.[353] The offences of neglecting to work, public indecency, and loitering were removed as constitutive offences of vagrancy, but both loitering and public indecency were maintained as offences under separate headings.[354] More substantial reforms were undertaken during Pierre Trudeau's Prime Ministership in the early 1970s. In 1972, the same year *Papachristou* was decided, wandering without apparent means of support, begging, and being a "common prostitute" were all decriminalized.[355]

In England, vagrancy laws were also effectively challenged in the late 1970s and 1980s. A Home Office Working Party set up to consider vagrancy law in 1971 observed that law in the area was curious, insofar as it "attempt[ed] to control behaviour which is in itself neither a substantive offence nor an attempted offence."[356] The Working Party nonetheless

351. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (holding that "where . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

352. *See* City of Portland v. White, 495 P.2d 778, 779 (Or. Ct. App. 1972) (striking down a loitering ordinance); People v. Berck, 32 N.Y.2d 567, 574 (N.Y. 1973) (striking down a loitering ordinance); Powell v. Stone, 507 F.2d 93, 95 (9th Cir. 1974) (striking down a vagrancy ordinance); City of Bellevue v. Miller, 85 Wash. 2d 539, 547 (1975) (striking down an ordinance criminalizing "wandering or prowling"); Brown v. Municipality of Anchorage, 584 P.2d 35, 38 (Alaska 1978) (striking down an ordinance criminalizing "loitering for the solicitation of prostitution"); Johnson v. Carson, 569 F. Supp. 974, 975 (M.D. Fla. 1983) (striking down a loitering ordinance); Coleman v. City of Richmond, 5 Va. App. 459, 467 (Va. Ct. App. 1988) (finding a loitering ordinance unconstitutional on First Amendment grounds); State v. Bitt, 798 P.2d 43, 49 (Idaho 1990) (striking down a "loitering and prowling" ordinance). In 1983, the Supreme Court found another, redrafted vagrancy-type law unconstitutional on the similar grounds that it vested too much discretion in the hands of the authorities. Kolender v. Lawson, 461 U.S. 352, 361–62 (1983). The relevant provision allowed detention of every person "who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Cal. Penal Code § 647(e) (1970).

353. Canada Criminal Code, C. Gaz. 1954, c 151.

354. For more, see Prashan Ranasinhe, *Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972*, 48 OSGOODE HALL L.J. 55, 68 (2010) (exploring vagrancy law reforms in Canada in the mid-twentieth century).

355. *See id.* at 87 (noting "criminal law was deemed inappropriate to attend to the potential concerns posed by these three classes of vagrants").

356. Lawrence, *supra* note 87, at 525.

suggested such laws should be maintained, precisely because they granted such a vague and expansive power.[357] The power to arrest based on suspicion was more forcefully criticized in 1978.[358] Three years later, the 1981 Criminal Attempts Act repealed Section 4 of the 1824 Vagrancy Act, the provision that authorized arrest on suspicion alone.[359] In New Zealand the explicit penalization of vagrancy came to an end in 1981,[360] while in Australia the Vagrancy Act was repealed in 2005.[361]

B. Limits

While by the early 1970s vagrancy laws were under serious challenge in the United States—the strongest attack such laws had ever faced in the common law world—these challenges were limited in both their extent and their jurisdictional scope. A lack of clarity as to the precise manner in which vagrancy laws were unconstitutional[362] helped sustain and even stregnthen vagrancy-type laws, even though vagrancy laws themselves had been declared unconstitutional. As the 1970s gave way to the 1980s and 90s, cities throughout the nation began rediscovering curfews, anti-loitering laws, order-maintenance policing, and related law-enforcement strategies.[363] While some courts struck down such new variants of the vagrancy law tradition,[364] drawing on the newly-developed anti-vagueness doctrine, others upheld such laws.[365] Some scholars denounced this renaissance of vagrancy-

357. *See id.* (the Working Party concluded "that it was useful to be able to obtain convictions in cases where 'the conduct of the accused, while going beyond anything likely to be susceptible of an innocent explana-tion [did] not amount to a substantial step towards the commission of an offence.'").

358. *See generally* Stuart Hall et al., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978) (exploring law and order measures adopted by the British state in the 1970s).

359. Criminal Attempts Act 1981 c. 47 (UK), https://www.legislation.gov.uk/ukpga/1981/47/enacted.

360. *See* New Zealand Summary Offences Act 1981, Public Act No. 113 of 1981 (Oct. 23, 1981) (removing the criminal penalization of vagrancy, while maininging the criminalization of other vagrancy-type offences).

361. *See Australia Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005*, (Cth) s 5 (Austl.) (repealing Australia's Vagrancy Act).

362. As Weinrib observes, "*Papachristou* . . . rested on a narrow basis that preserved plenty of space for police discretion." Weinrib, *supra* note 214, at 1679. *See also* Beckett & Herbert, *supra* note 25, at 110 (theorizing that new social control laws have replaced vagrancy laws, providing "the police with an important set of tools for general order maintenance").

363. Kahan & Meares, *supra* note 25, at 1160–61.

364. *See, e.g.*, E.L. v. Florida, 619 So. 2d 252 (Fla. 1993) (striking down the ordinance in question for being too vague, overbroad, and inconsistent with substantive due process); City of Akron v. Rowland, 618 N.E.2d 138 (Ohio 1993) (finding A.C.O. 138.26 violated federal and state due process clauses on grounds of vagueness and breadth); City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1997) (holding that the gang loitering law in question was an impermissible restriction on personal liberty and violated substantive due process).

365. The following cases upheld new versions of vagrancy laws: City of Milwaukee v. Wilson, 291

type laws,[366] others supported these new measures. Proponents applauded these laws on various grounds. Some strongly supported (poverty-oriented) public order policing.[367] Some believed in the necessity and virtue of a certain degree of police discretion relative to public order policing generally.[368] Some found traditional opposition to vagrancy laws justifiable because vagrancy laws were closely related to the history of racial discrimination, yet believed minority communities' support for the new laws rendered them less problematic.[369] A major challenge to gang laws, one crucial branch of the new vagrancy-type laws, came in 1999, when the Supreme Court struck down Chicago's "Gang Congregation Ordinance," which had allowed for the issuance of dispersal orders and the penalization of persons remaining in public space "with no apparent purpose."[370] The city simply responded with a more locally targeted version of the same law, however, which survived challenge.[371] Meanwhile, laws penalizing homelessness were passed in cities around the country.[372]

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N.W.2d 452 (Wis. 1980); City of South Bend v. Bowman, 434 N.E.2d 104 (Ind. Ct. App. 1982); Watts v. State, 463 So. 2d 205 (Fla. 1985); State v. Evans, 326 S.E.2d 303 (N.C. Ct. App. 1985); People v. Superior Court (Caswell), 758 P.2d 1046 (Cal. 1988); People v. Bright, 520 N.E.2d 1355 (N.Y. 1988); City of Milwaukee v. Nelson, 439 N.W.2d 562 (Wis. 1989); State v. E.L., 595 So. 2d 981 (Fla. Dist. Ct. App. 1992), *overruled by* E.L. v. State, 619 So. 2d 252 (Fla. 1993); City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992); People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997).

366. *See* Wayne LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983) (arguing that new vagrancy-type laws undermine the Fourth Amendment and restrict people's liberties); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1257 (1990) (positing that vagrancy-type laws continue to violate Fourth Amendment rights); Joel Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT. L. REV. 461 (1993) (suggesting that loitering laws must be carefully drafted to prevent constitutional infringements); Stewart, *supra* note 25 (arguing that new vagrancy-type laws are an unacceptable way to attempt to reduce crime).

367. *See* Clarence Thomas, *Keynote Address at Federalist Society Symposium*, YOUTUBE (Nov. 16, 2016), https://www.youtube.com/watch?v=qkrxhvwLmsA&ab_channel=TheFederalistSociety, *reprinted in* 1 MICH. L. & POL'Y REV. 269 (1996); William Barr, *A Practical Solution to Crime in Our Communities*, 1 MICH. L. & POL'Y REV. 393 (1996) (arguing that stronger police action is positive); Robert Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE. L.J. 1165 (1996) (suggesting that vagrancy-type laws promote the safety of cities).

368. *See* Deborah Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (arguing that a degree of police discretion is necessary).

369. *See* Kahan & Meares, *supra* note 25, at 1163–66 (describing the ways through which African-American community groups "supplied critical support for community policing techniques.").

370. City of Chicago v. Morales, 527 U.S. 41, 53 (1999).

371. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 112 (2002).

372. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 2 (1996); Harry Simon, *Municipal Regulation of the Homeless in Public Spaces*, *in* HOMELESSNESS IN AMERICA (Jim Baumohl ed., 1996); Don Mitchell, *The Annihilation of Space by Law:*

Elsewhere, the story was similar. While Canada emulated the United States in striking down its vagrancy laws, there too, broader discretionary police power remained intact, while vagrancy-type laws were effectively reinstituted through municipal measures such as bans on "panhandling" and "safe streets" measures.[373] In England, despite the repeal of Section 4, the "sus" clause, from the 1824 Vagrancy Act,[374] the act itself remained on the books until 2022, when it was finally scrapped.[375] Moreover, numerous vagrancy-type laws have been passed since 1981, expanding the authorities' arbitrary discretion to detain the poor. Section 5 of the 1986 Public Order Act allows for arrest and punishment on the basis of "disorderly behavior" or threatening visible representations.[376] The "Injunctions to Prevent Nuisance and Annoyance" and "Public Space Protection" orders enabled by the 2014 Anti-Social Behaviour, Crime and Policing Act[377] both granted the

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*The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 306–07 (1997); National Center on Homelessness & Poverty, *supra* note 25, at 6–9.

373. *See* Todd Gordon, *The Return of Vagrancy Law and the Politics of Poverty in Canada*, 54 CANADIAN REV. SOC. POL'Y 34, at 34 (2004) (considering the reintroduction of various vagrancy-type laws in Canada).

374. *See supra* note 362 and accompanying text.

375. For some of the calls for that reform, see Crisis et al., *Adjournment Debate Briefing and Lines: Use of the 1824 Vagrancy Act – Layla Moran MP*, CENTREPOINT (Jan. 29, 2019), https://centrepoint.org.uk/media/3189/vagrancy-act-1824-adjournment-debate-lines-for-mps-29-01-2019.pdf; Patrick Greenfield & Sarah Marsh, *Calls for 195-year-old Vagrancy Act to be Scrapped in England and Wales*, THE GUARDIAN (June 19, 2019), https://www.theguardian.com/society/2019/jun/19/calls-for-195-year-old-vagrancy-act-scrapped-homeless. On the reform itself, see Police, Crime, Sentencing and Courts Act 2022, c. 32.

376. Public Order Act 1986, c. 64, § 5.

377. 2014, c. 12. "IPNAs" replaced "ASBOs," *i.e.* "Anti-Social Behavior orders," which had been authorized by the Crime and Disorder Act (1998, c. 37). For an explanation of the problems with the ASBO/IPNA regime, see Andrew Ashworth et al., *Neighbouring on the Oppressive: The Government's 'Anti-Social Behaviour Order' Proposals*, 16 CRIM. JUST. 7 (1998) (arguing that the anti-social behavior order regime proposed was poorly designed); PETER SQUIRES & DAWN STEPHEN, ROUGHER JUSTICE: ANTI-SOCIAL BEHAVIOR AND YOUNG PEOPLE (2005); ELIZABETH BURNEY, MAKING PEOPLE BEHAVE: ANTISOCIAL BEHAVIOUR, POLITICS AND POLICY (2005); ANDREW SIMESTER & ANDREW VON HIRSH, INCIVILITIES: REGULATING OFFENSIVE BEHAVIOR (2006); Comm. On the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (2008) (expressing concerns over the proposed statute); PETER SQUIRES, ASBO NATION: THE CRIMINALISATION OF NUISANCE (2008); Adam Crawford, *Governing Through Anti-social Behaviour: Regulatory Challenges to Criminal Justice*, 49 BRIT. J. CRIMINOL. 810 (2009) (positing that the statute would be inconsistent with traditional conceptions of criminal justice); Adam Crawford, *Criminalizing Sociability Through Anti-Social Behaviour Legislation: Dispersal Powers, Young People and the Police*, 9 YOUTH JUST. 5 (2009) (criticizing the attempt to present youths as a criminal threat); Barry Goldson, *The Sleep of (Criminological) Reason: Knowledge—Policy Rupture and New Labour's Youth Justice Legacy*, 10 CRIMINOLOGY & CRIM. JUST. 155 (2010) (arguing that the new laws posed challenging questions pertaining to democracy, power, and accountability); Chris Cunneen et al., *Human Rights and Youth Justice Reform in England and Wales: A Systemic Analysis*, 18 CRIMINOLOGY & CRIM. JUST. 367 (2017) (criticizing the discretionary powers granted to law enforcement authorities under the act); JAMES MORRISON, SCROUNGERS: MORAL PANICS AND MEDIA MYTHS (2019) (arguing that these types of laws

police wide powers to detain individuals they deemed suspect or threatening. Imprisoning inividuals for council tax debt, a form of penalization of the poor, has been deployed arbitrarily and overwhelmingly against poor women, many of whom have been unlawfully imprisoned even according to the rules in force.[378] In New Zealand, Section 28 of the Summary Offences Act of 1981 still penalizes loitering and trespass, allowing a person found behaving in public "in a manner from which it can reasonably be inferred that he is preparing to commit an imprisonable offence" to be fined or, when convicted for a second time, imprisoned.[379] Furthermore, several municipal councils in New Zealand continue to penalize begging. In Australia, vagrancy-type laws are typically found at the sub-national level. In New South Wales, for instance, while vagrancy and begging have been decriminalized, vagrancy-type penalizations are applied in the form of the "move on" powers granted by New South Wales's 2002 Law Enforcement (Powers and Responsibilities) Act[380] and consorting laws.[381]

In many former British colonies, vagrancy laws have never been effectively challenged. The legitimacy of such laws has been reinforced by a curious feature of the decolonization process. Lacking a written constitution of their own, the British looked heavily to the European Convention on Human Rights as a source of inspiration for the constitutions they bequeathed to decolonizing societies.[382] The European Convention on Human Rights, however, contained a provision legitimizing vagrancy laws.[383] Consequently, numerous jurisdictions in the formerly British colonial world, including in Africa in particular, were left with provisions in their constitutions authorizing vagrancy laws. While some states have

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led people to associate low-income individuals with addiction and delinquency).

378. Rona Epstein, *Punishing the Poor: The Scandal of Imprisonment for Council Tax Debt*, 75 SOCIALIST LAW. 33, 33 (2017); CHRIS DAW, UNFAIR, INEFFECTIVE AND UNJUSTIFIABLE: THE CASE FOR ENDING IMPRISONMENT FOR COUNCIL TAX ARREARS IN ENGLAND (2019); Alicia Love, *'Anachronistic, Unfair, and Inhumane': Calls to Scrap Imprisonment for Non-Payment of Council Tax*, THE JUSTICE GAP (Sept. 23, 2019), https://www.thejusticegap.com/anachronistic-unfair-and-inhumane-calls-to-scrap-imprisonment-for-non-payment-of-council-tax/. *See also* SUZANNE FITZPATRICK ET AL., DESTITUTION IN THE UK (2016) (documenting how council taxes could contribute to destitution).

379. Summary Offences Act 1981, s 28.

380. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 197–98.

381. On the discriminatory application of consorting laws in New South Wales, see NEW SOUTH WALES OMBUDSMAN, THE CONSORTING LAW: REPORT ON THE OPERATING OF PART 3A, DIVISION 7 OF THE *CRIMES ACT 1900* (2016) (discussing consorting laws in New South Wales).

382. For the authoritative account of this process, see CHARLES PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES (A.W. Brian Simpson, 2007) (discussing the impact of the European Convention on Human Rights on the constitutions of former British colonies).

383. The provision was included on Swedish urging. Damon Barrett, *'Drug Addicts' and the ECHR*, EJIL: TALK! (Sept. 3, 2018), https://www.ejiltalk.org/drug-addicts-and-the-echr/.

removed these provisions over the intervening decades, they have survived in the constitutions of Botswana, Eswatini, Ghana, Lesotho, Nigeria, Sierra Leone, and Zambia.[384]

Whether supported by constitutional provisions or not, and despite the passage of more than a half-century since independence, vagrancy laws remain widespread across former British colonies in Africa. In many states, vagrancy laws assume fairly typical form. Botswana,[385] the Gambia,[386] Namibia,[387] Nigeria,[388] the Seychelles,[389] Sierra Leone,[390] Tanzania,[391] Uganda,[392] Zambia,[393] and Zimbabwe[394] all punish some or all of the

384. CONSTITUTION OF BOTSWANA 1966, art. 5(1)(h); CONSTITUTION OF ESWATINI 2005, art.16(1)(h); CONSTITUTION OF GHANA 1992, art.14(1)(d); CONSTITUTION OF LESOTHO 1993, art.6(1)(h); CONSTITUTION OF NIGERIA (1999), § 35(1)(e); CONSTITUTION OF SIERRA LEONE 1991/1996, art. 17(1)(i); CONSTITUTION OF ZAMBIA 1966, art. 13(1)(h).

385. PENAL CODE art.179, 182 (Bots.).

386. CRIMINAL CODE art. 166–67 (Gam.).

387. Vagrancy Proclamation 25 of 1920 (OG 33) (Namib.).

388. Nigerian Criminal Code Act, §§ 249–50. On police treatment of the public in police stations in Nigeria more broadly, see Ogadimma Arisukwu et al., *Police Treatment of the Public in Police Stations: Evidence from Zaria, Nigeria*, 15 J. POL'Y & PRACTICE 1854 (2021) (taking the manner in which the police treat members the Nigerian public, when detained in police stations, as a window into the social-economic and political inequalities in Nigerian society).

389. PENAL CODE art. 173–74 (Sey.).

390. Public Order Act, 1965 (Act No. 46/1965), §§ 7–8 (Sierra Leone).

391. PENAL CODE art. 171–77 (Tanz.); Tanzania Criminal Procedure Act, 1985, §§ 14(d), 14(h), 28(b). Among other things, Tanzania's vagrancy laws are used to round up "street children," who are often subsequently subject to being "beaten, abused, and sexually violated by both the police and the adult offenders with whom they are detained." Sheryl Buske, *A Case Study in Tanzania: Police Round-Ups and Detention of Street Children as a Substitute for Care and Protection*, 8 S.C. J. INT'L L. & BUS. 87, 88 (2011).

392. Penal Code Act, 1950, §§ 160–68 (Uganda); Criminal Procedure Code Act, 1950, §§ 10(e), 11 (Uganda). The impact of Uganda's vagrancy laws on marginalized groups in Uganda was extensively studied by the Human Rights Awareness and Promotion Forum in 2016, which concluded that those laws were applied in a manner that violated the marginalized communities' against whom they were primarily utilized rights to equality and non-discrimination, dignity, freedom from cruel and degrading treatment, liberty, a fair trial, and to life. HUMAN RIGHTS AWARENESS AND PROMOTION FORUM, THE IMPLICATIONS OF THE ENFORCEMENT OF 'IDLE AND DISORDERLY' LAWS ON THE HUMAN RIGHTS OF MARGINALISED GROUPS IN UGANDA 3 (2016).

393. Penal Code Act (1931) §§ 172–81 (Zam.); Criminal Procedure Code Act (1933) §§ 26(f), 27 (Zam.). On vagrancy law in Northern Rhodesia in the 1940s, 50s, and 60s, see Alexander Keese, *Slow Abolition Within the Colonial Mind: British and French Debates About "Vagrancy," "African Laziness," and Forced Labour in West Central and Central Africa, 1945–1965*, 59 INT'L REV. SOC. HIST. 377 (2014) (discussing vagrancy laws in certain British and French African colonies in the mid-twentieth century).

394. Vagrancy Act, 1960 (Zim.). On the context in which that law was passed and the uses to which it was put, see Jocelyn Alexander, *'Hooligans, Spivs and Loafers'?: The Politics of Vagrancy in 1960s Southern Rhodesia*, 53 J. AFRICAN HIST. 345 (2012) (discussing Southern Rhodesia's vagrancy law). On the use to which vagrancy laws were put in the early 1980s, see Clement Masakure, *'We Will Make Sure They Are Rehabilitated': Nation-Building and Social Engineering in Operation Clean-up, Zimbabwe, 1983*, 68 SOUTH AFRICAN HIST. J. 92 (2016). For contemporary calls for the repeal of vagrancy laws in Zimbabwe, see Farirai Machivenyika, *Zimbabwe: Repeal Vagrancy Law – Parliament*, THE HERALD

"offences" of begging, being idle and disorderly, being without means and unable to give a good account of oneself; public gambling, 'common prostitution,' solicitation, public indecency, breach of the peace, suspicious behavior, and loitering. Penalizations also exist on the subnational level, including, for instance, provisions in Lagos State's 2011 Criminal Law.[395] In some cases, additional elements are added to the mix. In Gambia, making, selling, and possessing "criminal charms" is considered within the ambit of vagrancy-related offences.[396] In Tanzania, the state maintains the ability to remove homeless and destitute persons back to their place of original residence if nationals, or to expel them if foreigners.[397] Numerous states in Africa have other forms of vagrancy-type laws as well—in South Africa, for instance, urban areas have instituted laws penalizing nuisance, camping, or residing in a public space, laying down in public, loitering, and begging.[398]

In Asia, vagrancy remains penalized in fairly typical terms in the laws of several states, including Bangladesh,[399] Brunei,[400] Malaysia,[401] Singapore,[402] and Sri Lanka.[403] Vagrancy is frequently penalized on the municipal level as well, including by the 1976 Dhaka Metropolitan Police

(May 14, 2021), https://allafrica.com/stories/202105140263.html.

395. Criminal Law, § 168 (Lagos).

396. Criminal Code § 168 (Act. No. 25/1933) (Gam.).

397. Tanzania Destitute Persons Ordinance (1923); Tanzania Township (Removal of Undesirable Persons) Ordinance (1944).

398. *See* Magnus Killander, *Criminalising Homelessness and Survival Strategies Through Municipal By-laws: Colonial Legacy and Constitutionality*, 25 S. AFR. J. HUM. RTS. 70, 5–6 (2019) (citing U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, CERD/C/USA/CO/7-9 (Sept. 25, 2014)).

399. Vagrants and Shelterless Persons (Rehabilitation) Act, ch. III–IV (Act. No. 15/2011) (Bangl.).

400. Minor Offences Act § 26 (Act. No. 4/1929) (Brunei).

401. Destitute Persons Act §§ 11–13 (Act No. 183/1977) (Malay.). The 1977 Act was heavily enforced in the years after its passage, to such an extent that the harsh effects of the regime were criticized in the press. In the mid-2010s, Malaysia's approach hardened, as government officials announced a variety of plans to more aggressively confront homelessness with the criminal law. *See* Rayna Rusenko, *Imperatives of Care and Control in the Regulation of Homelessness in Kuala Lumpur, Malaysia: 1880s to Present*, 55 URBAN STUD. 2123, 2132–33 (2018) (observing that "[f]ederal agencies expanded anti-vagrancy sweeps using vagrancy law statutes to form multi-agency operations" and that "[h]omelessness was presented as a menace to Malaysia's economy and dignity"). While the government has more recently announced it is reviewing its laws in the area, action is yet to be taken. *See* Martin Carvalho et al., *Govt mulls review of Destitute Persons Act to deal with homeless issue, says Women's Ministry,* THE STAR (July 15, 2020), https://www.thestar.com.my/news/nation/2020/07/15/govt-mulls-review-of-destitute-persons-act-to-deal-with-homeless-issue-says-women039s-ministry (noting government indications the Destitute Persons Act might be revised).

402. Miscellaneous Offenses (Public Order and Nuisance) Act §§ 25–31 (1906) (Sing.); Destitute Persons Act (1989) (Sing.).

403. Vagrants Ordinance §§ 2, 4–10, 21–23 (Act No. 4/1841) (Sri Lanka).

Ordinance,[404] the 1978 Chittagong Metropolitan Police Ordinance[405] and the 1985 Khulna Metropolitan Police Ordinance[406] in Bangladesh; and the 1974 Punjab Vagrancy Ordinance,[407] the 1975 Balochistan Vagrancy Ordinance,[408] the 1983 Sindh Vagrancy (Amendment) Ordinance,[409] and the 2020 Khyber Pakhtunkhwa Vagrancy Restraint Act[410] in Pakistan. In India, begging rather than vagrancy, formed the central subject of attention in the 1959 Bombay Prevention of Begging Act, which was extended to Delhi via the 1960 Delhi Prevention of Begging Rules and has influenced numerous other state laws since.[411] Numerous other vagrancy-type laws can be found in the region, including the penalizations of nuisance and the grant of power to the police to apprehend suspicious persons in Brunei[412] as well as the criminalization of loitering in Sri Lanka.[413]

Like in Africa, numerous former British colonies in the Caribbean, in particular Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines have provisions in their constitutions legitimizing the penalization of vagrancy.[414] The laws of numerous states in the region,

404. Dhaka Metropolitan Police Ordinance §§ 64–95 (Act No. 3/1976) (Bangl.).

405. Chittagong Metropolitan Police Ordinance §§ 66–95 (Act No. 48/1978) (Bangl.).

406. Khulna Metropolitan Police Ordinance §§ 66–98 (Act No. 52/1985) (Bangl.).

407. Punjab Vagrancy Ordinance §§7–9 (Act No. 20/1958) (substituted by the Punjab Laws (Adaptation) Order (1974)).

408. Balochistan Vagrancy Ordinance (1975) (Pak.).

409. Sind Vagrancy (Amendment) Ordinance § 3 (Act No. 7/1983) (Pak.) (amending the Sindh Vagrancy Ordinance (1958)).

410. Khyber Pakhtunkhwa Vagrancy Restraint Act §§ 11–13 (Act No. 8/2020) (Pak.).

411. *See, e.g.*, Jammu and Kashmir Prevention of Beggary Act §§ 3–7 (Act. No. 40/1960) (India); Assam Prevention of Begging Act §§ 3–11 (Act No. 18/1964) (India); Haryana Prevention of Beggary Act §§ 3–6 (Act No. 9/1971) (India); Goa, Daman and Diu Prevention of Begging Act §§ 3–7 (Act No. 4/1972) (India); The Madhya Pradesh Bhiksha Vritti Nivaran Adhiniyam §§ 3–7 (Act. No. 3/1973) (India); Uttar Pradesh Prohibition of Beggary Act §§ 8–16 (Act No. 36/1975) (India); Karnataka Prohibition of Beggary Act §§ 11–18 (Act No. 27/1975) (India); Telangana Prevention of Begging Act §§ 3–10 (Act No. 12/1977) (India); Andhra Pradesh Prevention of Begging Act §§ 3–10, 27–28 (Act No. 12/1977) (India); Sikkim Prohibition of Beggary Act §§ 4–11 (Act No. 4/2004) (India). For more on vagrancy regulation in Goa in particular, see generally Julia Wardhaugh, *Beyond the Workhouse: Regulating Vagrancy in Goa, India*, 7 ASIAN CRIMINOLOGY 205 (2012). One positive step was taken in 2018, when the High Court of Delhi struck down numerous sections of the 1960 Delhi Prevention of Begging Rules as unconstitutional. *See* Harsh Mander v. Union of India ¶ 44 (High Ct. 2018) (Delhi) (Finding that "Sections 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Bombay Prevention of Begging Act, 1959, as extended to Delhi, [are] unconstitutional," and striking them down).

412. Minor Offences Act §§ 11, 22.

413. Penal Code §§ 450–51 (Act No. 2/1883) (Sri Lanka).

414. *See* ANTIGUA AND BARBUDA CONSTITUTION Oct. 31, 1981, art. 5(1)(i) ("No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of

including Antigua and Barbuda,[415] the Bahamas,[416] Belize,[417] Dominica,[418]

his care or treatment or the protection of the community."); BAHAMAS INDEPENDENCE ORDER 1973 NO. 1080 [CONSTITUTION] JUL. 10, 1973, art. 19(1)(f) ("No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his case or treatment of the protection of the community."); BARBADOS INDEPENDENCE ORDER 1966 NO. 1455 [CONSTITUTION] Nov. 30, 1966, art. 13(1)(h) ("No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his care or treatment or the protection of the community."); BELIZE CONSTITUTION Sept. 21, 1981, art. 5(1)(h) ("A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his care or treatment or the protection of the community."); CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978, art. 3(1)(h) ("A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his care or treatment or the protection of the community."); GRENADA CONSTITUTION ORDER 1973 NO. 2155 Feb. 7, 1974, art. 3(1)(h) ("No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his care or treatment or the protection of the community."); CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA Act Feb. 20, 1980, art. 139(1)(h) ("No person shall be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his or her care or treatment or the protection of the community."); CONSTITUTION OF SAINT KITTS AND NEVIS Sept. 19, 1983, art. 5(1)(i) ("A person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his or her care or treatment or the protection of the community."); CONSTITUTION OF SAINT LUCIA Feb. 22, 1979, art. 3(1)(h) ("A person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . a vagrant, for the purpose of his or her care or treatment or the protection of the community."); SAINT VINCENT CONSTITUTION ORDER 1979 NO. 916 Oct. 27, 1979, art. 3(1)(h) ("No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say . . . in the case of a person who is, or is reasonably suspected to be . . . vagrant, for the purpose of his care or treatment of the protection of the community."). Other former British colonies outside Africa and the Caribbean which maintain such provisions in their constitutions are Cyprus and Malta in the Mediterranean, and Fiji, Kiribati, Papua New Guinea and the Solomon Islands in the Pacific.

415. Criminal Procedure Act § 6 (Act No. 3/1873) (Ant. & Barb.); Small Charges Act §§ 14, 30, 52 (Act No. 11/1891) (Ant. & Barb.).

416. Vagrancy Act (1939), §§ 3–5 (Act No. 22/1939) (Bah.).

417. Summary Jurisdiction (Offences) Ordinance §§ 3–4, 7–13 (Act No. 9E/1952) (Belize). Following a 2018 decision by the Caribbean Court of Justice, discussed below, the legislature in Belize decided to strike down the provision of that law penalizing cross-dressing. *See* Muri Assunção, *Guyana decriminalizes cross-dressing, 3 years after international court ruled against law,* NY DAILY NEWS (Aug. 11, 2021), https://www.nydailynews.com/news/world/ny-guyana-decriminalizes-cross-dressing-after-three-years-after-ccj-ruling-20210811-3qw53kvdovff7iiy2nd7vw3zuu-story.html (observing that "[l]awmakers in Guyana have officially decriminalized cross-dressing, three years after the Caribbean Court of Justice ruled that the Victorian-era law violated the rights of citizens, and it had to be struck down").

418. Small Charges Act §§ 10, 13, 19, 22, 24, 27, 29–30, 33, 38–39, 42–43, 49–50 (Act No. 11/1891) (Dominica).

Guyana,[419] and Trinidad and Tobago[420] penalize vagrancy in traditional terms. Numerous independent laws in the region, typically "sexual offences" laws, function as vagrancy laws by penalizing solicitation in stand-alone terms.[421] One relatively unusual provision is found in the law of Belize, which penalizes the spreading of false news under the provisions of its law targeting vagrancy.[422] In addition to more direct vagrancy-targeting legislation, several vagrancy-type laws grant the police and judicial authorities in the Caribbean region wide discretionary power. Relevant measures include the 1843 Towns and Communities Act and the 1864 Offences Against the Person Act in Jamaica, which penalize loitering as well as grant the police power to disperse and arrest the idle and disorderly;[423] the 1927 Penal Code in the Bahamas, which penalizes loitering, solicitation, nuisance, and the obstruction of streets;[424] the 1975 Mental Health Act in Trinidad and Tobago, which allows for the apprehension of those deemed "mentally ill;"[425] the 1998 Minor Offences Act in Barbados, which penalizes those able but unwilling to work, riotous or indecent behavior, loitering, and soliciting;[426] and the 2006 Police Service Act in Trinidad and Tobago, which allows the police to arrest suspicious persons.[427]

### C. The Second Wave of Challenges

In recent decades, vagrancy laws in former British colonies have come under increasing pressure in both national and international fora. On the national level, challenge has come for instance in both Malawi and Kenya.

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419. Summary Jurisdiction (Offences) Act §§ 143–53 (Act No. 17/1893) (Guy.).

420. Summary Offences Act §§ 45–46 (Act No. 31/1921) (Trin. & Tobago).

421. *See, e.g.,* Sexual Offences Act § 23(b) (Act No. 27/1986) (Trin. & Tobago) ("A person who . . . in any place solicits for immoral purposes, is guilty of an offence . . . ."); Sexual Offences Act § 22(b) (Act No. 9/1995) (Ant. & Barb.) ("A person who . . . in any place solicits for immoral purposes, is guilty of an offence . . . ."); Sexual Offences Act § 18(c) (Act No. 1/1998) (Dominica) ("A person who . . . procures another for prostitution, whether or not the person procured is already a prostitute, in Dominica or elsewhere . . . is guilty of an offence . . . .").

422. *See* Summary Jurisdiction (Offences) Act § 3(1)(ix) (Belize) (anyone who "maliciously fabricates or knowingly spreads abroad or publishes . . . any false news or false report tending to create or foster public alarm or to produce public detriment" is guilty of a petty misdemeanour). While false news penalizations have their own long, multi-jurisdictional history within the British Empire, they are not typically included in the immediate context of vagrancy penalizations.

423. Towns and Communities Act 1843 §§ 3, 20 (Act No. 3/1961) (Jam.); Offences Against the Person Act 1864 § 80 (Act No. 43/1958) (Jam.).

424. Penal Code §§ 104, 209, 212 (Act No. 17/1924) (Bah.).

425. Mental Health Act § 15(1) (Act No. 30/1975) (Trin. & Tobago).

426. Barbados Minor Offences Act §§ 2–3 (Act No. 50/1998) (Barb.). For more, see generally C.G. Hall, *The Minor Offences Acts and Prostitution in Barbados: New Cloth on an Old Garment*, 8 CARIBBEAN L. REV. 37 (1998).

427. Police Service Act § 46(f) (Act No. 7/2006) (Trin. & Tobago).

Specifically, in Malawi, the High Court struck down the offense of "wandering about" in the 1995 *Luwanja* case.[428] The following year, the same court found in *Brown* that arresting individuals sleeping in public violated their right to freedom of movement.[429] In *Ganizani*, the High Court pushed back against automatic penalization of non-students found asleep in schools.[430] In *Mwanza and others*, it found that poverty and homelessness could not be considered crimes.[431] In its 2017 *Gwanda* decision, the High Court struck down Section 184(1)(c) of Malawi's penal code, which penalized being "found in or . . . near . . . any public place . . . under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose."[432] Notwithstanding this train of progressive litigation, however, most underlying vagrancy offences, including the esoteric penalization of men with long hair, remain part of Malawi's laws, which also authorize the expulsion of persons with no regular employment or means of livelihood from particular areas.[433] In short, despite the High Court's *Gwanda* ruling, the persistence of such legal provisions—as well as limited official willingness or capacity to reign in police abuses generally—means that poor individuals remain subject to discretionary arrest.[434]

In Kenya, a post-independence vagrancy law was passed in 1968.[435] While heavily enforced for several decades, the law was challenged in the 1990s, leading to its repeal in 1997.[436] Although a positive step in its own right, Kenyan police continued to exercise extensive discretion over the poor under a variety of alternative laws. The police's discretionary power was *de jure* curtailed by the Kenyan High Court's 2015 *Mbuti* decision, where the court declared null and void provisions of Kenya's Criminal Procedure Code that allowed courts to impose bonds on suspicious individuals to keep the peace, because those provisions violated the rights to equality before the law,

428. Republic v. Luwanja, 1 M.L.R. 217 (High Ct. Malawi 1995).

429. Brown v. Republic Crim. App. No. 24 (High Ct. Malawi, 1996).

430. Republic v. Ganizani Confirmation Case No. 290 (High Ct. Malawi, 1999) (unreported).

431. Mwanza and Others v. Republic M.W.H.C. 228 (High Ct. Malawi, 2008).

432. Malawi Penal Code (1929), § 184(1)(c); Mayeso Gwanda v. the State, Constitutional Case 5 of 2015, High Court of Malawi (Jan. 10. 2017). For more on these cases, see Anneke Meerkotter, *Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces*, 74 U. MIA. L. REV. CAVEAT 1, 25 (2019) (declaring that vagrancy offenses have no place in a constitutional dispensation).

433. Malawi Penal Code (1929), §§ 180–87; Malawi Criminal Procedure and Evidence Code (1967), §§ 28–29.

434. *See* South Africa Litigation Centre, *No Justice for the Poor: A Preliminary Study of Enforcement of Nuisance-Related Offences in Blantyre*, Malawi, 1 (2013) ("The use of outdated Penal Code provisions and abuses by police against poor persons and sex workers specifically has caused some concern among many working on legal and human rights issues in Malawi."); Meerkotter, *supra* note 432, at 28.

435. Kenya Vagrancy Act, Act No. 61 of 1968.

436. Kenya Act No. 10 of 1997.

dignity, freedom and security of person, due process on arrest, and a fair trial.[437] Despite the decision, Kenyan police maintain discretionary authority, including under Section 29 of the Criminal Procedure Code, which allows for warrantless arrest in numerous circumstances, including relative to persons described through language typically found in vagrancy laws.[438]

Vagrancy laws have also met some resistance on the international level, though international attention to such issues has been later in coming and less concerted than might have been hoped. UN Habitat observed in 2009 that "[l]aws that criminalize homelessness, vagrancy or sleeping rough, along with street cleaning operations to remove homeless people from the streets" can violate homeless persons' rights.[439] In 2011, the Special Rapporteur on extreme poverty and human rights clearly articulated the rights violations involved in vagrancy laws and vagrancy-type measures in a report concerning "laws, regulations and practices that punish, segregate, control and undermine the autonomy of persons living in poverty."[440] In 2014, the Committee on Racial Discrimination observed its concern with the "criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging, and lying down in public spaces" in the United States.[441]

Attention has also been given to vagrancy laws on the regional level. While it has taken some steps recently, the European human rights system has been among the least bold institutions in such regards, not surprisingly perhaps given that Article 5(1)(e) of the Convention appears to legitimize the penalization of vagrancy.[442] Nonetheless, a 2021 decision by the European Court of Human Rights found the criminalization of the applicant

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437. Anthony Njenga Mbuti v. Attorney General No. 45 of 2014 (High Ct. Kenya, 2015).

438. Kenya Criminal Procedure Code (1930), § 29; *National Council on the Administration of Justice, Criminal Justice System in Kenya: An Audit* (2016). The provision in question authorizes, for instance, arrest of "any person . . . f[ound] in a highway, yard or other place during the night and . . . suspect[ed] upon reasonable grounds of having committed or being about to commit a felony" (Article 29(f)) and "any person . . . f[ound] in a street or public place during the hours of darkness and . . . suspect[ed] upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself" (Article 29(g)). In addition, it has been suggested the vagrancy law legacy persists in Kenya via the limitations on freedom of movement authorized by the 1950 Public Order Act and the 1967 Public Security (Control of Movement) Regulations. *See* Muendo, *supra* note 287.

439. UN Habitat, The Right to Adequate Housing, at 22 (2009).

440. Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/66/265 (Aug. 4, 2011), paras. 29–43.

441. Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America (2014), para. 12.

442. European Convention on Human Rights, Art. 5(1)(e). The article indicates that reasonable grounds for the deprivation of liberty include "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

for begging in Switzerland in violation of her right to privacy.[443] While this was a far more timid decision than it might have been—including for reasons recognized in the concurring and dissenting opinions—it still marked a step forward for the European human rights system. The Caribbean Court of Justice has also made a small contribution to challenging vagrancy laws through its decision in *McEwan and others v. Attorney General*, in which the court found the provisions of Guyana's law penalizing cross-dressing unconstitutionally vague and in violation of the rights to equality, non-discrimination, and freedom of expression.[444]

African regional human rights bodies have taken the most assertive stances so far. In 2017, the Court of Justice of the Economic Community of West African States ruled that Nigeria's detention of several women who were outside at night under charges of vagrancy in the form of prostitution violated their rights to liberty, dignity, to be free from cruel and unusual treatment, and to be free from gender-based discrimination.[445] In 2018, the African Commission on Human and Peoples' Rights disseminated Principles on the Decriminalization of Petty Offences, defined as including

> offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending.[446]

Most significantly, in late 2020 the African Court on Human and Peoples' Rights issued an advisory opinion that found that the vagrancy laws in numerous African jurisdictions violated the rights to liberty, equality, dignity, a fair trial, freedom of movement, and to be free from discrimination.[447] The decision was particularly powerful and important due to the fact that, in contrast to previous jurisprudence, it was not reached on a narrow basis but rather on an extensive yet eminently reasonable account of the numerous different ways in which vagrancy laws violate basic rights

443. Lacatus v. Switzerland, App. No. 14065/15, ECtHR (Jan. 19, 2021).

444. McEwan and others v. Attorney General, CCJ 30 (AJ, 2010).

445. Dorothy Njemanze & others v. Federal Republic of Nigeria, Case No. ECW/CCJ/APP/17/14, ECOWAS Court of Justice (Oct. 12, 2017).

446. *African Commission on Human and Peoples' Rights, Principles on the Decriminalization of Petty Offences in Africa*, *Part 1: Definitions*, AFR. COMM'N ON HUM. AND PEOPLES' RTS. (2018), at 9.

447. Request for Advisory Opinion by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, Advisory Opinion No. 1 of 2018, African Court on Human and Peoples' Rights (Dec. 4, 2020).

guarantees.[448] A coalition of civil society organizations has come together to work to ensure that decision is rendered effective in practice, moreover.[449] While much remains to be done to adequately address vagrancy laws within international human rights law, the existence of a strong regional movement, together with the firm statements contained in the African Court's advisory opinion, places an important milestone that will hopefully help spur further reform and attention in the years to come.[450]

## V. CONCLUSION: VAGRANCY LAWS, DISCRETION, AND THE RULE OF LAW

As their long history and global coverage make clear, vagrancy laws have proven highly replicable across jurisdictional boundaries and persistent over time. Vagrancy laws have been employed for a diverse array of purposes. They have been used to force populations to work, both by penalizing non-work and by forcing potential workers into the labor force through detention and fines. Over and above their use to coerce work directly, they have served to limit populations' bargaining power, both by limiting their ability to freely negotiate their terms of work and by limiting their mobility. They have enabled the removal of undesirables from particular locations. They have strengthened the virtue-based explanations for existing distributions of wealth, stigmatized the poor, and reinforced elite-justifying ideologies. They have served as a flexible means to crack down on a wide and loose range of perceived immoral activities, including but not limited to begging, drinking, gambling, public indecency, sex work, homosexuality, cross-dressing, fortune-telling, religious practices, and socializing across racial groups. And they have been used to squash political dissent, in close alignment with other laws aimed at suppressing the rights to freedom of assembly and of association. The consistency with which vagrancy laws have been relied upon, across time and place, testifies to how useful political authorities have found them.

Recognizing the magnitude of the dissemination and impact of vagrancy laws is important in and of itself. Acknowledging the influence of

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448. *Id.* ¶¶ 70, 79–82, 85–86, 92–93, 100, 117–18.

449. For more information, see *Campaign to Decriminalise Poverty and Status*, https://pettyoffences.org/.

450. On the significance of that decision, see INT'L JUST. RES. CTR., *African Rights Court Issues Landmark Advisory Opinion Rejecting Vagrancy Laws* (Dec. 9, 2020), https://ijrcenter.org/2020/12/09/african-rights-court-issues-landmark-advisory-opinion-rejecting-vagrancylaws/#:~:text=African%20Rights%20Court%20Issues%20Landmark%20Advisory%20Opinion%20Rejecting%20Vagrancy%20Laws,December%209%2C%202020&text=On%20December%204%2C%202020%2C%20the,incompatible%20with%20human%20rights%20standards; Christopher M. Roberts, *The Beginning of the End for Vagrancy Laws?*, I CONNECT BLOG (July 9, 2021).

vagrancy laws makes clear the extent to which labor has not only been coerced by the unequal bargaining positions workers are placed in by "the market" but also by more overt forms of criminal legal penalization. It helps to make clear how deeply entrenched vagrancy laws are within contemporary legal orders, and how much energy will be required to challenge them. It helps to make clear the close connection between the penalization and stigmatization of the poor and various other forms of partisan moralistic regulation. And it helps to make clear how extensive the rights violations caused by vagrancy law regimes have been and remain.

Examining the history of vagrancy law from a panoramic perspective is important for another reason as well. Since the early nineteenth century, the dissemination of vagrancy law has been closely linked to the development of the 'rule of law,' and modern legal orders more broadly. The early-nineteenth century saw the creation, expansion, and empowerment of a recognizably modern police service, as well as the proliferation and strengthening of the magistracy. In some ways, this development was positive—certainly, the gradual dismantling of the "Bloody Code," through the rapid reduction in the number of crimes for which the death penalty could be imposed, constituted a positive development in and of itself. In other ways, however, the victory of a more positivist legal order was more ambiguous. The penalties imposed by the law may have been less extreme and less discretionary in terms of the diminishing use of disproportionate punishments. At the same time, however, the law as a whole was becoming increasingly powerful and an increasingly frequently encountered force in the lives of poorer segments of the population.

This mixed balance sheet applies if one assumes that positivist legal reforms were generally able to offer the changes they promised. In reality, however, developments in practice were consistently more mixed, in terms of the fate of "discretion" within the law, than promised by the positivist movement. Some scholars have emphasized this facet with regard to the difference between the evolution of the law in the metropolitan and colonial contexts, where the differences were most distinct. As Singha has put it,

> Taking the long perspective on colonial law and policing, the Acts introduced [into India] in the 1830s and 1840s to deal with 'criminal communities' highlight the continuous tension within colonial law between the notion of 'due process' and legal equality, and the scope which the law actually allowed for police and judicial discretion. 'Rule of law' was crucial to certain ideological and institutional imperatives of colonial state formation, for instance to the expansion of the claims of the state at the expense of other jurisdictions of social authority, to the maintenance of stable, centralized mechanisms of rule and to an assertion of the superiority

of a 'despotism of law' over that of 'arbitrary' native despotism. But the difficulty of aligning colonial police and legal power to indigenous sources of social authority constantly opened out new areas of executive discretion within the interstices of 'rule of law'.[451]

There is no doubt that Singha is right, in terms of her emphasis on the expansive space for executive discretion within law as applied in the colonial context. She may, however, have taken too seriously British law's claim to have been operating differently in its metropolitan context. The extensive application of vagrancy law and related legal orders in the metropolitan context[452] suggests that the tendency that Singha has eloquently laid out for the law to vacillate between "police and judicial discretion" and "due process" and "legal equality" was not a feature of colonial law alone, but rather of law as it developed in the period more broadly. In England, too, the rise to prominence of broad, vague and discretionary vagrancy laws proceeded side-by-side with the increased strength of the rule of law. Everywhere, the increasing strength of vagrancy laws was closely connected to the increasing strength in the new mechanisms of law enforcement, both in the context of the police, who had vagrancy penalizations written into their foundational statutes, and in the context of the magistracy, who gained in summary and discretionary authority in the period, not least through vagrancy laws.[453]

In short and in sum, the rise of the rule of law in practice in the early nineteenth century was inextricably bound up with the rising strength of vagrancy law. Far from incidental and contradictory, vagrancy law and anti-vagrancy enforcement provided means, motive, and justification through and on the basis of which the 'rule of law' was advanced. Rather than antagonistic characteristics, the flexibility and discretion inherent in vagrancy law constituted key component elements through which the place and role of law was expanded, both in Britain and across the British colonial world.

Vagrancy laws continued to proliferate and to be heavily enforced in the late nineteenth and early twentieth centuries, both to force populations to work and to 'clean up' and exclude undesirable elements from the streets of the world's growing metropolises. Besides witnessing an expansion in the effect of vagrancy laws in practice, the turn of the century saw vagrancy laws obtain further ideological support, as Dicey disseminated a widely influential vision of the British common law legal order as synonymous with the 'rule

451. SINGHA, *supra* note 111, at 90–91.
452. *See supra* Part II.1 above.
453. *See supra* Part II above.

of law' and the limitation of discretionary authority. By ignoring altogether the extensive role of vagrancy laws and the arbitrary legal power they exercised against the poor, however, Dicey's 'rule of law' served to invisibilize, entrench, and support such modes of repressive legality, which have rarely formed a prominent concern in the writings of common law constitutional scholars and jurists since. In this regard, Dicey may be taken as both an exemplar of and an important component within a broader tradition, within which acts of exceptional violence or rights violation have tended to receive far greater attention than the admittedly less individually serious, but structurally much more widespread, acts of arbitrary interference in the lives and liberty of poorer members of society in countries around the world. This tradition is worrying not only insofar as it distracts attention from the violence against the poor built into modern legal systems, but also insofar as it has allowed for many of the very same legal and institutional tools through which that violence is enacted to be praised as positive components of the 'rule of law.'

Breaking through centuries of inattention, a major assault on vagrancy laws was launched in the 1960s and early 70s in the United States, as Goluboff has extensively and insightfully detailed.[454] That resistance to the vagrancy law tradition looks all the more remarkable in light of the long history and global extent of vagrancy laws, as laid out in this article. There is no doubt, moreover, that it marked a genuine advance, removing repressive laws from the books and providing a repository of precedent that can be looked to in challenging vagrancy laws and policies in the future. More recently, a second wave of challenges has been advanced in Africa by organizations such as the South African Litigation Center, the Pan African Lawyers' Union, and the Institute for Human Rights and Development in Africa, pushing back strongly against the persistence of vagrancy laws on the continent. In England, moreover, the 1824 Vagrancy Act was finally fully repealed in 2022, just shy of two hundred years after its passage.[455]

At the same time, however, challenges to date have fallen short of what reformists might have hoped for. As detailed in section four, in many states around the world, vagrancy and vagrancy-type laws remain on the books, and continue to be used to penalize the poor, in both traditional and novel

454. *See* GOLUBOFF, *supra* note 19.

455. On the law's ongoing application in the previous years, *see, e.g.,* Rob Waugh & Helen Pidd, *Begging prosecutions increase dramatically across England and Wales,* THE GUARDIAN (Nov. 30, 2014), https://www.theguardian.com/society/2014/nov/30/begging-prosecutions-increase-england-wales; *Pudsey's Story: 'People Need Help and Housing, not Being Called a Criminal',* CRISIS (UK), (accessed Oct. 22, 2021), https://www.crisis.org.uk/get-involved/real-life-homeless-stories/bulletins/pudseys-story/. On the law's repeal, see *Vagrancy Act repeal: 'It gives people a chance,'* CRISIS (UK), https://www.crisis.org.uk/about-us/the-crisis-blog/vagrancy-act-repeal-it-gives-people-a-chance/.

ways. In Ghana, vagrancy and loitering laws are used to target street traders.[456] In Uganda, street children are often arrested under vagrancy charges.[457] In South Africa, by-laws are frequently used to penalize the urban poor and homeless.[458] In Hong Kong, repeal of the previously heavily relied upon vagrancy law in 1977 was shortly thereafter followed by passage of a loitering statute, which has survived challenge and continued to be relied upon ever since.[459] In Sierra Leone, loitering laws are used not only to arbitrarily arrest the poor, but also to extract bribes and to conduct sexual assault.[460] Where individuals get to work and move around via automobile, traffic laws serve many of the same functions historically advanced by vagrancy laws.[461] Unsurprisingly, given such measures, studies conducted in England and the United States indicate that poorer individuals are overrepresented in criminal justice systems.[462] Effectively challenging the

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456. *See* Campaign to Decriminalise Poverty and Status, *Poor Traders in Jail*, PETTY OFFENSES ORG. (May 25, 2022), https://pettyoffences.org/poor-traders-in-jail/.

457. *See* HUMAN RIGHTS WATCH, THE IMPLICATIONS OF THE ENFORCEMENT OF 'IDLE AND DISORDERLY' LAWS ON THE HUMAN RIGHTS OF MARGINALISED GROUPS IN UGANDA 2 (HRAPF 2014) ("Victims of these arrests are marginalised persons that arguably rank lowest on the social and economic ladders like . . . street children . . . .").

458. *See* APCOF, POVERTY IS NOT A CRIME: DECRIMINALISING PETTY BY-LAWS IN SOUTH AFRICA 6 (June 2021) ("Across South Africa, municipalities have adopted measures to criminalise urban poverty and homelessness, including the enactment of by-laws for infringements . . . .").

459. *See* Law Revision (Miscellaneous Amendments), Ordinance No. 70 of 1977; Crimes Amendment No. 2 Ordinance, Ordinance No. 37 of 1979; Law Reform Commission of Hong Kong, Report: Loitering (June 1990).

460. Sarah Johnson, *Bid to Overturn Sierra Leone Loitering Laws that Activists Claim 'Criminalize Poverty'*, THE GUARDIAN (May 4, 2022), https://www.theguardian.com/global-development/2022/may/04/bid-to-overturn-sierra-leone-loitering-laws-that-activists-claim-criminalise-poverty.

461. As one scholar notes, in the United States "[t]raffic 'crimes' now play the role that [vagrancy] statutes used to play . . . authoriz[ing] the police to stop and/or arrest whom they wish . . . with a population in vehicles rather than on foot." William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 69 (1997).

462. *See* Bruce Western and Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8, 8 (2010) (observing connections between social inequality and incarceration); National Research Council Committee on Law and Justice, National Academy of Sciences, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 31 (2014) (exploring the causes of high incarceration levels in the United States); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (2015); *Demographic Differences in Sentencing: Update to the 2012 Booker Report*, United States Sentencing Commission (2017); Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, The BROOKINGS INST. (2018); Kerris Cooper & Nicola Lacey, *Safety and Security: 2015–2020*, SPDO, LSE, 4 (2019) (noting that England and Wales have "a criminal justice system in which the disadvantaged are disproportionately on the receiving end of state control"); Bailey Gray, Doug Smith & Allison Franklin, *Return to Nowhere: The Revolving Door Between Incarceration and Homelessness*, TX. CRIM. JUST. COAL. (2019); Institute for Research on Policy, *Connections Among Poverty, Incarceration, and Inequality*, Policy Brief No. 48-2020 (2020). Incarceration rates have also been found to be correlated with inequality. *See* Dae-Young Kim, *Punishment and Economic Inequality: Estimating Short-Term and*

vagrancy law tradition will require tackling all such measures, and, more broadly, limiting the ability of police forces to arbitrarily detain poorer individuals at will.[463] While this is no small task, only if such reforms are undertaken will contemporary legal systems' claims to comply with the 'rule of law' become meritorious, rather than mystificatory.

*Long-Term Equilibrium Relationships*, 28 CRIM. POL'Y REV. 641 (2015) (providing data concerning incarceration rates in the United States since WWII).

463. On the discretionary power of the police, see Deborah Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 609 (1997) (observing "[t]he period's constitutional reforms left untouched the patrolman's discretion to enforce or not enforce valid public order laws—a discretion that, as commentators have long understood, can be a convenient mask concealing failures of equal protection").