

# AN OVER-EXPANDED APPLICATION OF VAGRANCY STATUTES

## INTRODUCTION

Police often confront situations in which they wish to gain custody of one suspected of a serious crime, but under circumstances where the probability of guilt is not adequate to justify an arrest for the suspected offense. Usually the desire to obtain custody is bottomed on a felt need to interrogate the suspect under circumstances viewed as favorable to obtaining admissions of complicity, or on a fear that the suspect will flee the jurisdiction or otherwise seek to prevent discovery of his whereabouts.<sup>1</sup>

The comprehensive—indeed vague—wording of modern vagrancy statutes, coupled with the amorphous nature of the crime at common law, provides law enforcement agencies with a flexible tool to carry out this purpose. Commonly, arrests on a charge of vagrancy are made without intention to carry through prosecution for that offense, but solely to obtain custody of one suspected of a more serious offense. The use of vagrancy statutes to accomplish purposes other than prosecution for vagrancy constitutes the subject matter of this note.<sup>2</sup>

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1. See *United States v. Carignan*, 342 U.S. 36, 46 (1951), where Justice Douglas said,

Another time-honored police method for obtaining confessions is to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime. This is an easy short-cut for the police. How convenient it is to make detention the vehicle of investigation! Then the police can have access to the prisoner day and night. Arraignment for one crime gives some protection. But when it is a pretense or used as the device for breaking the will of the prisoner on long, relentless, or repeated questionings, it is abhorrent. We should free the federal system of that disreputable practice which has honeycombed the municipal police system in this country. We should make illegal such a perversion of a "legal" detention.

Here the court held that the defendant's murder confession was not inadmissible solely because it was given prior to his arrest for that charge.

2. Vagrancy statutes have been used:

A. To harass reputed criminals. Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 369 (1936); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203, 1218 (1953); Note, 16 St. Louis L. Rev. 148, 153 (1931).

B. To serve as a cloak to justify an arrest that could not be legally made. Freund, *The Police Power* § 100 (1904); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 614 (1956).

C. To arrest on suspicion (arrests on suspicion are illegal). See generally, Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

D. To arrest for investigation. *Culombe v. Connecticut*, 367 U.S. 568,

The principal discussion will be preceded by an analysis of the purpose and function of vagrancy statutes as a background to the problem.<sup>3</sup>

### I. NATURE AND PURPOSE OF VAGRANCY LAWS

The purpose of vagrancy laws is the prevention of crime.<sup>4</sup> At common law a vagrant was one who was idle, without visible means

(1961), wherein the defendant was arrested on a breach of the peace charge so that the police might interrogate him concerning a recent killing in that area. The court commented on this by saying that the breach of the peace charge was a palpable ruse concocted to give the police time to pursue their investigation. See, e.g., *United States v. Carignan*, 342 U.S. 36 (1951); *Freund*, op. cit. supra; *Douglas*, supra at 12; *Foote*, supra at 614; *Hall*, supra at 369; *Lacey*, supra at 1218; *Ploscowe*, *A Modern Law of Arrest*, 39 *Minn. L. Rev.* 472 (1955); *Note*, 59 *Yale L.J.* 1351 (1950).

E. To round up a certain class of known criminals, such as prostitutes. *Douglas*, supra at 8.

F. To imprison possible suicides and mentally ill. *Foote*, supra at 615. (While this is a necessary humanitarian service, it is nevertheless an abuse of the criminal process.)

G. To validate what would otherwise be an illegal search. *Ibid.*

3. Although beyond the scope of this note, it is noteworthy that courts often attempt to retain custody of suspects by setting bail for minor offenses at unconscionable amounts. Such procedure is not pursuant to the primary purpose of bail, which is to insure the presence of the accused at trial. U.S. Const. amend. VIII. The motive in these high bail cases, clearly, is to hold the accused for interrogation or investigation. See *People ex rel. Sammons v. Snow*, 340 Ill. 464, 173 N.E. 8 (1930), where a suspect with a long criminal record was arrested and charged with vagrancy and three other crimes. Bail on the vagrancy count was set at \$10,000, but when the court discovered that such amount could be posted by the suspect, the judge increased the bail to \$50,000, stating that if he thought the accused could post this amount he would increase it. The supreme court held such bond unreasonable and excessive. See also *Ex parte Lonardo*, 86 Ohio App. 289, 89 N.E.2d 502 (1949), where petitioner with a criminal record was suspected of membership in an organized band of law breakers then under investigation. After being arrested for violating a city ordinance and charged as a suspicious person, he appealed the bail, set at \$75,000. The appellate court, in ordering a reduction of the bond, said,

We are aware of the difficulties encountered by public officials in the investigation and prosecution of crime. Also, we recognize the worthy motives that impel conscientious law enforcement officers to ask for high bail on minor charges against persons suspected of committing major crimes. But such consideration must yield to the imperious voice of the Constitution which the courts are sworn to support. . . . If, by adhering to the constitutional mandate, as we must, an advantage accrues to those who deserve it least, such a result is to be deplored. But greater potentialities for enduring harm lie in an evasion of judicial duty that would impair the integrity of one of the fundamental guarantees of liberty contained in the Bill of Rights. *Id.* at 290-93, 89 N.E.2d at 503-04.

4. *Lacey*, supra note 2. See *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); *Forbes' Case*, 11 *Abb. Pr.* 52 (N.Y. Sup. Ct. 1860); *State v. Grenz*, 26 *Wash. 2d* 764, 175 *P.2d* 633 (1946).

of support, and who, although able to work, refused to do so.<sup>5</sup> State statutory vagrancy provisions<sup>6</sup> have been enlarged so as to encompass not only the sweeping coverage of the common law definition of the crime,<sup>7</sup> but also such specific acts as: abandoning wife or child;<sup>8</sup> begging;<sup>9</sup> disorderly conduct in a public place;<sup>10</sup> fortune telling;<sup>11</sup> gambling;<sup>12</sup> lewdness;<sup>13</sup> masquerading with intent to conceal one's identity;<sup>14</sup> operating a confidence game;<sup>15</sup> thieving;<sup>16</sup> wandering about the streets at a late or unusual hour;<sup>17</sup> overcharging,<sup>18</sup> and other specific acts detrimental to society.<sup>19</sup>

When attacked as vague or indefinite, vagrancy statutes consistently have been held constitutional as not violative of the due process clause of the fourteenth amendment,<sup>20</sup> or as a valid exercise of the police power of the state for the preservation of community good order and security.<sup>21</sup> One accused of vagrancy usually is not entitled to a trial by jury, for this constitutional guarantee<sup>22</sup> is not made applicable to the states by the due process clause of the fourteenth amendment.<sup>23</sup> The constitution secures the right to trial by jury only for those offenses which were so entitled at the time of its adoption.<sup>24</sup>

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5. Foote, *supra* note 2 at 615-17.

6. For a comprehensive list of the vagrancy statutes, and scope, see Lacey, *supra* note 2 at 1207 nn.17 & 18.

7. Okla. Stat. Ann. tit. 21, § 1141(1) (1951).

8. *State v. Chapman*, 202 S.W. 439 (Mo. App. 1918).

9. E.g., Fla. Stat. Ann. § 856.02 (1941); Ga. Code Ann. § 26-7001 (1953).

10. R.I. Gen. Laws Ann. c. 45, § 11(1) (1956).

11. *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939 (1912).

12. E.g., *Cannon v. State*, 114 Ark. 263, 169 S.W. 812 (1914); Okla. Stat. Ann. tit. 21, § 1141(5) (1951).

13. R.I. Gen. Laws Ann. c. 45, § 11(1) 1956).

14. See *People v. Luechini*, 75 Misc. 614, 136 N.Y.S. 319 (1912).

15. Cal. Pen. Code § 647 (4).

16. *People v. O'Keefe*, 178 Ill. App. 86 (1913).

17. Cal. Pen. Code § 647 (4).

18. *State v. Suman*, 216 Minn. 293, 12 N.W.2d 620 (1943).

19. *Ibid.*

20. In *re McCue*, 7 Cal. App. 765, 96 Pac. 110 (1908), held that the constitutional right of due process would not be given precedence over supervening considerations of public policy.

21. *City of New Orleans v. Postek*, 180 La. 1048, 158 So. 553 (1935). See also *Levine v. State*, 110 N.J.L. 467, 166 Atl. 300 (1933), where a vagrancy statute was attacked as class legislation because of the specification of certain classes as vagrants.

22. U.S. Const. amend. VI.

23. *Palko v. Connecticut*, 302 U.S. 319 (1937).

24. *Ragsdale v. City of Danville*, 116 Va. 484, 82 S.E. 77 (1914). See also, *Ex parte Clancy*, 112 Kan. 247, 210 Pac. 487 (1922); *People v. Harding*, 115 Misc. 298, 189 N.Y. Supp. 657 (Erie County Ct. 1921); *State v. Glenn*, 54 Md. 572, 606

As a result, vagrancy and many other petty offenses are triable without a jury, and a summary conviction is a conviction by due process of law.<sup>25</sup>

It is apparent that these statutes are readily adaptable for utilization as effective crime preventives, for vagrancy laws, as contrasted with the usual criminal laws, are broad regulatory measures rather than specifically punitive in character.<sup>26</sup> The offender of the common law of vagrancy is guilty of being a certain type of person,<sup>27</sup> rather than of committing or omitting certain acts.<sup>28</sup> Thus, vagrancy laws are designed as police regulations to *prevent* rather than to *punish* criminal acts.<sup>29</sup> Because of this peculiar purpose, it is necessary that vagrancy regulations be couched in equivocal, almost generic terms.<sup>30</sup> As such, they may be applied, at one time or another, to any and every citizen, law-abiding or lawless, and it is herein that the danger of their application lurks.<sup>31</sup> It is not the fact that vagrancy statutes are enforced, but the reasons for their utilization, other than for prosecution of the crime itself, which is the concern of this note.

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(1880). In this case the court said that to require jury trials for vagrants even if practicable has never been contended; nor could such contention be maintained for a moment.

25. *Byers v. Commonwealth*, 42 Pa. 89 (1862). *Contra*, *Ex parte Johnson*, 13 Okla. Crim. 30, 161 Pac. 1097 (1917); *Ex parte McAlester*, 13 Okla. Crim. 47, 161 Pac. 1176 (1917).

26. *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934). Here the particular act in question was ruled invalid because it gave administrative officers arbitrary powers.

27. *Lacey*, *supra* note 2.

28. *State v. Grenz*, 26 Wash. 2d 764, 175 P.2d 633 (1946).

29. *Ibid.*; *People v. Belcastro*, 356 Ill. 144, 148, 190 N.E. 301, 303 (1934); *Lacey*, *supra* note 2. See also the early decision of *Forbes' Case*, 11 Abb. Pr. 52, 55 (N.Y. Sup. Ct. 1860) where the court held,

These statutes—declaring a certain class or description of persons vagrants, and authorizing their conviction and punishment as such; . . .—are in fact rather of the nature of public regulations to prevent crime and public charges and burdens, than of the nature of ordinary criminal laws prohibiting and punishing an act or acts as a crime or crimes.

30. *Forbes' Case*, 11 Abb. Pr. 52, 55 (N.Y. Sup. Ct. 1860). See also *Comment*, 23 Cal. L. Rev. 616, 618 (1935) where the problem of drafting an acceptable vagrancy statute was discussed, the conclusion being that, "To create an intelligent and intelligible statute covering vagrancy is almost an impossibility unless it be recognized from the beginning that a certain latitude must be allowed in its application."

31. In *Blakely v. State*, 78 Ga. App. 516, 520, 51 S.E.2d 598, 600 (1949), the court warned,

Caution should be exercised by the courts in the trial of vagrancy cases, lest the purpose for which the statute was enacted be inadvertently extended to law abiding citizens going about under the presumed protection of the law in the exercise of their inherent liberties. This sacred right should be zealously guarded by the courts and its violation never countenanced under the guise of law enforcement.

## II. RAISING THE ISSUE

The procedural contexts in which the issue of the true purpose of the vagrancy arrest may be raised are, in the main, two; namely, the false arrest action and a motion to suppress illegally seized evidence.

The party arrested and ostensibly charged with vagrancy, but investigated and interrogated solely about another crime or crimes, may choose to bring an action of false arrest against his arresting officer. The problems of proof, however, are legion. Also, the policy determination must be made whether to hold law enforcement officers civilly liable for arresting a notorious suspect on the only legal grounds available. Often, if an on-the-spot arrest is not made, the suspect will never be apprehended. Public sentiment, too, encourages law enforcement bodies to operate without strict adherence to legal restrictions, and the expertness of the modern criminal has virtually forced the police to employ extralegal means to curb crimes.<sup>32</sup> These so-called preventive or precautionary arrests are directed toward a legitimate end,<sup>33</sup> and have been condoned when sufficiently correlated with the peace, safety and welfare of the public so as to justify the occasional inconvenience borne by the law abiding citizen.<sup>34</sup> As a result, it would seem to be more just and less of an intrusion upon the effectiveness of the police power simply to suppress any evidence obtained by, or to dismiss any charges growing out of an abuse of the vagrancy charge, rather than to hold the arresting officer liable in a civil action.<sup>35</sup>

A motion to suppress illegally seized evidence is another method of questioning the propriety of an arrest on the charge of vagrancy. In a Wisconsin case,<sup>36</sup> defendants, suspected of burglary, were stopped by police officers who charged them with vagrancy, questioned them and searched their automobile. In the trunk of the auto the police found some of the stolen articles, and so the vagrancy charge was replaced with that of burglary. At trial, defendants objected to the introduction of the stolen articles, the product of the search, contending that the evidence had been illegally seized. In overruling the objection, the court held that the search was a legal incident to a lawful arrest for vagrancy. Though the court never questioned the purpose or motive of the initial arrest, it is apparent that the arresting

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32. Cogshall, *Are We Buying the Trojan Horse?*, 40 J. Crim. L. & C. 242, 243 (1949); Kooken, *Ethics in Police Service*, 38 J. Crim. L. & C. 61 & 172 (1934); 25 J. Crim. L. & C. 279 (1934).

33. See, e.g., *People v. Craig*, 152 Cal. 42, 91 Pac. 997 (1907).

34. *City of Portland v. Goodwin*, 187 Ore. 409, 428, 210 P.2d 577, 586 (1949).

35. Besides, the contention that the arrest is illegal seems to have been made to no avail. See, e.g., *People v. Craig*, 152 Cal. 42, 91 Pac. 997 (1907).

36. *Gray v. State*, 243 Wis. 57, 9 N.W.2d 68 (1943).

officers used the shield of a vagrancy charge to legitimize what would otherwise have been an illegal search.

Had the court adhered to the guide that arrests should be made with the intent of prosecuting to judgment the crime with which the suspect is charged,<sup>37</sup> it might well have suppressed the burglary evidence seized by the arresting officers.

### III. UNCONCERN OF THE JUDICIARY

The problem presented by the use and abuse of vagrancy statutes is seldom acknowledged by American courts,<sup>38</sup> which question only whether the accused is statutorily a vagrant, and thereon judge the legality or illegality of the arrest.<sup>39</sup> The true motive or purpose of the

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37. See *Moran v. City of Beckley*, 67 F.2d 161, 163 (4th Cir. 1933). In this case the plaintiff who was arrested for driving a car with Virginia dealer license plates through West Virginia, an act which was not unlawful, successfully brought a false imprisonment action against the defendant who attempted to justify the arrest on the grounds that the plaintiff was guilty of speeding. See also *Donovan v. Guy*, 347 Mich. 457, 462, 80 N.W.2d 190, 192 (1956). Here the false imprisonment action was successfully brought by the plaintiff who was arrested for disorderly conduct, a charge of which he was not guilty, although the court implied that the defendant might have been guilty of a parking violation.

38. Although this note purports only to discuss the United States' view on this subject, it is noteworthy that this problem has been recognized and condemned by the Canadian Court as an abuse of process.

In *Rex v. Dick*, (1947) 2 D.L.R. 213, the plaintiff, suspected of murdering her husband, had been retained in police custody on a vagrancy charge. During this time, the police constantly questioned her regarding her participation in the killing of her husband until she confessed. The court ruled that the admission of said confession was error and set aside the conviction.

In so doing the court held that:

It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence: *R. v. Seabrooke*, [1932], 4 D.L.R. 116 at pp. 119-120. . . . It is trifling with the long-established maxim *nemo tenetur seipsum accusare*, and has more than the mere appearance—but, in the intended result it has at times the effect—of a trial by the police *in camera* before even the charge has been laid. *Id.* at 225.

39. The *in personam* jurisdiction of the courts in these cases is not questioned, for it is recognized that jurisdiction in a criminal case is not impaired even though the accused is brought before the court in an unlawful manner. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Albrecht v. United States*, 273 U.S. 1, 8 (1926); *Sheehan v. Huff*, 142 F.2d 81 (D.C. Cir. 1944). It is also admitted that a court of criminal jurisdiction is not required to inquire as to how the prisoner came within reach of its mandates. The presence of the accused in court on a proper charge is sufficient to confer jurisdiction of his person even though he was arrested contrary to law. *Frye v. Settle*, 168 F. Supp. 7, 11 (W.D. Mo. 1958); *Davenport v. District of Columbia*, 61 A.2d 486 (D.C. Munic. Ct. App. 1948).

arrest is ignored or at least not questioned. To state that the courts assume all vagrancy arrests are for the purpose of convicting and punishing vagrants as such would be to impute to our judiciary an unrealistic naïveté.

The 1907 California case of *People v. Craig*,<sup>40</sup> presents the typical fact situation in which resort is made to a vagrancy charge to legitimize an arrest. But the case is extraordinary in that the court adverts to the problem. The uncontradicted testimony of police officers revealed that the true motive for the vagrancy arrest was a report that the defendants had committed an assault, not the fact that they were vagrants. The officers further explained that they had been instructed not to bother the defendants, known vagrants, as long as they conducted themselves properly in all other ways. But after the assault, the officers, suspecting the defendants, arrested them on a vagrancy charge. The court, commenting on this testimony, said,

whether this is an entirely commendable attitude towards the appellants' class of misdemeanants, we need not stop to consider; but we think that the admitted fact that the appellant would not have been arrested if he had confined himself to vagrancy did not render his arrest for that offense illegal.<sup>41</sup>

A careful reading of appellate court opinions of cases in which a charge of vagrancy was involved at some stage of the pre-trial proceedings is an eye-opening experience as to the expansion of the application of vagrancy statutes. The mere fact that most of the unfortunate parties involved in these proceedings are usually near insolvency, and thus have no means with which to appeal their conviction,<sup>42</sup> would seem to justify the conclusion that hundreds of this type arrest are made annually. Other reasons for the paucity of cases at the appellate level are: the accused may be guilty of vagrancy and fear that if too much attention is directed to him, he will be identified as having committed a more serious offense;<sup>43</sup> he may be a wanted criminal who elects to serve the shorter term, although innocent of vagrancy;<sup>44</sup> or he may be innocent of vagrancy, but unaware (or perhaps aware) of the strength of the prosecution's case against him for a more serious offense, and therefore believes the shorter sentence is a wise compromise.<sup>45</sup>

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40. 152 Cal. 42, 91 Pac. 997 (1907). Defendants, suspected of assault and battery, were arrested and charged with vagrancy. They attacked the arrest on the grounds that it was illegal, that they were not suspected of having committed a felony and that the officers had no warrants.

41. *Id.* at 47, 91 Pac. at 1000.

42. Note, *supra* note 2 at 150.

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

Even at the appellate level, however, courts are almost always oblivious to the extralegal applications of the vagrancy statute.<sup>46</sup> In the Washington case of *State v. Grenz*,<sup>47</sup> defendant, suspected of chicken theft, was followed by police until he parked on a road near a chicken farm. As he approached the wire fence, clad in "sneakers" and carrying a flashlight and two gunny sacks, he was arrested for vagrancy.<sup>48</sup> The court admitted there was insufficient evidence to support a charge of attempted larceny or burglary, because of lack of an overt act tending to accomplish either offense, but held that the charge was vagrancy and the arrest was consistent with the purpose of the vagrancy act.

What the court apparently meant was that vagrancy laws are designed to subject persons with objectionable antisocial habits to police regulations which promote the general welfare. This, however, should not provide the police with a license to resort to these laws as a mere cover for an arrest which would otherwise be illegal. The vagrancy statute was not designed to provide a source of reserve legality. In the *Grenz* case, however, the court permitted the statute to be used for just such a purpose. The court admitted that an arrest for attempt, under the circumstances, would have been illegal;<sup>49</sup> but then it immediately condoned another type of illegal arrest, arrest on suspicion made technically legal by a vagrancy charge.<sup>50</sup> This case provides a glaring example of the enduring harm that lies in an evasion of judicial duty.<sup>51</sup>

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46. See, e.g., *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68, 72 (1943), discussed in text accompanying note 36 supra.

47. 26 Wash. 2d 764, 175 P.2d 633 (1946).

48. Every person who wanders about the streets at late or unusual hours without any visible or lawful business is a vagrant. Wash. Rev. Stat. § 2688.8 (1932).

49. *State v. Grenz*, 26 Wash. 2d 764, 722, 175 P.2d 633, 638 (1946). The dissent categorizes this crime as "an attempt to attempt to commit a crime."

50. Though vagrancy is the usual charge used to justify an arrest which would otherwise be illegal, it is by no means the only means so employed. In *Fulford v. O'Conner*, 3 Ill. 2d 490, 121 N.E.2d 767 (1954), an ex-convict, suspected of robbery, was arrested at his place of employment and charged with disorderly conduct. Police who testified at the trial admitted: "there had never been any disorderly conduct, but this is a technical charge."

We bring a man in as a burglary suspect and we cannot prove it. We bring him to court on what we call disorderly." The court, in ruling that this arrest was illegal, and, regarding the police testimony, that rather than justifying the detention, such testimony manifested a patent disregard of the duty which the law imposes upon police officers. Continuing, the court said that the existence of insufficient evidence to justify preferring charges against a criminal suspect was no excuse for detention on some minor charge, but that such detention is precisely the evil which the law is aimed at correcting.

51. *Ex parte Lonardo*, 86 Ohio App. 289, 293, 89 N.E.2d 502, 504 (1949).



The dangers to which an extension of the application of vagrancy laws beyond their intended scope may lead is also vividly illustrated in the case of *Edelman v. California*.<sup>52</sup> Defendant had been making speeches in a public park, and in the course of these talks attacked the local police force. The police silenced their critic by arresting and charging him with vagrancy because he was dissolute.<sup>53</sup> The convicted speaker petitioned the United States Supreme Court to grant certiorari, claiming a violation of the due process clause of the fourteenth amendment because the statute was vague, indefinite and uncertain.

The Court granted certiorari, but after further consideration concluded that the writ had been improvidently granted. Justices Black and Douglas, dissenting, were concerned with the petitioner's right to freedom of speech. Justice Black admonished that the "courts should be astute to examine and strike down *dragnet legislation* used to abridge public discussion of views on political, social or economic questions."<sup>54</sup> He stated that the statute was void on its face, for it permitted punishment for incidents fairly within the protection of the guarantee of free speech.

#### CONCLUSION

Although the expansion and extension of the vagrancy laws by law enforcement agencies are seldom adverted to by the courts, the scholars are many and unanimous in denouncing these practices. At the outset, all concede that the comprehensive definition of vagrancy provides an effective means of combatting the criminal elements of the populace and temporarily restrains them,<sup>55</sup> and in this respect the statute is utilized to effect the historic purpose of the vagrancy laws as a method of preventing crime.<sup>56</sup> The extensive scope of the law and the quick,<sup>57</sup> non-publicized summary convictions truly

52. 344 U.S. 357 (1953).

53. Cal. Pen. Code § 647 (5). "Every dissolute person . . . is a vagrant. . . ."

54. *Edelman v. California*, 344 U.S. 357, 366 (1953). (Emphasis added.)

55. Freund, *The Police Power* § 100 (1904); Note, 16 St. Louis L. Rev. 148 (1931). See *State v. Grenz*, 26 Wash. 2d 764, 175 P.2d 633, (1946).

56. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203 (1953); see *State v. Grenz*, supra note 55.

57. Douglas, in his article, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960), pointed out that according to the Federal Bureau of Investigation Crime Reports, in:

1958, out of 2,340,000 arrests, 88,351 were for vagrancy;

1957, out of 2,068,667 arrests, 69,520 were for vagrancy;

1956, out of 2,070,794 arrests, 75,478 were for vagrancy.

Douglas said that the speed with which these arrests are handled is amazing. Fifty to sixty defendants were processed by one judge in 15 minutes and one court handled 1,600 cases in a month.

provide the police with a "most effective weapon in the arsenal of law enforcement."<sup>58</sup>

However, "preventive arrests" and "precautionary arrests," the means used to effect a legitimate end, are uniformly condemned as being unwarranted under our laws,<sup>59</sup> and it is this aspect of the law that is feared. "The power of the prosecution to use laws passed for one purpose to accomplish an entirely different purpose is to be viewed with alarm."<sup>60</sup>

That the courts continue to avoid discussion of the misapplications of vagrancy laws, thereby condoning the abuses of the police, can only be justified by a balancing of interests—weighing the intrusion into personal liberties against the demand for effective law enforcement—and concluding the latter outweighs the former.<sup>61</sup> But it is contended that such a result can only be reached on unbalanced scales. To permit police powers to outweigh the liberties guaranteed by the Bill of Rights, and extended by the due process clause of the fourteenth amendment, is to impose a serious threat to the preservation of basic human rights.<sup>62</sup> The justifiability and lawfulness of the end sought by an expansion of the application of vagrancy laws is not questioned. Nevertheless, to permit the vagrancy law to be utilized for purposes other than its enactment, to condone its use as a tool of crime discovery rather than as a tool of crime prevention, is to

58. Perkins, *The Vagrancy Concept*, 9 *Hastings L.J.* 237, 252-53 (1958).

59. See, e.g., Note, *supra* note 55; Freund, *supra* note 55.

60. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 *Yale L.J.* 1, 14 (1932).

61. Such a conclusion tends to destroy constitutional safeguards established at the infancy of our nation in the interests of its citizens. However, it must be recognized that a contrary holding might substantially hinder police efficiency. Nevertheless, this problem must be raised.

Courts are never able to live up to the standards set for them by legal scholars. . . . Yet it seems to be the general opinion that we should keep on criticising courts in the light of these unattainable ideals. Arnold, *supra* note 60 at 1.

62. The inherent danger in the nature of vagrancy statutes was recognized as early as 1860 in *Forbes' Case*, 11 *Abb. Pr.* 52 (N.Y. Sup. Ct. 1860), where Sutherland, J., speaking of vagrancy statutes, said:

They are constitutional, but should be construed strictly, and executed carefully in favor of the liberty of the citizen. Their description of persons who shall be deemed vagrants, is necessarily vague and uncertain, giving to the magistrate in their execution an almost unchecked opportunity for arbitrary oppression or careless cruelty. The main object or purpose of the statutes should be kept constantly in view, and the magistrate should be careful and see, before convicting, that the person charged with being a vagrant is shown either by his or her confession, or by competent testimony, to come exactly within the description of one of the statutes. *Id.* at 55.

permit law enforcement agencies to become law breakers, and breeds lawlessness and disrespect of authority.<sup>63</sup>

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63. Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438 (1925), said:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. *Id.* at 485.