

VAGRANCY AND ARREST ON SUSPICION*

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I often think that a disproportionate part of the energies of our profession is devoted to the semantics of the law. The formulation of doctrine, the writing of briefs, the preparation of opinions are critically important. Reasoned opinions are essential for the integrity of the judicial process. Briefs that throw light into dark corners are essential. Criticism by the profession of the work of courts and legislatures is vital to any healthy system. Yet it often seems that the discourse with which we tend to preoccupy ourselves is pretty much in the pattern of theological discourse. The priests of the profession argue and debate about nice points of law that may seem important to those who lead smug lives in ivory towers but quite unimportant in the life of the nation.

Law teaching—legal research—appellate arguments—the writing of opinions are often far, far removed from the problems that affect people. The generality of a law—its average incidence—the symmetry it gives to the whole system becomes the preoccupation. Even the finest of our profession often become so absorbed in the process as to be lost.

The “unliquidated errors in the law,” to borrow a phrase from Chief Justice Hughes, may average out over the long pull. But the daily mills that grind may produce awful consequences; and the people affected may be too overwhelmed, too disorganized, too inarticulate to object.

Edmond Cahn makes the point neatly:

[A]verages in the administration of justice do not avail the person who is wronged grievously in his own, particular case. The appeal to time and patience may assist in evolving better concepts and techniques for future use of the profession, but it cannot excuse or exonerate our sending an innocent man to the penitentiary here and now. Enlightenment tomorrow or elsewhere will not serve, for his destiny rests in our hands today, and our sense of injustice (for that is what I call it) forbids us to be patient at his cost.¹

In 1800 the Supreme Court had before it the case of *Cooper v. Telfair*,² where it appeared that Georgia in 1782 had enacted a law confiscating the

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1. Cahn, *The Consumers of Injustice*, 34 N.Y.U.L. REV. 1166, 1176 (1959).
2. 4 U.S. (Dall.) 14 (1800).

property of all persons who had aligned themselves with the British in the war and banishing them from the state. Mr. Justice Cushing said, "The right to confiscate and banish, in the case of an offending citizen, must belong to every government."³ Banishment and exile were once handmaidens of the loyalty oaths which our colonists brought to these shores from England.⁴ So it is not unusual to find our pre-Constitution law congenial to banishment as punishment. The law involved in the *Cooper* case, being *ex post facto* and a bill of attainder, would not survive the Constitution as *Cummings v. Missouri*,⁵ and *Ex parte Garland*⁶ make plain. Moreover, though banishment of citizens was well known in the western world,⁷ it was one of the practices against which the Habeas Corpus Act⁸ was directed. The Virginia Resolutions as reported by Madison also condemned the practice.⁹ Yet as late as 1837 we find the Supreme Court, speaking through Mr. Justice Barbour in *City of New York v. Miln*, saying:

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.¹⁰

Not until 1941 was the right of a person, though indigent or destitute, to move freely from state to state clearly recognized, and the dictum of the *Miln* case rejected.¹¹ Even the banishment of aliens who have long residences here has not gone unchallenged.¹²

The Supreme Court of Michigan, therefore, spoke in a great tradition when it ruled that banishment from the State was "prohibited by public policy."¹³ Yet in spite of the revulsion which liberty-loving people have long had against banishment, it lingers on in many magistrate courts. Who has not heard a judge tell a transient, "Don't come back here again or you go to jail?"¹⁴ Scores of people are thus banished from our cities every day. Those exiled are not traitors or even thieves. They are wanderers, men of the "open road;" persons whose only crime in many cases is in being jobless and homeless, the same people who have been the heroes of much of our great literature and

3. *Id.* at 19.

4. See HYMAN, *To TRY MEN'S SOULS* chs. II-IV (1959).

5. 71 U.S. (4 Wall.) 277 (1866).

6. 71 U.S. (4 Wall.) 333 (1866).

7. 1 CHITTY'S BLACKSTONE COMMENTARIES 99 (1874); 2 *id.* at 302.

8. 31 Car. II.

9. See 4 ELLIOT'S DEBATES 555 (1845).

10. 36 U.S. (11 Pet.) 102, 142-43 (1837).

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

12. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Galvan v. Press*, 347 U.S. 522 (1954).

13. *People v. Baum*, 251 Mich. 187, 189, 231 N.W. 95, 96 (1930).

14. See *Lynch v. Republic Pub. Co.*, 40 Wash. 2d 379-82, 243 P.2d 636, 638 (1952).

whose way of life has been glorified and envied by others for generations.

The song, *The Happy Wanderer*, that eulogizes the man who travels with a knapsack on his back, is part of our folklore, as *Waltzing Matilda* is a part of Australia's. And I am sure that my old friend Carl Sandburg, whom America loves, feels warm inside when I address him as *Fellow Hobo*. The term implies independence, a restless spirit, the quest for a better life, rebellion against submission to orthodoxy.

Robert Louis Stevenson immortalized the vagabond:

Give to me the life I love,
Let the lave go by me,
Give the jolly heaven above
And the byway nigh me.
Bed in the bush with stars to see,
Bread I dip in the river—
There's the life for a man like me,
There's the life for ever.

A much different sentiment is shown by an article in a Tucson, Arizona newspaper for January 4, 1960, which reads in part as follows:

Recent frosty weather probably will result in some vacancies at the "Tucson Hilton."

Unlike the rest of Tucson's sunshine climate boosters, the operators of the "Hilton" do every thing they can think of to discourage their particular type of tourist from wintering here.

"Hilton" is the name jailers have tagged on a cluster of drafty Army tents at the city jail farm annex, used to house itinerant vagrants and bums.

Tucson's growing reputation as a place in the sun has paid off in a mass influx of well-heeled winter tourists. But the advertising campaign also has been effective in attracting the not-so-well-heeled travelers who started arriving—by rod and boxcars—in increasing volume a few winters back.

Two years ago the Tucson Police Department declared war on the growing population of winter vags.

The word went out from police head Bernard L. Garmire: pick up any vags spotted within the city limits. A vag is defined simply as a man with no address, no money and no visible means of support.

Brought into City Court by the vanful they usually are handed a 15-day sentence.

They actually serve only about eight days of the 15-day sentence because they get two days' credit for one while working.

The campaign against vags has paid off, according to Garmire. There seems to be a few less this year.

There is evidence that the bad word about Tucson is getting around by that special grapevine vagrants and bums use to communicate with the rest of the brotherhood.¹⁵

The statistics from Tucson show the intensity of this new campaign. While the year 1956 showed 276 arrests for vagrancy and 260 convictions, the three

15. Tucson Daily Citizen, Jan. 4, 1960, p. 60, cols. 3-5.

subsequent years show a marked increase. In 1957 there were 644 arrests, with 632 convictions, in 1958, 1,829 arrests with 1,613 convictions, and in 1959, 1,226 arrests with 1,192 convictions. In Tucson, those charged with vagrancy are not permitted a jury trial—a practice that is in accord with the construction given the requirements of some other state statutes and constitutions.¹⁶ If one does not plead guilty but asks for a trial, he faces a substantial delay during which he must remain in jail, since he is usually unable to post bond. He may thus spend more time in jail awaiting trial than he would have spent had he pleaded guilty. These circumstances combine to induce most to plead guilty, regardless of the facts.

As I reflected upon this crusade and talked to local people in Tucson about the problem, I became disturbed. Well-to-do people are welcomed with open arms to that fine community. But is not a destitute person entitled to look for work in a sunshine state?

What happens in Tucson and elsewhere is illustrated by a recent case. The defendant was picked up by officers after midnight while walking the city streets. He was not drunk or disorderly. He had no criminal record. "I thought this was free America," the man told the judge. "You are trying to make a criminal out of me and I'm not." He was a casual worker, without a regular residence. That was his crime. Sentence was suspended for a week to enable him to get a residence and a job. "If you don't, I have a place of residence for you for 6 months," said the judge.

The Code for the District of Columbia indeed provides that "any person wandering abroad and lodging . . . in the open air, and not giving a good account of himself" is a vagrant.¹⁷ The same goes for "Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself."¹⁸ Vagrancy by this code is punishable by a fine of not more than 300 dollars or not more than 90 days in jail or by both.¹⁹

I have known judges and lawyers who, afflicted with insomnia, have wandered the streets at night. John Muir, who walked a thousand miles from Kentucky to Florida and who recorded his venture in a book, was certainly a vagrant in the pure sense of the word. As a youth I knew the casual laborers of the Pacific West; I rode "the rods" with them, shared their meals under railroad bridges, and slept with them in the open air. I came to know that the "consumers of injustice" are not the sleepless judges and lawyers but the wanderers who have no prestige of class or family.

We have today great migrations of people within the United States. One of the most dramatic is the movement of citizens from Puerto Rico to the

16. See Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203-12 (1953); cf. *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Rogers v. District of Columbia*, 31 A.2d 649 (D.C. Munic. Ct. App. 1943).

17. D.C. CODE ANN. § 22-3302(6).

18. D.C. CODE ANN. § 22-3302(8).

19. D.C. CODE ANN. § 22-3304.

mainland.²⁰ A million-odd farm migrants follow the crops in all parts of the United States—in fruit, wheat, cotton, sugar beets, and berries. Some are looking for permanent homes; nearly half, it has been estimated, are habitual migrants sometimes known as hoboes or bindle stiffs. Their presence is essential to harvesting the crops of some areas. Yet their presence in some communities has raised major problems, as the 1951 Report of the President's Commission on Migratory Labor makes clear.²¹ In my day many of these characters felt the hard impact of vagrancy statutes even though their only crime, if such it was, was being an I.W.W.²²

The treatment of these migratory people sometimes has bizarre aspects as the story of the I.W.W.'s, the account from Tucson, and another account from Philadelphia show. Caleb Foote of the University of Pennsylvania Law School has published a recent survey made in Philadelphia which shows that banishment is a fixed feature of Philadelphia's vagrancy administration:

This fifteenth century policy objective of erecting barriers against the wanderings of the poor and of banishment of those who were found where they were not supposed to be retains surprising vitality in present day Philadelphia vagrancy administration. Any migrant, whether a transient en route between jobs, or stopping over to spend the proceeds of one job before moving on to the next, or arriving in a city destitute and planning to stay there while seeking employment, is bait for a vagrancy arrest. He tends to gravitate to the skid row in any city through which he passes, if only because that is where 50¢ beds can be obtained, and he can patronize the bars, walk the streets, or sit on a park bench on a warm summer night. Some, but by no means exclusively the drinkers, get scooped up in the nightly rounds of clean-up arrests. They constituted a small but significant minority of the drunkenness and vagrancy prosecutions observed in this study. In the magistrates' courts their defense of recent employment or search for employment was viewed with such extreme suspicion that it was very difficult to establish.²³

These vagrancy statutes have a long and ancient history. Stephen, in his *History of Criminal Law of England*, shows how in origin vagrancy was a part of "the criminal aspect of the poor laws."²⁴ The Statute of Laborers "practically confined the labouring population to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime."²⁵ The crime of vagrancy was born in the breakup of

20. Senior, *Puerto Rico: Migration to the Mainland*, 78 MONTHLY LAB. REV. 1354 (1955); Senior, *Migration and Puerto Rico's Population Problem*, Annals, Jan. 1953, p. 130.

21. See also S. REP. No. 1150, pt. 3, 77th Cong., 2d Sess. (1942).

22. For a vivid account of their forcible removal from one state, see *United States v. Wheeler*, 254 U.S. 281 (1920), known as the Bisbee deportation case.

23. Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 617-18 (1956). (Footnotes omitted.)

24. 3 STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND 266 (1883). See also Geeson, *The Justices, the Vagrants and the Poor*, 112 JUSTICE OF PEACE AND LOC. GOV. REV. 289 (1948).

25. STEPHEN, *op. cit. supra* at 267.

the feudal system. The vagrant was the runaway serf. And with that as the start it evolved so that it was aimed at a host of different but related things: begging, drunkenness, disorderly conduct, prostitution, lewdness, narcotics peddling, etc.²⁶ Yet the vagrancy statutes in general punish being a certain kind of person, not doing a certain overt act. Vagrancy, said the court in *Handler v. City and County of Denver*, is "a present condition or status."²⁷ The philosophy of the modern statutes was stated in *District of Columbia v. Hunt* as follows: "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life."²⁸

26. The broad sweep of the statutory definition is seen in D.C. CODE ANN. § 22-3302 (Supp. VIII 1960):

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any park, highway, public building, or other public place, store, shop, or reservation, or at any public gathering or assembly.

(2) Repealed. [Any person upon whom shall be found any instrument, tool, or other implement for picking locks or pockets or that is usually employed or reasonably may be employed in the commission of any crime who shall fail satisfactorily to account for the possession of the same (now D.C. CODE ANN. § 22-3601 (Supp. VI 1958) with increased penalty).]

(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source.

(4) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire.

(5) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license.

(6) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage, gasoline station, parking lot, or in the open air, and not giving a good account of himself.

(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms.

(8) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

(9) And all persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not.

For a summary of various types of vagrancy statutes or ordinances, see Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

27. 102 Colo. 53, 58, 77 P.2d 132, 135 (1938).

28. 163 F.2d 833, 835 (D.C. Cir. 1947).

The California Supreme Court said, "Vagrancy differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms."²⁹

There is a real nest of problems for the lawyer in these vagrancy statutes.

First is the question of propriety of the statutory standard. A federal court declared unconstitutional an ordinance of Hawaii which made a vagrant of anyone who "habitually" loafs, loiters, or idles in any public place including public streets or highways.³⁰ Judge Rudkin, who wrote for the court, wrote in the spirit of Carl Sandburg and Robert Louis Stevenson.

Illinois struck down a law that left to administrative officials power to charge a person with vagrancy who was "reputed to be" an habitual criminal.³¹

An early Missouri ordinance met a like fate since it made one a vagrant who knowingly "associated" with persons having the reputation of being criminals.³² The citizen, said the court, has "the right to go where and when he pleases, and to associate with whom he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one, and that he interfere with the rights of no other citizen."³³

West Virginia nullified, as an unreasonable restraint on liberty, a statute which required, on penalty of being a vagrant, every able-bodied male between 16 and 60 to work regularly at least 36 hours a week in some lawful employment.³⁴

The prevailing view was probably stated by the Supreme Court of Missouri in *Ex parte Branch*³⁵ where it said that neither being without visible means of support, or being idle, or loitering around saloons and gambling houses is a crime. It is "when they all three meet in one person at the same time they constitute a vagrant, who has been very appropriately described as 'the chrysalis of every species of criminal.'"³⁶ And the same court saved another statutory provision by construing "tramping or wandering from place to place, without visible means of support," not as condemning destitute people in search of a job, but only those who ramble here and there "without any certain course and with no definite object in view."³⁷

One who thumbs through these vagrancy statutes may often wonder whether, apart from everything else, some of the provisions are too vague to satisfy constitutional tests. One bill which President Roosevelt vetoed made

29. *People v. Craig*, 152 Cal. 42, 47, 91 Pac. 997, 1000 (1907). See *People v. Allington*, 103 Cal. App. 2d 911, 919, 229 P.2d 495, 500 (Super. Ct. 1951).

30. *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931).

31. *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934).

32. *City of St. Louis v. Roche*, 128 Mo. 541, 31 S.W. 915 (1895).

33. *Id.* at 547, 31 S.W. at 917. See *Ex parte Smith*, 135 Mo. 223, 36 S.W. 628 (1896).

34. *Ex parte Hudgins*, 86 W. Va. 526, 103 S.E. 327 (1920).

35. 234 Mo. 466, 470-71, 137 S.W. 886, 887 (1911).

36. *Id.* at 471, 137 S.W. at 887.

37. *Ex parte Karnstrom*, 297 Mo. 384, 392, 249 S.W. 595, 597 (1923).

a vagrant out of "any person leading an idle life . . . and not giving a good account of himself."³⁸ In his veto message President Roosevelt said:

What constitutes "leading an idle life" and "not giving a good account of oneself" is not indicated by the statute but is left to the determination in the first place of a police officer and eventually of a judge of the police court, subject to further review in proper cases. While this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. I am not willing to agree that a person without lawful means of support, temporarily or otherwise, should be subject to the risk of arrest and punishment under provisions as indefinite and uncertain in their meaning and application as those employed in this clause.

It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.³⁹

Second is the extent to which the movement of destitute people *interstate* may be hindered before there is a collision with the Federal Constitution. The Court, in *Edwards v. California*,⁴⁰ held invalid a California statute which made it a crime to bring into the state a nonresident "indigent." What of indigents who are en route through one state to another looking for jobs?

Third is whether, when the crime charged under a particular statute is one of status, it may be proved by a single act,⁴¹ or whether one act can be made to do service for several ingredients of the crime.⁴²

Fourth, when does a person cease to be a vagrant? Must the prosecutor show lack of reform or is the burden of proving reform on the accused? How long may a person be charged with vagrancy after the last act of vagrancy has been committed?⁴³

Fifth, since vagrancy is a crime of status, can a person once convicted be convicted again or does double jeopardy apply?

Sixth, how is the vagrancy statute used in relation to other crimes? It is common, I believe, in some cities to make regular roundups of prostitutes, charge them with vagrancy, impose modest fines, and discharge them. Then

38. This bill also defined a "vagrant" as "any able-bodied person who lives in idleness upon the wages, earnings, or property of any person having no legal obligation to support him." President Roosevelt in his veto message stated, "This definition is so broadly and loosely drawn that in many cases it would make a vagrant of an adult daughter or son of a well-to-do family who, though amply provided for and not guilty of any improper or unlawful conduct, has no occupation and is dependent upon parental support." See S. REP. No. 821, 77th Cong., 1st Sess. 2 (1941).

39. S. REP. No. 821, 77th Cong., 1st Sess. 2 (1941).

40. 314 U.S. 160 (1941).

41. *Fleming v. District of Columbia*, 34 App. D.C. 5 (Police Ct. 1909).

42. *People v. Moss*, 309 N.Y. 429, 131 N.E.2d 717 (1956).

43. See *Titus v. State*, 97 Tex. Crim. 444, 261 S.W. 1029 (1924).

the vagrancy charge is substituted for prostitution and perhaps even ameliorates the punishment. But is the vagrancy statute sometimes used as a cloak or cover for arresting and convicting people for some other crime that cannot be proved or for conduct that is not a crime?

On a journey to Afghanistan, I learned of a political leader who had campaigned too vigorously against the church and was prosecuted for sacrilege. Though acquitted of that charge, he was convicted of vagrancy and disorderly conduct. We in the United States have known of convictions for lesser crimes when the true offense was a major one which the prosecution had difficulty in establishing. We have also seen that vagrancy statutes are sometimes used to justify arrests which otherwise would not be lawful.⁴⁴ One notorious incident of the kind occurred in California in 1935 where waterfront strikers were convicted of vagrancy during a period when there was a police drive against "radicals." The Court of Appeals reversed the judgment because it was convinced that the convictions were based not on vagrancy, but on communism at a time when the Communist Party was on the ballot and wholly lawful in California.⁴⁵ I understand that even in New Mexico—a state quite free in modern times of political persecution or discrimination—arrests for vagrancy are often no more than "arrests for investigation." And in one of the few vagrancy cases to reach the Supreme Court it seemed plain that an ordinance was used to suppress unpopular speech which, in part at least, was critical of the police.⁴⁶

Seventh, is vagrancy charge an easy way of making arrests on suspicion? The study which Professor Foote made in Philadelphia leaves the uneasy feeling that vagrancy is too often a device for making an arrest on suspicion.⁴⁷ He states, "One cannot escape the conclusion that the administration of vagrancy-type laws serves as an escape hatch to avoid the rigidity imposed by real or imagined defects in criminal law and procedure."⁴⁸

Those who cherish the Anglo-American tradition will join in what Lord Hewatt said in *Rex v. Dean*:

It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824.⁴⁹

The volume of vagrancy cases in the courts each year is large. Last year in the District of Columbia we had 421 prosecutions; and in 1958 we had 245.

44. See *People v. Craig*, 152 Cal. 42, 47, 91 Pac. 997, 1000 (1907).

45. *The Recorder*, January 24, 1935, pp. 1, 8.

46. See *Edelman v. California*, 344 U.S. 357, 365-66 (1953) (dissenting opinion).

47. See 59 *YALE L.J.* 1351 (1950).

48. Foote, *supra* note 23, at 649. See also Lacey, *supra* note 16, at 1218.

49. 18 *Crim. App. R.* 133, 134 (1924).

The FBI Uniform Crime Reports for 1958 show, on a national basis, 88,351 arrests for vagrancy out of a total number of arrests of 2,340,004.⁵⁰ The figure for 1957 was 69,520 arrests for vagrancy out of a total of 2,068,677 arrests.⁵¹ The figure for 1956 was 75,478 arrests for vagrancy out of a total of 2,070,794 arrests.⁵²

The speed with which some of these cases are handled is startling. Professor Foote relates that between 50 and 60 defendants were processed by one judge in 15 minutes, and one court handled 1,600 cases a month.⁵³ The defendant was commonly not informed of the charge until he was "tried." No pretense of proving the crime charged was made. And usually these defendants were without the aid of counsel.⁵⁴

In Philadelphia almost all of the magistrates are laymen; few have ever had any experience in lawmaking or law enforcement; and until recently the police sat on the bench with them. In the District of Columbia the municipal courts, manned by law-trained judges, handle vagrancy cases. The charge is prepared on a printed form; a hearing is had; and the accused can have a lawyer appointed for him if he desires. The absence in the District of Columbia of the acute problems revealed in Philadelphia indicates that generalizations are difficult. Yet across the country in large cities and small towns it is the vagrancy statutes or ordinances that ultimately touch the lowliest class among us.

Moreover, a good look at the way our magistrates' courts operate may give vagrancy cases a new dimension in our thinking. The Court held in *Tumey v. Ohio*⁵⁵ that a criminal trial in a state court violates due process when the judge is paid for his service or can recover his costs only when he convicts the defendant. Some magistrates' courts still thrive on that practice. A justice of the peace who finds a defendant guilty gets \$5; a justice of the peace who finds a defendant innocent gets nothing. This is not a problem peculiar to vagrancy. But whether it is brigaded with vagrancy or traffic cases, it is a blot on the administration of justice.⁵⁶

I think we can say with confidence that in this particular area of law the traditional safeguards available to accused persons tend to mean practically nothing. These vagrants usually have no lawyer to speak for them. Yet one

50. P. 78. This report covers 1,586 cities over 2,500 in population.

51. 1957 *id.* at 114. This report covers 1,473 cities over 2,500 in population.

52. 1956 *id.* at 109. This report covers 1,551 cities over 2,500 in population.

53. See Foote, *supra* note 23, at 606-07.

54. *Id.* at 644.

55. 273 U.S. 510 (1927).

56. See *Payola in Court*, 43 J. AM. JUD. Soc'y 111 (1959); WARREN, *TRAFFIC COURTS* 211-17 (1942); Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 46 ILL. BAR J. 754, 806 (1958); Vanlandingham, *Pecuniary Interests of Justices of the Peace in Kentucky*, 45 KY. L.J. 607 (1957); Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. BAR J. 300, 331-34 (1947); Note, 19 MISS. L.J. 342 (1948); Note, 29 NOTRE DAME L. REV. 438 (1954); Note, 20 N.C.L. REV. 304 (1942).

charged with vagrancy may have as much need of a lawyer as one charged with more serious crimes, as the knotty problems I have discussed plainly suggest.

Furnishing them lawyers presents quite a problem. New Jersey has made the greatest advance in furnishing indigent defendants with lawyers, using a voluntary assignment system that the bar has worked out. It does not, however, reach down to the Municipal Court level where vagrants are tried. Newark alone has 16,000 cases a year in its Municipal Court, exclusive of traffic cases; and of these, it is estimated that in 75% the defendants are indigent. A student of the New Jersey situation has recently said, "Purely as a matter of mechanics and administration, it is utterly impossible for any assigned counsel system to cope with such a caseload, especially where each case is disposed of so rapidly."⁵⁷ Is the only alternative a public defender system operating under a regime where each defendant is apprised of his right to counsel?

The view persists in this country that these wanderers are "a potential menace to the community" and must be punished.⁵⁸ What Perkins wrote in "The Vagrancy Concept"⁵⁹ is typical of these pronouncements. "In metropolitan centers . . . the vagrancy law is one of the most effective weapons in the arsenal of law enforcement, and if the officer's use of this weapon should be seriously impaired the security of the citizen would be grievously weakened."⁶⁰ That has a familiar ring. The same justification is often given for holding people *incommunicado* and for allowing coerced confessions to be used in evidence. But do not these vagrancy laws—like the use of force to get a confession—merely make for lazy police and lax police practices?

The charge against them is more serious than that. A man who is idle and has no visible means of support is placed in a criminal category, because he is deemed likely to commit a crime in order to gain a livelihood. Foote and others have challenged that premise;⁶¹ and there seems, indeed, little evidence to support it. Moreover, when the law proceeds on that basis, suspicion is the foundation of the conviction; the presumption of innocence is thrown out the window. England got rid of that concept. Criminal intent of some character, not mere idleness and destitution, must be present.⁶²

Idleness and destitution in the modern setting have haunting aspects of welfare and of the right to work—both of which lack criminal elements as we know them. These three elements, now inseparably combined, should be segregated. The welfare element should be integrated with our vast welfare

57. See Trebach, *A Modern Defender System for New Jersey*, 12 *RUTGERS L. REV.* 289, 299 (1957).

58. H.R. REP. NO. 1248, 77th Cong., 1st Sess. 2 (1941).

59. 9 *HASTINGS L.J.* 237 (1958).

60. *Id.* at 252-53.

61. Foote, *supra* note 23, at 625-27.

62. See Danks, *Suspected Persons and Reputed Thieves*, 5 *CRIM. L. REV.* (N.Y.) 115 (1958).

programs. The right to work should be part of our employment procedures. Criminal activity should be treated for what it is. Can we as a people be proud to say that a destitute person looking for a job—in a sunshine state or elsewhere—is a criminal?

John Lisle wrote in 1915, "A short term in the county workhouse where all kinds and conditions are huddled pell-mell, with work of the meanest character has no beneficial effect upon the shiftless."⁶³ The rate of recidivism in vagrancy tells all who will listen that the traditional "get tough" attitude accomplishes nothing toward solving the problem.

Jacobus tenBroek of the California State Social Welfare Board has stoutly maintained that no penal sanction is appropriate where only the need for welfare or the need for work is involved.⁶⁴ How can we hold our heads high and still confuse with crime the need for welfare or the need for work?

To what extent are vagrancy laws used to control suspicious persons and to permit arrests not otherwise legal?

The FBI Uniform Crime Reports, already mentioned, shows that arrest on suspicion is common in this country. Those arrested in 1956 on suspicion and released without prosecution ran at the rate of 280.4 people per 100,000 inhabitants,⁶⁵ and the total of persons arrested either for a specific offense or for suspicion alone, and released without being held for prosecution, was at the rate of 666.7 per 100,000 inhabitants.⁶⁶ And the figure for arrests on suspicion in 1958 was 96,740.⁶⁷

There is no crime known as "suspicion." Nor is there any federal crime known as "holding for investigation." Yet it is common in the District of Columbia to make arrests for the latter purpose. There were 7,367 persons so arrested in 1958, *all of whom were later released*.

A recent report of the Illinois Division of the American Civil Liberties Union states, "Almost daily the Chicago newspapers report police investigations in which suspects are taken into custody for questioning."⁶⁸

One purpose of arrests on suspicion is obvious.⁶⁹ It is to hold men *incommunicado* with the hope of getting confessions from them. Yet this practice

63. 5 J. CRIM. L., C. & P.S. 498, 511 (1915).

64. Address by Jacobus tenBroek, Western Conference, American Public Welfare Ass'n, Phoenix, Ariz., Oct. 15, 1958.

65. FBI, UNIFORM CRIME REPORTS No. 1, Semiann. Bull. 65 (1957).

66. *Id.* at 65.

67. 1958 *id.*, at 93.

68. Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union, 11 (1959).

69. The Report of the American Civil Liberties Union, *supra* note 68, at 11, states:

The main reason for questioning a suspect in a police station is the coercive influence of arrest and incommunicado detention. The police can question anyone at any time without placing him under arrest. But he may refuse to speak and cannot be forced to answer questions. A man who is restrained and held in isolation from the outside world is more likely to answer questions. This is borne out by the widespread practice of the Chicago police of refusing to allow an arrested person to call

violates the requirements of federal law,⁷⁰ and of the law in most states, that any person arrested be promptly arraigned⁷¹ so that he can have the advice of counsel and be released upon bail.

Arrests for suspicion are not countenanced by the Bill of Rights. The fourth amendment allows arrests—as well as searches—only for “probable cause.”⁷² Police must make out part of their case at least before the citizen is arrested. We do not permit the practice engaged in in some other lands of allowing arrests on suspicion or at the caprice of the police, so that long interrogation can follow with the hope it will make out the necessary case that justifies the arrest. Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time. Not many of the provisions of the Bill of Rights (I am sorry to say) have been held to be incorporated in the standard of due process which the fourteenth amendment demands of the states. Yet the fourth amendment is one of the select few.⁷³ The result is that arrests on “suspicion” are unconstitutional at the local, as well as at the federal, level.

The persons arrested on “suspicion” are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police.

The bar has had increasing responsibilities thrust on it since World War II. We experienced in that decade and a half a rash of measures designed to increase our security in a troubled world. Investigations led the way; loyalty procedures for federal employees were adopted; the investigation of the attitudes and beliefs of men was extended to employees working for firms doing business with the federal government; state loyalty programs were adopted. Thousands upon thousands went through “the security wash.”

Some bar groups did good work in offering their services to these suspects. Yet, by and large, we sat by and watched the parade of branded people march to oblivion. It is not to our credit that we did this. We salved our consciences by saying that no one has the right to work for the government, and from that premise found power in government to put the scarlet letter “S” on the foreheads of thousands of our people.

a lawyer before he is questioned. It is said that the lawyer will advise him of his right not to answer questions and the police will then find it more difficult to gather the evidence they need to solve crime.

But arrests based on suspicion for the purpose of interrogation are made in flat disregard of the law. The requirement that prisoners be brought to court promptly after they are arrested is intended to prevent just such police misconduct.

70. *Mallory v. United States*, 354 U.S. 449 (1957).

71. See *McNabb v. United States*, 318 U.S. 332, 342 n.7 (1943).

72. *Henry v. United States*, 361 U.S. 98 (1959).

73. *Wolf v. Colorado*, 338 U.S. 25 (1949).

This, we hope, is a transitory, not a recurring problem. The arrests for vagrancy and the arrests for suspicion promise to be more enduring. They, like the poor whose problems gave rise to these remedies, are likely to be with us for a long time.

I hope that bar groups across the country concern themselves with these local problems and try to discover how our system can be designed to dispense justice to vagabonds as well as to corporate clients.

The very existence of committees should make impossible what has transpired in Philadelphia, Tucson, and other centers. Reports that aired the problems should result in new and different methods of treatment of the drifters in our midst.

It is important for a nation with moral authority in a troubled world to reduce its "consumers of injustice" to a minimum. The measure of the health of our legal system is the justice dispensed at all levels. Better that we be rid of the ancient poor laws that oppress our people, better that we outlaw arrests on "suspicion" and without "probable cause," better that we have judges who hold no monetary stake in the outcome of a trial, than that we reach the moon. Conquering of space has glamour and glitter; and it will be tremendously important in future centuries. But we live on earth; and here we will remain—at least, most of us. Vagrancy and arrest on suspicion are not distant, remote, speculative; they are just around the corner in many of our communities. It is what takes place in this block and in this neighborhood that gives the true reading on the health of our democratic way of life and on the actual vigor of our Bill of Rights.