Louisiana Vagrancy Law - Constitutionally Sound

Harry M. Zimmerman Jr.
LOUISIANA VAGRANCY LAW—CONSTITUTIONALLY UNSOUND

The several provisions of Louisiana's vagrancy law¹ are derived from three main sources. The first is the original common law concept of vagrancy which was developed in fourteenth century England because of grave economic conditions created by the Black Death. The Statute of Labourers of 1349² deemed anyone wandering from place to place without work a vagrant and subjected offenders to harsh punishment. This first type of vagrancy was, therefore, predicated on a theory of economic status criminality.³

As early as the sixteenth century, however, the reason for punishment under vagrancy laws was changed from one of economic status to one of probable criminal status. For several reasons,⁴ vagrants, as originally defined, were felt to be likely criminals and "crime prevention," rather than economic considerations, became the justification for the continuance of such laws. Although the reason for the punishment had changed, the poor and shiftless were still in truth punished on the basis of

   "(1) Habitual drunks; or
   "(2) Persons who live in houses of ill fame or who habitually associate with prostitutes; or
   "(3) Able-bodied persons who beg or solicit alms, provided that this article shall not apply to persons soliciting alms for bona fide religious, charitable or eleemosynary organizations with the authorization thereof; or
   "(4) Habitual gamblers or persons who for the most part maintain themselves by gambling; or
   "(5) Able-bodied persons without lawful means of support who do not seek employment and take employment when it is available to them; or
   "(6) Able-bodied persons of the age of majority who obtain their support gratis from persons receiving old age pensions or from persons receiving welfare assistance from the state; or
   "(7) Persons who loaf the streets habitually or who frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly, without lawful business or reason to be present; or
   "(8) Persons found in or near any structure, movable, vessel, or private grounds without being able to account for their lawful presence therein; or
   "(9) Prostitutes.

   "Whoever commits the crime of vagrancy shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both."
2. 23 Edw. 3, c. 1 (1349).
3. 91 C.J.S. Vagrancy § 1(a) (1955): "At common law, a person is deemed a vagrant who goes about from place to place without visible means of support, is idle, and, although able to work for his maintenance, refuses to do so, and lives without labor or on the charity of others." A variation of this theme can be seen in subsection 5 of Louisiana's vagrancy statute. This subsection is, in effect, a paraphrase of the original Statute of Labourers.
their economic status. In the name of crime prevention, vagrancy statutes over the years were constantly expanded in order to include not only the jobless, but almost every type of petty criminal; this is the second source of several Louisiana provisions. Guilt, as before, was not predicated upon any act, but on a person's status—in this case, his criminal status. It was while in this form that the vagrancy concept was adopted by almost every American jurisdiction and, in the United States at least, this idea of status criminality has remained largely unchanged.

5. For a rather recent defense of vagrancy laws based on the crime prevention theory, see Perkins, The Vagrancy Concept, 9 Hastings L.J. 237 (1958). As stated in note 3 supra, La. R.S. 14:107(5) is closely related to the original Statute of Labourers, which was based solely on economic grounds. That the justification for this type of purely economic status offense later became "crime prevention" is seen in the official comment to La. R.S.14:107(5) (1950), which states that the subsection was "enacted to prevent men who are able to work from idling and wandering about the community, and becoming drones, thieves or charges upon the public." While crime prevention is still, therefore, bandied about by the authorities as justification for such laws, this is not the true state of affairs. It has been shown that vagrancy arrests have no real connection with the prevention of crime. Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956). Such laws in actuality have several purposes far divorced from any reasonable theory of "crime prevention": (1) to "clean up the town" by getting the bums off the streets; (2) to put "on ice" those persons suspected of crime but against whom no evidence can be produced; (3) to, perhaps not intentionally, harass disadvantaged minority groups. Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 37 U. Pa. L. Rev. 605 (1950); Comment, 37 N.Y.U. L. Rev. 102 (1962); Note, Harv. Civ. Rts.-Civ. Lib. L. Rev. 439 (1967-68).

6. One of the many examples of the widening of the vagrancy offense could have at one time been found in Municipal Code of Chicago, ch. 193, § 1. This ordinance provided, in part, that "all persons ... who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; all persons who are idle or dissolute and go about begging; all persons who use or exercise any juggling or other unlawful games or plays; all persons who are found in houses of ill-fame or gaming houses; all persons lodging in or found at any time in sheds, barns, stables, or unoccupied buildings, or lodging in the open air and not giving a good account of themselves ... all persons who stand, loiter, or stroll about in any place in the city, waiting or seeking to obtain money or other valuable things from others by trick or fraud, or to aid or assist therein; all persons that shall engage in any fraudulent scheme, devise or trick to obtain money or other valuable things in any place in the city ... all touts, ropers, steerers, or cappers, so called, for any gambling room or house who shall ply or attempt to ply their calling on any public way in the city ... all persons who shall have or carry any pistol, knife, dirk, knuckles, slingshot, or other dangerous weapon concealed [sic] on or about their persons ... shall be deemed guilty of disorderly conduct ..." Although this was a "disorderly conduct" ordinance, it was derived from the vagrancy concept. The ordinance was declared unconstitutional because of vagueness in Landry v. Daley, 280 F. Supp. 908 (N.D. Ill. 1968). Subsections 2, 3, 4, 6, and 9 of Louisiana's vagrancy statute are further examples of the broadening of the vagrancy offense.

7. Lacey, Vagrancy and Other Crimes of Personal Condition, 60 Harv. L. Rev. 1203, 1206 (1953).

8. England abandoned status criminality for conduct criminality in The Vagrancy Act of 1824, 5 Geo. 4, Ch. 83.

9. This very short historical analysis of the vagrancy offense is taken from a more exhaustive study in Comment, 37 N.Y.U. L. Rev. 102 (1962). Other excellent histories may be found in Foote, Vagrancy-Type Law and Its Adminis-
The third source of Louisiana’s vagrancy law is one of the few types of conduct criminality that found its way into the typical vagrancy statute—the offense of loitering. While such a provision proscribes an act rather than a status, it is, because of the “crime prevention” justification, used almost exclusively against the poor and those reputed to be or look to be criminals. This offense is thus a derivation from the vagrancy concept since its use is based upon a person’s economic or criminal status.

The whole thrust of Louisiana’s vagrancy law is not the punishment of crime, but the prevention of crime. For the fulfillment of this purpose, many states, like Louisiana, made their vagrancy provisions rather broad in scope. As is often the case with broadly drawn penal statutes, some very basic civil liberties are often jeopardized in the exercise of vagrancy-type laws. While the making of regulations for the prevention of crime is certainly within the police power of the state, it has often been stated that the power to regulate must be exercised so as not to unjustifiably interfere with protected freedoms.

In the past, however, the courts have had little reason to worry about this problem because the ratio of vagrancy arrests to judicial appeals has always been extremely low. The reasons for this are not difficult to imagine. The fact is that, until approximately ten years ago, the courts had not been faced with many well-drawn constitutional challenges to these statutes and regulations, 104 U. Pa. L. Rev. 603 (1956); Perkins, The Vagrancy Concept, 9 Hastings L.J. 237 (1958); Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Calif. L. Rev. 557 (1960).

10. California, New York, and Illinois have recently switched from status to conduct criminality in their vagrancy-type statutes. Calif. Penal Code § 647 (Supp. 1966); N.Y. Rev. Penal Code § 240.35(6); Ill. Ann. Stat. ch. 38, § 35–1 (Smith Hurd Supp. 1961). Unfortunately, however, the New York and California statutes were poorly drafted and still retain features that are of doubtful constitutionality. See note 112 infra.


15. See text accompanying notes 22–27 infra.

16. “Vagrancy-type” is the term used because these common law vagrancy derived offenses are often gathered into disorderly conduct statutes.


19. Ignorance and poverty seem, as would be expected, to be the main obstacles to judicial appeals on such arrests. See id. at 647.
ordinances. Considering the relatively primitive state of civil rights and liberties just a decade ago, it is not surprising that most of the challenges that did reach the upper courts were struck down.\textsuperscript{20} With the recent upheaval in the field of civil rights and liberties, however, has come not only several state decisions invalidating vagrancy statutes and ordinances,\textsuperscript{21} but also many more constitutional challenges to such laws.

Successful attacks on vagrancy provisions have been made on several grounds: (1) void for vagueness or arbitrary enforcement under the due process clause of the fourteenth amendment,\textsuperscript{22} (2) unreasonable restraint of liberty under the thirteenth amendment,\textsuperscript{23} (3) cruel and unusual punishment under the eighth and fourteenth amendments,\textsuperscript{24} and (4) void as offending due process of the fourteenth amendment by making status a crime.\textsuperscript{25} In theory, some vagrancy-type provisions could be challenged on the grounds that they offend the equal protection guarantee of the fourteenth amendment,\textsuperscript{26} and one state court has recently held that punishment for economic or criminal status is no longer within the police power of the state.\textsuperscript{27} Unfortunately, the United States Supreme Court has rarely spoken out in this area, but the indications are that the Court will support these decisions.\textsuperscript{28}

This Comment will explore those provisions of Louisiana's vagrancy statute that are open to constitutional attack. For analysis purposes, the provisions will be separated into those that would be commonly considered as true vagrancy provisions and those that are, in fact, loitering provisions.

\textit{Vagrancy}

"The following persons are and shall be guilty of vagrancy:

\begin{enumerate}
\item [(1)] Habitual drunkards;
\end{enumerate}

In the past, most provisions of this type have been attacked on the ground that they were void for vagueness as offending

\textsuperscript{21} This statement is supported by the text accompanying notes 29-99 infra.
\textsuperscript{22} Lanzetta v. New Jersey, 306 U.S. 451 (1939); People v. Belenstro, 356 Ill. 144, 190 N.E. 301 (1934).
\textsuperscript{23} St. Louis v. Roche, 128 Mo. 541, 31 S.W. 915 (1895).
\textsuperscript{24} Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
\textsuperscript{26} Note, 20 Ala. L. Rev. 141, 146 (1967).
\textsuperscript{28} See text accompanying notes 35-41 infra.
the due process of the fourteenth amendment. The challenge has centered around the word "habitual," or, as in most other provisions of this genre, "common." The leading case on the void for vagueness argument in this area is Lanzetta v. New Jersey. Here, the Supreme Court invalidated a statute that made membership in a "gang" one of the prerequisites for being declared, and punished as, a "gangster." The Court felt that the word "gang" had so many possible meanings that no one could know with any certainty precisely what activity would be deemed illegal, and that therefore the statute was invalid under due process.

When used in a provision such as we are concerned with here, it would seem that the same argument would apply to the words "common" or "habitual." However, three later state decisions held that the word "common" was not too vague. One of these decisions has since been overruled by In re Newbern. There, the California Supreme Court held that the word "common" had too many possible definitions, and in dicta said that the word "habitual" would be no improvement. The court found that the statute failed "to include a standard of what inordinate use of intoxicants makes a person a common drunkard . . . the statute leaves to the individual judge or jury the determination of the meaning of the law . . . ."

While this decision indicates that Louisiana's "habitual drunkard" provision could very well be challenged on vagueness grounds, an attack which could have a much greater effect on the provision would be that it is invalid as cruel and unusual punishment under the eighth and fourteenth amendments. Robinson v. California was the first case to open the door to

33. Id. at 786, 350 P.2d at 124, 3 Cal. Rptr. at 371.
34. It would be difficult, but not impossible, for a state to sufficiently define "habitual" or "common." Thus the vagueness argument has only limited use to those who wish to have habitual drunkard laws declared altogether unconstitutional. The problem is compounded by the fact that the Supreme Court has been extremely reluctant to accept a case challenging a vagrancy provision on the grounds of vagueness. See Wainwright v. New Orleans, 392 U. S. 598 (1968), writ dismissed as improvidently granted; Hicks v. District of Columbia, 383 U. S. 252 (1966), writ dismissed as improvidently granted; Edelman v. California, 344 U. S. 357 (1953), writ dismissed as improvidently granted. When the Court does accept such a case, it makes every effort to avoid the constitutional question; Thompson v. City of Louisville, 362 U. S. 190 (1960).
such a challenge. A California law deemed it a punishable offense to be a drug addict. The United States Supreme Court felt that drug addiction was a disease and held that a state could no more punish someone for having the status of a drug addict than it could punish someone for having a common cold. It was held that such a conviction would be cruel and unusual punishment.

Two federal appellate courts then held that conviction of a chronic alcoholic on a charge of public drunkenness also would violate the “cruel and unusual punishment” protection. It was held that chronic alcoholism, like drug addiction, was a disease that gave rise to an uncontrollable compulsion to drink. The courts felt that drunkenness was but a symptom of a disease or evidence of a status, and therefore should not be punished. The United States Supreme Court stopped short of this position, however, in Powell v. Texas. The Court in a 5-4 decision insisted that Robinson stood only for the narrow holding that a state could not punish a person for his status—but that it could punish a person for his actions, whether or not that act was a characteristic of the status.

Although some commentators felt that Robinson stood for the proposition that the only personal status protected from punishment is that which is retained under some sort of compulsion, the court in Powell emphasized the fact that the voluntariness of the acquired status had nothing to do with their decision in Robinson. That decision was simply that the state could not prosecute a person because of his status, regardless of whether that status was voluntarily or involuntarily acquired and retained. As was said by Justice Marshall in the Court’s opinion,

“The entire thrust of Robinson’s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms,

39. The Court in Powell spent a lot of effort in attempting to determine whether or not alcoholism could be defined as a disease and whether or not appellant was under an irresistible urge to drink. But, judging from what the Court later said (see text accompanying note 40 infra), it seems that all of this discussion was not a factor in the decision.
has committed some actus reus. It thus does not deal with the question of whether conduct cannot constitutionally be punished because it is, in some sense 'involuntary' or oc-casioned by a compulsion."

In dicta, all nine justices seemingly agreed that if Powell had been arrested because he was a chronic alcoholic, the case would have been brought under the Robinson rule and the statute authorizing such arrest declared unconstitutional. It would be of no merit for the state to claim that the person arrested under such a statute was not driven by an overwhelming physical or psychological compulsion to drink. As stated in Powell, voluntariness is an irrelevant factor when the state has made a status, rather than an act, the only ingredient of a criminal offense.

Since the Court is not limiting this question to involuntary status, there is no reason why the rationale of the Robinson and Powell decisions could not be used to attack the constitutionality of all status offenses. Justice Black in concurring opinion states that

"[A]ny attempt to explain Robinson as based solely on the lack of voluntariness encounters a number of logical difficulties. Other problems raised by status crimes are in no way involved when the state attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.... Punishment for a status is particularly obnoxious... because it involves punishment for a mere propensity, a desire to commit an offense... This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established..." (footnotes omitted)

It seems only a matter of time, therefore, until Louisiana's "habitual drunkard" provision will be declared unconstitutional on the grounds of cruel and unusual punishment.

"(2) Persons who live in houses of ill fame or who habitually associate with prostitutes;"

Laws similar to the first part of this provision have generally been upheld when under constitutional attack. Legislation sim-

41. Id. at 542, 543.
42. Annot., 92 A.L.R. 1228, 1233 (1934). It has been reasonably argued, however, that such a provision has no place in the criminal law because "while it may be said that the resident of the house of ill fame perhaps ought to be made [sic] punishable, at least for his deplorable taste, such establishments have long been outlawed and are subject to speedy closure." Sherry, Vagrants, Rogues
ilar to the second part, which predicates "criminality upon the criminal repute or fame of the accused or his associates has generally been held violative of rights secured by state and federal constitutional provisions."\(^4\) Missouri courts, for example, have held consistently that a provision making association with certain elements of society a punishable offense is unconstitutional,\(^4\) even if the provision states that the associating must be done with the intent of committing a crime.\(^4\) The rationale of these cases is that such laws are an unreasonable invasion of personal liberty.\(^4\)

"If it can be made a penal offense for a person to associate with those of his own choosing, however disreputable they may be, when not in the furtherance of some overt act of public indecency or in the perpetration of some crime, then it necessarily follows that by the same authority he may be compelled to associate with persons not of his own choosing."

---


44. Ex parte Smith, 135 Mo. 223, 26 S.W. 628 (1896); St. Louis v. Roche, 128 Mo. 541, 31 S.W. 915 (1895); But see People v. Pieri, 269 N.Y. 315, 199 N.E. 495 (1946).

45. Cf. Hechinger v. Maysville, 22 Ky. L. Rep. 486, 57 S.W. 619 (1900); People v. Pieri, 269 N.Y. 315, 324, 199 N.E. 495, 498 (1936) ("Mere association of people of ill repute with no intent to breach the peace or to plan or commit crime is too vague a provision to constitute an offense."); City of Watertown v. Christnach, 39 S.D. 286, 164 N.W. 62 (1917). The United States Supreme Court has recently discovered that there is some sort of peripheral right to "freedom of association" to be found in the Constitution. Shelton v. Tucker, 364 U.S. 479 (1960); NAACP ex rel. Patterson v. Alabama, 357 U.S. 449 (1958). None of the decisions have, however, dealt with the question of the prohibition of personal associations. It has been suggested that if the Court ever steps into an area in which certain personal associations are prohibited, it would be advised to use due process or equal protection arguments rather than freedom of association. See Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1 (1964). In any event, the indications from those "association" cases the Court has decided are that any law prohibiting personal association would come under rigid scrutiny, and that the danger resulting from the association had better approach the danger inherent in Communism. See Scales v. United States, 367 U.S. 203 (1961).

46. St. Louis v. Roche, 128 Mo. 541, 546, 31 S.W. 915, 916-17 (1895).
A renowned case in this area is *People v. Belcastro.* There, an Illinois statute declared that anyone who associated with reputed habitual criminals or persons who habitually carried weapons was, and could be punished as, a "vagabond." The court held that such a law gave administrative officers arbitrary and discriminatory powers and was also an unreasonable denial of liberty without due process.

A very recent decision in Nevada indicates that a new ground for invalidating such statutes has been found. The court held unconstitutional an ordinance which deemed to disorderly conduct for persons of ill repute to assemble for an unlawful purpose and made their reputation prima facie evidence of their intent. The court said that the statute violated due process by making the mere status of certain persons the grounds for punishment. Unfortunately for analysis purposes, the court did not explain its use of the due process argument. Because of the United States Supreme Court decision in *Powell v. Texas,* however, it certainly seems that in addition to the powerful argument that LA. R.S. 107(2) is an affront to personal liberty, the fact that the provision makes status an offense raises grave doubts as to its constitutionality—whether the problem is approached on the grounds of due process or cruel and unusual punishment.

"(5) Able-bodied persons without lawful means of support who do not seek employment and take employment when it is available to them;"

This type of provision is a true derivative of the original common law crime of vagrancy. In earlier years, there was little doubt that the state could control those who refused to go to work in order to keep them from becoming "drones, thieves or charges upon the public." Harsh statutes of this order have been challenged, however, on several grounds, and a number of these challenges have been successful.

As early as 1912 in *Ex parte Smith,* an Ohio court over-

---


50. This provision does not create a status offense in that the words "habitually associate" allow a person to be arrested even if at the time of arrest he is not committing the act of associating with a prostitute. Of course, removal of the words "habitually associate" would not save the provision because it would still be invalid as an unreasonable restraint on liberty.


53. 13 Ohio N.P. (N.S.) 278 (1912).
threw a provision almost identical to Louisiana's law54 on grounds of vagueness. The very existence of Louisiana's provision points out the fact that this decision was ahead of its time;55 but two very recent decisions have turned to the rationale of Smith and invalidated this type of vagrancy provision because of vagueness. In Baker v. Binder,56 a federal district court ruled unconstitutional a statute declaring that those persons who habitually loitered and refused to work were "vagrants." The court felt that the statute was a catch-all which was not specific as to what it wished to prohibit or what type of conduct would violate it. The Massachusetts court in Alegata v. Commonwealth57 cited Lanzetta v. New Jersey58 in support of its recent decision to invalidate a Massachusetts statute, which was similar to Louisiana's provision, on several grounds including vagueness.

Vagueness has not been the only objection forwarded against this type of provision. In the 1920 decision of Ex parte Hudgins,59 a West Virginia statute that required every able-bodied man to work at least thirty-six hours a week was found to be an unreasonable restraint on liberty. In defining "liberty," the court said:

"As defined by Blackstone, 'it consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.'"60

In 1967, New York's highest court in Fenster v. Leary61 held as an improper exercise of the police power a statute that defined a vagrant as "a person who, not having visible means to maintain himself, lives without employment."62 It felt that whatever earlier justification there was for the law, it was obvious from all the governmental welfare and poverty programs that the government had abandoned vagrancy laws as a means

54. OHIO GEN. CODE § 13409 defined a vagrant as "whoever, being a male person able to perform manual labor, has not made reasonable effort to procure employment or has refused to labor at reasonable prices, is a vagrant . . . ."
57. 231 N.E.2d 201 (Mass. 1967).
59. 86 W. Va. 526, 103 S.E. 327 (1920).
60. Id. at 529, 103 S.E. at 329.
62. N.Y. CODE CRIM. P. § 887(1).
to persuade the unemployed poor to go to work. The New York court also expressed doubts as to the law's constitutionality since it made status a basis for a penal offense. Although the court chose not delve into this problem, other courts have done so and prior to 1967 most of them found nothing wrong with punishing the status of being voluntarily jobless. The Nevada Supreme Court in Parker v. Municipal Judge of City of Las Vegas has broken with this tradition, however, in holding that a law making the status of poverty grounds for conviction offended due process. A Colorado court in State v. Jones cited Robinson v. California in support of a similar holding, even though Robinson had approached the problem by means of the cruel and unusual punishment clause.

Once again, while there are excellent grounds for all of these challenges, the most powerful of them is the "status" argument. As has been suggested, the Supreme Court in Powell v. Texas seems to be preparing for a full scale assault on all status offenses. Furthermore, although the Court has not yet faced this precise question, individual justices over the years have displayed a marked distaste for the original common law type vagrancy offense. One of the strongest statements was

63. The court charged that the only persons picked up for vagrancy were derelicts who wandered into nice neighborhoods, and people suspected of crime but on whom the police had no evidence—and that the first use was more of a problem for the public welfare people, and that the second was unconstitutional.
67. 2 CRIM. L. REP. 2498 (Colo. County Ct. 1968).
69. Actually, the decision in Powell is not the only indication that the United States Supreme Court will not look favorably upon status type offenses. It has been shown that the reasoning of several Court decisions dealing with the punishment of Communists could by easy analogy be applied to the type of status offenses being discussed here. See Note, 20 ALA. L. REV. 141, 145 (1967). It should also be noted that there is a very potent argument against status offenses that apparently has not yet been discovered by the courts. As discussed in Note, supra at 146, the "equal protection" scheme advanced by Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949), when applied to status offenses, indicates that such laws violate the equal protection guarantee of the fourteenth amendment.
70. Justice Frankfurter, in a dissenting opinion in Winters v. New York, 333 U.S. 507, 540 (1948), referred to vagrancy statutes in these words: "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 police and prosecution, although not chargeable with any particular offense." Speaking for the majority in Edwards v. California, 314 U.S. 160, 177 (1941), Justice Byrnes stated that "we do not think that it will now be seriously contended that because a person is without employment and without funds he con-
made by Justice Jackson in his concurring opinion in *Edwards v. People of State of California*:\(^71\).

"We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States... The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color."\(^72\)

From any number of constitutional grounds, therefore, it would seem that LA. R.S. 107(5) will not stand before a constitutional onslaught.

*Other Provisions*

Subsections 4 and 9, which declare habitual gamblers and prostitutes "vagrants," are probably invalid in that they make a person's mere status the basis of a criminal offense.\(^73\) If the Louisiana courts decide that the "houses of ill fame" in the first part of Subsection 2 do not have to be proven as actual places of prostitution, the provision is invalid because it makes "reputation" a basis for punishment.\(^74\) Even correctly interpreted, there could be some question as to whether a state can validly prohibit the status of living in, as opposed to running or supporting, a house of prostitution. Subsection 6 is some sort of "welfare" regulation, and as such seems to suffer from some serious constitutional defects. These defects, however, involve problems beyond the scope of this Comment and will not, therefore, be explored.

Subsection 3 should be in no constitutional difficulty—provisions such as this have been invariably upheld by the courts.\(^75\) Of the seven provisions in Louisiana's vagrancy law already explored, however, at least five of them are in definite constitutional jeopardy.

---

\(^{71}\) Justice Black and Douglas dissented from the denial of writs in *Edelman v. California*, 344 U.S. 357 (1953), stating that a statute making a "dissolute" person a vagrant was too vague. Justice Douglas has for years spoken out against vagrancy provisions. See *Hicks v. California*, 383 U.S. 252 (1966) (dissenting from denial of writs); *Douglas, Vagrancy and Arrest on Suspicion*, 70 *Yale L.J.* 1 (1960).

\(^{72}\) Id. at 184, 185.

\(^{73}\) See *Powell v. Texas* in text accompanying note 37 supra.

\(^{74}\) See text accompanying notes 43-48 supra.

\(^{75}\) Annot., 92 A.L.R. 1228, 1233 (1934); 91 C.J.S. *Vagrancy* § 1-2 (1955).
Loitering

“(7) Persons who loaf the streets habitually or who frequent the streets habitually at late or unusual hours of the night . . .”

Loitering provisions differ from the status type of vagrancy provision in that their purpose is not to get people back to work, but to prohibit certain types of acts which, if not prohibited, are supposedly an open invitation to crime. Even though such provisions deal with an act rather than a status, they still must undergo rigid constitutional scrutiny by the courts. And in recent years, this scrutiny has greatly narrowed the scope of activities that loitering statutes can prohibit.

This first part of Subsection 7 would appear to be unconstitutional on its face. With rare exceptions, provisions similar to this have been consistently invalidated by the courts. Most of the cases in this area are concerned with the vagueness of the word “loiter” and its synonyms, such as: “standing,” “strolling,” “wandering,” “sauntering,” “lounge,” “idle,” or “loaf.” Almost invariably it has been held that such words, standing by themselves, offer no standard by which a person could discover when a perfectly legal action became illegal. Other decisions have invalidated similar provisions on the

76. Cf. Phillips v. Municipal Court of Los Angeles, 24 Cal. App. 2d 453, 75 P.2d 548 (1938); Adamson v. Hoblitzell, 279 S.W.2d 759 (Ky. 1955); Tunstley v. City of Richmond, 202 Va. 707, 119 S.E.2d 488 (1961). Phillips was later ignored by In re Cregler, 56 Cal.2d 308, 363 P.2d 305, 14 Cal. Rptr. 260 (1961), and dismissed by In re Huddleson, 229 Cal. App. 2d 618, 40 Cal. Rptr. 581 (1964). In a unanimous decision, the United States Supreme Court in Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1967), held that an ordinance drafted substantially like that approved in Tunstley violated the fourteenth amendment.

77. Headly v. Selkowitz, 171 So.2d 368 (Fla. 1965); City of St. Louis v. Gloner, 210 Mo. 502, 109 S.W. 30 (1908).

78. Headly v. Selkowitz, 171 So.2d 368 (Fla. 1965).


grounds that they were an unreasonable restraint on liberty. The word "habitual" in Louisiana's provision does not save it—to prohibit even habitual loafing would be an unreasonable restraint. Just as part of the essence of liberty is the right of "locomotion," so is the right of non-locomotion a part of personal liberty. "It is a matter of common knowledge that the majority of mankind spend a goodly part of their waking hours in whiling or idling the time away."

Provisions such as this are usually held constitutional only if (1) words similar to "for the intent of doing an unlawful act" are either in the statute or are added by the court in its interpretation of the statute, or (2) if the prohibition is limited to places where children congregate, such as schools. Even this last possibility is in some doubt. It has been held that such a provision is an unreasonable restraint on liberty, and the California Supreme Court in a recent decision held that a showing of the act of loitering around a school will not be sufficient for conviction if it was not also shown that the person was loitering with the intent of committing a crime.

"(7) (O)r who loiter around any public place of assembly, without lawful business or reason to be present;"

It should be evident that Subsection 7 would be held constitutional by most courts only if the words "without lawful busi-

86. Hawaii v. Anuahi, 48 F.2d 171 (9th Cir. 1931). Notice also that the word "habitual" turns this provision into a status-type of offense which would be unconstitutional under the Powell v. Texas rationale discussed in text accompanying note 37 supra.
87. See text accompanying note 45 supra. It should be stated here that it is not universally agreed that Americans have the right to travel from place to place as they please. In In re Cregler, 56 Cal.2d 308, 363 P.2d 305, 14 Cal. Rptr. 289 (1961), the California court made this rather unfortunate statement: "It is within the legislative power to define vagrancy and to provide that those who indulge in pointless, useless wandering from place to place within the state without any excuse for such roaming other than the impulse generated by what is sometimes denominated wanderlust, shall come within the definition and that such individuals may properly be penalized as the statute ordains." Id. at 280, 36 P.2d at 445.
88. Hawaii v. Anuahi, 48 F.2d 171, 173 (9th Cir. 1931).
ness or reason” could be interpreted as meaning “with the intent of committing an unlawful act.” As has been already pointed out, mere loitering or loafing cannot be made illegal; and therefore being around a public place for the purpose of whiling away the time or taking in some air must be considered “lawful business.” Therefore a person can lawfully be arrested under this provision only if the policeman has probable cause to believe that the suspect intends to commit some criminal offense and not only the act of mere loitering.

“He must be deemed innocent until his voluntary conduct overcomes the apparent presumed innocence of his movements by disclosing a purpose to violate some law....”

Any other interpretation, of course, would allow arrest on suspicion, which has long been held unconstitutional. In any event, such a necessary interpretation emasculates the provision and makes it rather useless.

“(8) Persons found in or near any structure, movable, vessel, or private grounds without being able to account for their lawful presence therein.”

Subsection 8 at first glance seems to be a typical “satisfactory account” type of loitering statute. A second reading, however, brings one to the realization that this provision has fatal deficiencies. While this subsection seems to be limited in scope by requiring that the suspect be found “in or near any structure, movable, vessel, or private grounds” before he must account for his actions, one realizes on reflection that it is virtually impossible for a person to avoid being in or near at least one of these objects. What this provision actually does is authorize a policeman to stop any person at any time and at any place for no valid reason whatsoever and demand that the person account for his

98. These types of provisions usually require that a person acting in a suspicious manner be prepared to give a police officer a “satisfactory account” of what he is doing. For discussions on the constitutionality of such provisions, see Murtagh, Status Offenses and Due Process of Law, 36 Fordham L. Rev. 51 337 (1968); Notes, 20 Ala. L. Rev. 141 (1967), 4 Ariz. L. Rev. 284 (1962-63).
being there. If the officer does not like the explanation given to him, he is allowed to make an arrest. This provision is invalid not only for vagueness and as a grossly unreasonable restraint on liberty, but also because it authorizes the police to arrest and search all persons whom they think are "suspicious."99

Conclusions and Suggested Reforms

As has been suggested, those Louisiana vagrancy provisions that make a person's status grounds for punishment100 are open to a variety of constitutional objections, the most potent of which seems to be the cruel and unusual punishment argument recently advanced by the United States Supreme Court. It has been shown that arrests for this species of vagrancy have no real value in crime prevention,101 and law review writers, with possibly one exception,102 have long advocated the repeal or invalidation of such provisions.103 Seemingly, the courts at last are moving toward the same position, so perhaps the legislature would be well advised to follow the lead of New York, California, and Illinois104 in repealing all of the status provisions and making specific acts the grounds for arrest. Subsections 1, 4, 9, and the second part of Subsection 2 should be put where they belong—in the sections of the Criminal Code dealing with specific acts of public intoxication,105 prostitution,106 gambling,107 and pandering.108 Subsection 5, that wholly unnecessary and greatly abused relic of the middle ages,109 should be repealed and forgotten. Subsection 6 and the first part of Subsection 2 should undergo study to determine whether such provisions really have a place in the criminal law—indeed, whether they are even constitutional. If such a study results in the retention of these provisions, they and Subsection 3 should be removed and placed in an omnibus disorderly conduct statute.

106. Id. 14:82.
107. Id. 14:90.
108. Id. 14:84.
109. See note 103 supra.
Louisiana's two loitering provisions are in no better position. In fact, the case against them is possibly even stronger than that against the status-type offenses. Subsection 7 and 8 are definitely unsound and should be repealed. All of this would, of course, enable the Louisiana Criminal Code to rid itself entirely of the long outdated and even dangerous concept of vagrancy.\textsuperscript{110}

Assuming that most people agree that beside being unconstitutional, status provisions have no value in law enforcement and should be abandoned, it must be determined whether loitering provisions have value in crime prevention and whether they can be drafted to escape a charge of unconstitutionality. It is general knowledge that most public authorities honestly believe that loitering provisions enable the police to prevent crime, but it must be realized that while the prevention of crime is a laudable objective, the "prevention" must not have the effect of trampling individual liberties. Putting a person "on ice" because he is acting suspiciously is both undesirable and unconstitutional.

The American Law Institute has attempted to solve the problem of balancing individual civil liberties with society's interest in crime prevention in Section 250.6 of the Model Penal Code:

"A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity... Unless flight by the actor or other circumstance makes it impracticable, a police officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm."\textsuperscript{111}

Unfortunately, this "model" provision does not solve any of the constitutional problems inherent in all loitering provisions. The word "alarm" is certainly just as vague as the words "common"

\textsuperscript{110} Dangerous in the sense that they can cause social unrest, abuse by the police, punishment for innocent conduct, and suppression of free speech. See Note, 3 HARV. CIV. RTS.—CIV. LIB. REV. 439, 442 (1967-68).

\textsuperscript{111} ALI MODEL PENAL CODE § 250.6 (Off. Draft, 1962).
or "suspicious" and there is, therefore, no real standard given as to when a policeman would have the right to demand explanations for conduct. The words "dispel any alarm" also leave much to be desired in the way of certainty. These defects are not cured by saying the offender cannot be convicted if the court believes his story because the words "dispel any alarm" are no less vague for the court than for the policeman; and, in any event, the damage has been done: the suspect has been arrested, searched, booked, and held in jail until he could raise bond if, indeed, he could. This is the true evil of such laws; they enable the police to arrest, search, and "put on ice" all persons they are vaguely suspicious of, the policeman only being required to claim "alarm" and "unsatisfactory explanation." This is the unlimited type of police-state power, the arrest on suspicion, that the authorities should not and cannot under the Constitution be permitted to have.

The police should have, however, reasonable powers to protect property and citizens from harm without necessarily having the power of arrest if the situation does not warrant it. A situation under which the police would have the power to protect without having the immediate power to arrest is envisioned in this writer's proposed provision:

A person commits the misdemeanor of disorderly conduct if he loiters or prowls after 12:30 A.M. on a public way which contains commercial or residential structures and manifests an intent to, and the officer of the peace has probable cause


This provision requires that a party either identify himself or give a "reasonable credible account of his purposes" if he is loitering "under circumstances which justify suspicion that he may be engaged or about to engage in crime." One New York Supreme Court judge has already expressed the opinion that because of this "suspicion" clause the law is unconstitutional: Murtagh, Status Offenses and Due Process of Law, 36 Fordham L. Rev. 51 (1967). The commentary attached to the Official Draft of § 250.6 explains that "suspicion" of Tentative Draft No. 13 was excised in order to "save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause." ALI Model Penal Code § 250.6, comment at 227 (Off. Draft 1962). This fear was not unfounded because there have been at least four cases that have stated or strongly implied that suspicion is not grounds upon which an officer can demand a "reasonable" or "satisfactory" explanation: Dominguez v. City and County of Denver, 363 P.2d 666 (Ariz. 1961); Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967); City of Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577, on rehearing, 187 Ore. 429, 210 P.2d 586 (1949); City of Seattle v. Drew, 423 P.2d 522 (Wash. 1967). California's new vagrancy law, CAL. PENAL CODE § 647(3) (Supp. 1966), is also similar to Tentative Draft No. 13, and it was upheld in People v. Weger, 251 Cal. App. 2d 554, 59 Cal. Rptr. 661 (1967), cert. denied, 389 U.S. 1047 (1968). This decision by the California court has been heavily attacked. See Comment, 2 U. San Francisco L. Rev. 337 (1968).
to believe that, the actor is about to commit a criminal act against persons or property on such public way; and the actor does not remove himself from said public way within 15 minutes after being requested to do so by the officer of the peace, if after said 15 minutes the officer requests of the actor, and the actor fails to give, a credible and readily provable account of his reasons for staying on said public way other than the desire to wander along or loiter on the public way.

If the court finds that the actor did indeed give the police officer a credible and readily provable account of his reasons for remaining on the public way, or that the actor manifested no intent and the officer had no probable cause to believe that the actor was about to commit a criminal act against persons or property on the public way, the actor shall be released from custody, all records of the arrest destroyed, and any fruits of a search pursuant to an arrest under this provision deemed inadmissible in any subsequent civil or criminal proceeding.

This writer believes that such a provision achieves as nearly as possible the ideal of preventing arrest on mere suspicion, while preserving the state's right to protect the lives and property of its citizens. While more exacting than "alarm," parts of the provision do have rather vague standards. But as the provision stands, a police officer cannot take advantage of these necessarily ambiguous words to make an immediate arrest. If the officer does make an arrest without observing the standards set out in the provision, he is liable for false arrest.

There is a United States Supreme Court decision which indicates that such a statute would survive constitutional attack. In *Shuttlesworth v. Birmingham*, the Court was faced with an ordinance which prohibited persons from standing or loitering upon any street or sidewalk of the city after having been requested by a police officer to move on. In the Court's opinion, Justice Stewart stated that:


114. 382 U.S. 87 (1967).
"Literally read, therefore...the second part of this ordinance says that a person may stand on a public sidewalk...only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state."\textsuperscript{115}

However, Justice Stewart also said:

"The Alabama Court...has thus authoritatively ruled that 1142 applies only when a person who stands, loiters, or walks on a street or sidewalk \textit{so as to obstruct free passage} refuses to obey a request by an officer to move on... As so construed, we cannot say that the ordinance is unconstitutional..."\textsuperscript{116} (Emphasis added.)

The Court seemed to be saying that a provision limiting a person's freedom of movement is valid if it is so narrowly drawn that it is applicable only in a situation in which the state has a genuine interest in preventing such movement. It is submitted that the state does have a genuine interest in limiting movement on a certain street when that movement presents probable and imminent danger to persons and property on that street. The proposed statute protects this interest, and is probably valid. In conclusion, therefore, it can be stated that while most of Louisiana's vagrancy provisions are invalid for a variety of reasons, it does seem possible that statutes can be drafted that will achieve the purpose underlying vagrancy-type laws which has never been accomplished constitutionally—crime prevention.

\textit{Harry M. Zimmerman, Jr.}

\textsuperscript{115} Id. at 90, 91.
\textsuperscript{116} Id. at 91.