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Criminal Law - Constitutional Law - Vagrancy Statutes and Due Process - *Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967)

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CURRENT DECISIONS

Criminal Law—Constitutional Law—VAGRANCY STATUTES AND DUE PROCESS. In *Alegata v. Commonwealth*,¹ defendants were convicted for violation of five “vagrancy” statutes designed to curtail the activities of: persons suspected of unlawful design who do not give a satisfactory account of themselves;² idle persons who, not having visible means of support, live without lawful employment;³ persons who rove about from place to place, living without visible means of support;⁴ known criminals if acting in a suspicious manner;⁵ and idle and disorderly persons.⁶ Defendants maintained that these statutory provisions were unconstitutional on their face because they did not state a crime for which punishment could have been imposed, and that the

1. *Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967).

2. MASS. ANN. LAWS ch. 41, § 98 (1957): “During the night time . . . [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going. . . . Persons so suspected who do not give a satisfactory account of themselves may be arrested by the police, . . . and taken before a district court to be examined and prosecuted.”

3. *Id.*, ch. 272, § 66 (1951): “Idle persons who, not having visible means of support, live without lawful employment; persons wandering abroad and visiting tipping shops or houses of ill fame, or lodging in groceries, outhouses, market places, sheds, barns or in the open air, and not giving a good account of themselves; persons wandering abroad and begging, or who go about from door to door, or place themselves in public ways, passages or other public places to beg or receive alms, and who do not come within the description of tramps, . . . shall be deemed vagrants and may be punished by imprisonment for not more than six months in the house of correction.”

4. *Id.*, ch. 272, § 63 (1902): “Whoever, not being under 17, a blind person or a person asking charity within his own town, roves about from place to place begging, or living without labor or visible means of support, shall be deemed a tramp.” § 64 “A tramp shall be punished by imprisonment in the house of correction for not more than 30 days.”

5. *Id.*, ch. 272, § 68 (1913): “A person known to be a pickpocket, thief or burglar, if acting in a suspicious manner around any . . . shop . . . shall be deemed a vagabond and shall be punished by imprisonment in the house of correction for not less than four nor more than 12 months.”

6. *Id.*, ch. 272, § 53 (1956): “Stubborn children, runaways, both male and female, common railers and brawlers, persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, disturbers of the peace, keepers of noisy houses and persons guilty of indecent exposure may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than \$200.00, or by both such fine and imprisonment.”

words which purported to define the prohibited conduct were vague and indefinite.

In reversing all but one of the convictions,⁷ the Massachusetts Supreme Judicial Court held that these provisions were unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment⁸ and article twelve of the Massachusetts Constitution.⁹

Vagrancy statutes punish a person for what he is, and not what he has done.¹⁰ In *Handler v. City and County of Denver*,¹¹ vagrancy was said to be a present condition or status.¹² These offenses have a long history, beginning with the Statute of Labourers,¹³ which confined the laboring population to its "place of abode" and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime.¹⁴

7. *Alegata v. Commonwealth*, 231 N.E.2d 201 at 211 (Mass. 1967). In upholding the conviction for "idle and disorderly persons" the court viewed the statute as definitive enough to withstand a constitutional challenge on the ground of vagueness. It was felt that the meaning of "disorderly" had a common understanding, especially in the light of the revision of the Massachusetts' criminal laws in 1941 which deleted many outmoded offenses. Since the "disorderly persons" statute was retained and recent case law, legal scholarship and the Model Penal Code (§ 250.2) have defined its meaning, the court felt that definitiveness was not wanting. It is important to note that this rationale for upholding the statute has not gone uncriticized. In this era of fast-moving social change, "disorderly conduct" statutes and their definitions open up a wide field for judicial abuse. They may lead to an abridgement of civil liberties, especially when applied to conduct centering around the Civil Rights movement and the anti-Vietnam demonstrations. For a discussion of the dangers involved in their abuse, see Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 W. & M. L. REV. 349 (1967).

8. U.S. CONST. amend. XIV, 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

9. DECLARATION OF RIGHTS OF THE CONSTITUTION OF THE COMMONWEALTH OF MASS. art. XII ". . . and no subject shall be arrested . . . or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

10. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 at 12-13 (1960). See Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960).

11. 102 Colo. 53, 58, 77 P.2d 132, 135 (1938).

12. At Common Law, "vagrancy" was wandering or going about from place to place by idle persons who had no lawful or visible means of support and who subsisted on charity and did not work, though able to do so. *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601, 603 (1933). See the dissenting opinion of Justice Douglas in the dismissal of certiorari in *Hicks v. District of Columbia*, 383 U.S. 252 (1966); *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426 (3rd Cir. 1967).

13. Statute of Labourers of 1349 & 1350, 23 & 25 Edw. 3 (st. 1).

14. 3 J. STEPHAN, *THE HISTORY OF CRIMINAL LAW IN ENGLAND* 266 (1883).

Crime prevention has been given as their primary purpose¹⁵ although other explanations have been cited.¹⁶ When challenged in the past, the courts have given three primary reasons for their validity: 1) they constitute a reasonable exercise of the police power;¹⁷ 2) the standard of conduct within the statute is sufficiently definite to withstand a constitutional challenge of vagueness and uncertainty;¹⁸ 3) the conduct or the circumstances of the individual's presence constituted an offense or the suggestion of an intent to commit an offense.¹⁹

15. *District of Columbia v. Hunt*, 163 F.2d 833, 835 (D.C. Cir. 1947) "A vagrant is a probable criminal; and the purpose . . . is to prevent crimes which may likely flow from this mode of life." H.R. REP. No. 1248, 77th Cong., 1st Sess. 8099-8100 (1941). "The measure [vagrancy statute for the District of Columbia] is directed primarily to persons who are a potential menace to the community."

16. *State v. Hogan*, 63 Ohio St. 202, 58 N.E. 572 (1900). The provisions of vagrancy statutes ". . . rest upon the economic truth that industry is necessary for the preservation of society, and that he who, being able to work, and not able otherwise to support himself deliberately plans to exist by the labors of others, is an enemy to society and to the commonwealth." See *People v. Bell*, 204 Misc. 71, 74, 125 N.Y.S.2d 117, 119 (Nassau County Ct.), *aff'd*, 306 N.Y. 110, 115 N.E.2d 821 (1953); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 604 (1955-56).

17. *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601, 603 (1933):

Society recognizes that vagrancy is a parasitic disease; which, if allowed to spread, will sap the life of that upon which it feeds. To prevent the spread of the disease, the carrier must be reached. In order to discourage, and, if possible, to eradicate vagrancy, our Legislature has enacted a statute defining vagrants and penalizing them according to its terms. Other Legislatures have pursued the same course. We see no reason why this cannot, or should not, be done as a valid exercise of the police power.

Accord, *State v. Grenz*, 26 Wash. 764, 175 P.2d 633 (1946); *McNeilly v. State*, 119 N.J.L. 237, 195 A. 725 (Sup. Ct. 1937); *State v. Salerno*, 27 N.J. 289, 142 A.2d 636 (1958); *Dominguez v. City and Council of Denver*, 147 Colo. 233, 363 P.2d 661 (1961).

18. *Portland v. Goodwin*, 187 Ore. 409, 210 P.2d 577 (1949). Portland, Ore., Ordinance No. 76339, § 16-617, made it unlawful for any person between the hours of 1 A.M. and 5 A.M. to roam or be upon any street, alley or public place without having or disclosing a lawful purpose. In the eyes of the court, the statutory language was not unduly uncertain or vague, but, on the contrary, evinced a clear, definite and ascertainable standard of guilt; *McNeilly v. State*, 119 N.J.L. 237, 195 A. 725 (Sup. Ct. 1937); *Dominguez v. City and Council of Denver*, 147 Colo. 233, 363 P.2d 661 (1961). See *People v. Cooper*, 366 Ill. 113, 7 N.E.2d 882 (1937); *Hicks v. District of Columbia*, 197 A.2d 154, 155 (D.C. 1964), *cert. denied*, 383 U.S. 252 (1966). "The Constitution does not require impossible standards on statutes, and all that is necessary is a reasonable degree of certainty." *United States v. Petrillo*, 332 U.S. 1 (1947).

19. *Dominguez v. City and Council of Denver*, 147 Colo. 233, 363 P.2d 661 (1961). Denver, Colo., Ordinance § 824.1-7 made it unlawful for any person to wander about the streets late at night and not be able to give a satisfactory account of himself. "The City's only witness [a police officer] testified that at approximately 3:00 A.M. the defendant was seen in front of the La Bonita Cafe in an automobile. . . . [t]hat the defendant ran

Recently, statutes similar to those in the principal case have been viewed as not being specific enough to survive a constitutional challenge of due process. A New Jersey statute²⁰ declared a person "disorderly" if he was apprehended and unable to give a good account of himself. In invalidating the statute, the court in *U. S. v. Margeson*²¹ considered the word "good" so subjective that it enabled one to draw many conclusions as to its precise definition.²² Similarly, an ordinance defining "disorderly conduct" as standing, loitering or strolling in any place in the city and not being able to give a satisfactory account or being without lawful means of support was held invalid because of the imprecision of its terms.²³ Recently, a statute which defined vagrants as persons who,

from the car to another location, and . . . that the window of the car had been broken. . . . [t]hat while the defendant was running he dropped a frozen chicken and that the defendant was arrested a few blocks from the scene of the alleged violation. [He further] testified that when the defendant was asked why he was running he first said he was just running, but later said he was running to his girl's house." (147 Colo. at 236, 363 P.2d at 663) The court reasoned that the conduct of the defendant was of such a nature that it was proper for the officer to require a satisfactory exculpatory statement and that the defendant's explanation was not a satisfactory account in view of all the circumstances. See *State v. Salerno*, 27 N.J. 289, 142 A.2d 636 (1958); *Harris v. District of Columbia*, 132 A.2d 152 (D.C. Cir. 1957).

20. N.J. STAT. ANN. 2A: 170-1 (1952).

21. 259 F.Supp. 256 (1966). Acting upon information from an off-duty policeman, police officers apprehended defendants who were fleeing from the back door of a motel room. The officers were acting upon the report of "suspicious conduct" of the defendants which was heightened by the refusal of the officers' request to enter the motel room. After searching a cardboard container carried by the defendants, the officers found a revolver. One of the defendant's identification was different from that stated in the motel register and the defendant explained that he had moved recently and had not been able to change his automobile registration. Defendant also stated that he was a television salesman which, he suggested, was equivalent to being a G.E. Corporation representative as registered by the motel. The other defendant's identification had no discrepancy. Both were arrested under the disorderly persons statute for failure to give a good account of themselves.

22. *Id.*, at 268. The court asked what is a good account? It hypothesized that "good" could mean "morally good," or above suspicion of a crime, or enough credible information sufficient so as to negate probable cause. Or, it was felt possibly to mean that if one does not admit of a crime he has given a good account of himself. Also, no time limit is stated and one cannot tell how far back in time he may have to justify himself or his activities in order to avoid the penalties of the statute. See *Edelman v. People*, 344 U.S. 357, 362 (1953) (dissenting opinion) (the term "dissolute person" was found by Justice Black to be too vague and uncertain; *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (discussing the meaning of the word "gang" and the phrase "known to be a member" of a gang); *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); *Seattle v. Drew*, 423 P.2d 522 (Wash. 1967).

23. *Headley v. Selkowitz*, 171 So.2d 368 (Fla. 1965). Miami, Fla. Code § 43-10.5 was declared invalid because it failed to define the area involved within the city or to

not having visible means of support, live without employment, was declared void. The statute was felt to constitute an overreaching of the proper limitations of the police power and made lawful conduct criminally punishable.²⁴

In view of the fact that some courts have held "vagrancy" statutes valid while others have considered them too vague and uncertain to meet a constitutional challenge of due process, the question arises as to the consistency of the courts' standards. The key to the answer lies in the perplexing problem of deciding what is "vagueness" and "indefinitiveness."²⁵ As Mr. Justice Frankfurter suggested, indefinitiveness is not a

limit the time of day in which it was applicable. Because of its broad terms, the court felt that any citizen who may be engaged in lawful pursuits would possibly be subject to arrest merely because he cannot give a satisfactory account.

Commonwealth v. Carpenter, 325 Mass. 519, 91 N.E.2d 666 (1949). Revised Ordinance of Boston, c.40, § 34 (1947) stated that "no persons shall, in a street . . . willfully and unreasonably saunter or loiter for more than seven minutes after being directed by a policeman to move on." It was declared void on its face since it did not prescribe any standard capable of intelligent human evaluation in enabling one chargeable with its violation to discover those conditions which convert lawful conduct into criminal conduct.

People v. Diaz, 4 N.Y.2d 469, 151 N.E.2d 871 (3rd Cir. 1958) A Dunkirk, N.Y. Ordinance c.18, § 10 punished a person for disorderly conduct if he should lounge or loiter about any street or street corner. It was declared invalid for vagueness and uncertainty and for failing to provide any standards or criteria by which the prohibited conduct could be tested. See *Hawaii v. Anduka*, 48 F.2d 171, 172 (9th Cir. 1931).

24. *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426 (3rd Cir. 1967). N.Y. Code Crim. Pro. 1, § 887 was held unconstitutional on the ground that it violated due process and constituted an overreaching of the proper limitations of the police power in that it unreasonably made criminal and provided punishment for conduct which in no way encroached upon the rights or interests of others and which had in no way been demonstrated to have anything more than the most tenuous connection with the prevention of crime and preservation of the public order, other than, perhaps, as a means of harassing, punishing or apprehending suspected criminals in an unconstitutional fashion.

City of Reno v. 2d Judicial Dist. Ct., 427 P.2d 4 (Nev. 1967). Reno, Nev., Municipal Code 12-112-1 described a person as being disorderly if he was engaged in any illegal occupation or had evil reputation and was found consorting for an unlawful purpose with a person or persons who had an evil reputation. It was invalidated for attempting to make mere status a crime.

25. See *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966). "A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962); *Commonwealth v. Carpenter*, 325 Mass. 519, 91 N.E.2d 666 (1950); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *United States v. Petrillo*, 332 U.S. 1 (1947); *Connally v. General Const. Co.*, 269 U.S. 385 (1926).

quantitative concept.²⁶ What may appear too vague as to one subject may be definite as to another.²⁷ To the minds of some courts, the criticized statutory word or phrase has a well-recognized or common meaning.²⁸ It also may be determined that the challenged portion has a definite and well-settled meaning in the common law.²⁹ In the light of the fact that the more recent decisions have held "vagrancy" statutes unconstitutional, and with the Supreme Court giving greater force and effect to concepts of equal justice,³⁰ it is probable that courts in the future will look more rigorously at these statutes in determining their constitutionality. However, the Supreme Court has yet to decide the validity of "vagrancy" statutes.³¹ Until such a case is decided, the courts are relatively free to construe these statutes with their own notions of "vagueness" and "indefinitiveness."

Criminal Law and Procedure—ELECTRONIC EAVESDROPPING. In *Katz v. United States*,¹ petitioner was charged with transmitting wagering information by telephone in violation of a federal statute.² Over

26. *Winters v. New York*, 333 U.S. 507, 524 (1948) (dissenting opinion).

27. *Id.*, at 525.

28. *Id.*; *Phillips v. Municipal Ct.*, 24 Cal. App. 2d 453, 75 P.2d 548 (1938); *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601 (1933); *McNeilly v. State*, 119 N.J.L. 237, 195 A. 725 (Sup. Ct. 1937); *See People v. Bell*, 204 Misc. 71, 74, 125 N.Y.S.2d 117, 119 (Nassau County Ct.), *aff'd*, 306 N.Y. 110, 115 N.E.2d 821 (1953); *People v. Sohn*, 269 N.Y. 330, 333, 199 N.E. 501, 502 (1936); *Lacey, Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); *contra*, *United States v. Margeson*, 259 F. Supp. 256 (1966), where the court stated, in discussing the meaning of "good account," that "the New Jersey courts have not defined it, and we must confess that to us it is insufficiently precise to pass muster under the 14th Amendment." *Contra*, *People v. Diaz*, 4 N.Y.2d 469, 151 N.E.2d 871 (3rd Cir. 1958), where the court felt that while the word "loiter" had acquired a common and accepted meaning, it did not, by itself, inform a citizen of its criminal application and was left open to arbitrary enforcement.

29. *Connally v. General Const. Co.*, 269 U.S. 385 (1926); *contra*, *Winters v. New York*, 333 U.S. 507, 519 (1948).

30. For a discussion of the dangers of disorderly conduct statutes vis-à-vis our changing social times, *see Watts, Disorderly Conduct Statutes in Our Changing Society*, 9 W. & M. L. REV. 349 (1967).

31. *Hicks v. District of Columbia*, 197 A.2d 154 (D.C. Cir. 1964), *cert. denied*, 383 U.S. 252 (1966).

1. 88 S. Ct. 507 (1967).

2. 18 U.S.C. § 1084 (Supp. III, 1958). That statute provides in part:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the