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Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision

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Dogberry You are thought here to be the most senseless and fit man for the constable of the watch; therefore bear you the lanthorn. This is your charge: you shall comprehend all vagrom men

Much Ado About Nothing, Act III, Scene III

I

THE ARCHAIC pattern of Dogberry's speech by which he commissioned the constable of the watch is an inseparable part of the charm and interest so characteristic of the writing of Shakespeare. Transposed to the contemporary American scene, however, and cherished on the pages of what we are pleased to call a modern statutory system, its anachronistic character is ill-suited to the objectives of the administration of justice in a modern world. It has been so transposed, nonetheless, to the vagrancy statutes of virtually every jurisdiction in the United States.¹ If this were merely a matter of style, if phraseology alone were at the heart of the matter, retaining the quaint medieval syntax of old England might be tolerated on grounds of historical sentiment. Unfortunately, the 14th century *wagabund*² and Shakespeare's *vagrom men* are not just words for which modern substitutes stand readily at hand, nor are the statutes in which the vagrant, rogue and vagabond of today are identified and defined

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¹ Vagrancy is a statutory offense in every state except West Virginia where it remains a common law offense. *City of Huntington v. Salyer*, 135 W. Va. 397, 63 S.E.2d 575 (1951); see Foote, *Vagrancy-Type Law and Its Administration*, 104 U.P.A. L. REV. 603, 609 (1956).

² "[I]n the year 1311 [in London] we find 'John Blome indicted as a common *wagabund* by night for committing batteries and other mischiefs'" RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY 39 (1887).

so written that their inadequacies may be cured by translating their terms into the prose of the mid-20th century draftsman.

Some such translation has been attempted, some modernization has been accomplished. Essentially, however, the notion persists that an individual living in a land in which the protection of civil rights is a primary objective of government may still be punished as a criminal by virtue of personal condition or of belonging to a particular class.³ Such a conclusion, inconsistent as it may be with otherwise prevailing standards of criminal responsibility, is not illogical; rather, it is compelled by the concept of feudal paternalism which the first vagrancy laws were consciously designed to foster⁴ and which centuries later were uphappily spread upon the statute books of a nation whose legal, political and social principles were of a very different order.⁵

A comparatively recent illustration of the persistence of this antiquated paternalism is found in the following defense of the Virginia vagrancy statute:⁶

Adverting to our vagrancy statutes, it will readily be seen that deserving but unfortunate persons are not likely to suffer. Wide latitude is granted trial courts. If a defendant establishes that he has made reasonable effort to obtain employment and offered his services at reasonable prices and has failed to secure work, he will not be convicted of vagrancy. Or if he has been convicted the court may allow him to give bond and to be discharged from custody conditioned upon his future industry and good conduct for a year. Or if the defendant is physically incapable of supporting himself and is in destitute circumstances, he may, in the discretion of the court, be committed to the poorhouse. With these reasonable safeguards it is not likely that an injustice will be done . . .⁷

This casual dismissal of the usual safeguards inherent in criminal proceedings, this willingness to assume that no one is likely to suffer as a result and the candidly patronizing attitude of the court is in sharp conflict with prevailing principles of criminal law and procedure, but it is quite consistent with the purpose, spirit and administration of the forbears of the Virginia

³ Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); with an eye toward Shakespeare, Henshaw, J., in *People v. Lee*, 107 Cal. 477, 480, 40 Pac. 754, 755 (1895), wrote: "A person, for example, charged with vagrancy is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or as being a healthy beggar, in short, as belonging to what class, or as having habitually committed what act to lay him liable as a 'vagrom man.'" *Id.*

⁴ 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 266-75 (1883).

⁵ See, e.g., this reference to the history of the Maine statute in *State v. Burgess*, 123 Me. 393, 394, 123 Atl. 178 (1924): "This is an old statute, somewhat quaint in its phraseology, and has come down in substantially the same form through all the revisions since the establishment of our state. . . . In fact, this statute was copied from the old Massachusetts statute of March 26, 1788 [St. 1788, c. 21]."

⁶ VA. CODE ANN. § 63-338 (1950).

⁷ *Morgan v. Commonwealth*, 168 Va. 731, 241, 191 S.E. 201, 205 (1937).

statute. There has been some translation from the ancient forms in this law but a brief comparison will illustrate that the concepts are the same.

The Virginia Code defines nine classes of persons "who shall be deemed vagrants." In the first class are all persons who shall unlawfully return into any county or corporation whence they have been legally removed. As early as 1494, in the reign of Henry VII, it was provided that beggars and idle persons, after appropriate punishment in the stocks, were to be put out of town and directed to return to their homes, there to remain upon pain of further punishment should they return.⁸ This became a standard provision of the many statutes which dealt with the problem of shoring up the sagging institution of serfdom thereafter and it appears in substance in the Vagrancy Act of 1824⁹ which remains the basic law on the subject in England today.¹⁰ In its present form, however, the English law no longer authorizes banishment as a form of punishment for vagrancy.¹¹

The second class defined in the Virginia statute are those who, "not having the wherewithal to maintain themselves," live idly, without employment and refuse to work for the usual and common wages given to other laborers in like work. This provision is recognizable as a paraphrase of the most vital part of the Statute of Laborers which was drafted in 1349.¹² Its survival in this age of NLRB, Taft-Hartley and the complex of labor legislation found in every state would be extraordinary if it were not for the fact that such relics of the past are far more common than otherwise in the vagrancy laws of the United States.

The law of Virginia,¹³ in its remaining subdivisions, includes among those who commit the offense of vagrancy persons wandering or strolling about in idleness; persons leading idle, immoral or profligate lives who are propertyless and unwilling to work; able-bodied beggars and those who abandon wife or child; persons who come from without the state and who are found residing or loitering within it and who have no visible occupation or means of subsistence and who are unable to give a reasonable account of themselves; persons having a fixed abode but who live by stealing or bartering stolen goods; persons who hire out their children and live on their earnings although able themselves to work; and all persons without apparent lawful income who consort with idlers, gamblers, bootleggers and other varieties of sinners, or with persons "having the reputation of any of the above named."

⁸ Statute of Westminster, 1494, 2 Hen. 7, c. 2.

⁹ The Vagrancy Act, 1824, 5 Geo. 4, c. 83.

¹⁰ 18 HALSBURY, STATUTES OF ENGLAND 202 (2d ed. 1950).

¹¹ It is not a permissible form of punishment in California. *In re Scarborough*, 76 Cal. App. 2d 648, 173 P.2d 825 (1946); cf. *Edwards v. California*, 314 U.S. 160 (1941).

¹² 23 Edw. 3, c. 7; see 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 458 (1923); PUTNAM, THE ENFORCEMENT OF THE STATUTES OF LABOURERS (1908).

¹³ VA. CODE ANN. § 63-338, subdivs. 1-9 (1950).

As in the case of the first two subdivisions of the statute, these are in all essentials faithful adaptations of the principal English vagrancy statutes which were enacted during the three or four centuries preceding the Industrial Revolution.

It must be repeated, however, that Virginia is by no means unique in clinging to a law that long since lost any reasonable relationship to the social, political, economic and legal conditions which prevail in the modern world. The Alabama statute,¹⁴ for example, is very much the same. It adds "common drunkard" to the list of vagrants (a classification, incidentally, which does not appear in the English vagrancy laws)¹⁵ and it makes at least one concession to the world of today by excluding idleness resulting from strikes or lockouts as a condition of vagrancy.¹⁶ Connecticut is faithful to the ancient models;¹⁷ Delaware, like Connecticut, includes the category of "tramp" to describe the idle wanderer and adds to the list of vagrants "all persons roaming about the country, commonly known as gypsies."¹⁸ The District of Columbia Code lists nine categories, among them fornicators; the ninth includes all persons who are vagrants by the common law whether or not named specifically in the statute.¹⁹ Florida²⁰ and Illinois²¹ are distinctly Elizabethan; they condemn persons who use juggling or unlawful games or plays,²² common pipers and fiddlers, common railers

¹⁴ ALA. CODE tit. 14, §§ 437-44 (1941).

¹⁵ Common drunk was not an offense known to the common law. *In re Newbern*, 53 Cal. 2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960). See note 41 *infra*.

¹⁶ ALA. CODE tit. 14, § 440 (1941).

¹⁷ CONN. GEN. STAT. REV. §§ 53-336, 53-340 (1958). In the first of these sections, the transient beggar and the idle vagrant "who stroll over the country without lawful occasion" are classified as "tramps." The second makes those punishable who go about begging, who travel without lawful occasion, who sleep in outhouses or barns or in the open air and can give no good account of themselves, those who camp on the public highways or on private property without permission, "all brawlers and fortune tellers and all common drunkards."

¹⁸ DEL. CODE ANN. tit. 11, § 881 (1953).

¹⁹ D.C. CODE ANN. § 22-3302 (1951).

²⁰ FLA. STAT. § 856-02 (1957).

²¹ ILL. ANN. STAT. ch. 38, § 578 (Smith-Hurd 1935).

²² In the time of Elizabeth, actors or players were licensed under the patronage of the great lords. It was for their protection that unlicensed competition was made unlawful by the phrase "unlawful games or plays." RIBTON-TURNER, *op. cit. supra* note 2, at 110. As for unlawful games the following instruction which appears in A COMPLEAT GUIDE FOR CONSTABLES, anon., London, printed near Temple Bar, 1707, is revealing: "And for distinguishing what are unlawful Games, and who are unlawful Gamesters, it is enacted the said Statute, 33 H. 8. cap. 9. That no Artificer, or his Journeyman, no Husbandman, Apprentice, Labourer, Servant at Husbandry, Mariner, Fisherman, Waterman, or Servingman shall play at Tables, Tennis, Dice, Cards, Bowls, Clash, Coyting, Loggating, or any other unlawful Game, out of Christmas, or then out of their Masters house or presence . . . But this Act shall not restrain a Servant, by his Masters License, to Play at Cards, Dice, or Table with the Master himself, or other Gentleman resorting to his Masters House." The GUIDE's references to rogues and vagabonds, together with indignant comment, may be found in PARRY, THE LAW AND THE POOR 4 (1914).

and brawlers, the idlers, the loafers and other assorted rascals which seem to have been selected more or less at random from the provisions of the Statute of Elizabeth as it was enacted in 1597-98.²³

At least one jurisdiction includes those who are found in possession of weapons or instruments with intent to commit a crime.²⁴ This category was an innovation in the law of England in 1824.²⁵ Others make special provision, usually under the designation "tramp," for the trespasser found armed in a building or the trespasser who threatens injury to the person or property of the occupants of land or buildings.²⁶

Massachusetts defined vagrancy in 1788 by conforming to the then current English style.²⁷ A hesitant step toward modernization was made in 1943 when the words "Rogues and vagabonds, persons who use any juggling . . . common pipers and fiddlers" were stricken; in 1953 the category of common drunkard was dropped, but of the classes which remain condemned by the statute "stubborn children" lead all the rest.²⁸

Window peepers,²⁹ persons diseased from drunkenness or debauchery,³⁰ fortune tellers "and such other like impostors,"³¹ idlers who are not Indians,³² frequenters of "low dens,"³³ persons who paint or discolor their faces,³⁴ persons who act as callers of figures for dances in houses of ill fame,³⁵ sturdy beggars³⁶ and, in Hawaii, persons who practice "hoopiopio, hoounauna, hoomanamana, anaana, or pretend to have the power of praying persons to death,"³⁷ are categories included in American vagrancy statutes which serve to give some indication of the style in which they are written and the great range of human activity which they purport to sweep within their ambit.

²³ 39 Eliz., c. 4.

²⁴ E.g., GA. CODE ANN. § 26-7101 (1953) which deems such a person to be "a rogue and a vagabond."

²⁵ The Vagrancy Act, 1824, 5 Geo. 4, c. 83; See 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 273-74 (1883); KENNY, OUTLINES OF CRIMINAL LAW 411-15 (17th ed. 1958).

²⁶ IND. ANN. STAT. § 10-4603 (Burns 1956); IOWA CODE § 746.3 (1958); ME. REV. STAT. ANN. ch. 137, § 34 (1954); MD. ANN. CODE art. 27, § 490 (1957); N.H. REV. STAT. ANN. 576:2 (1955); N.Y. PEN. LAW § 2371; N.C. GEN. STAT. § 14-339 (1953).

²⁷ Note 5 *supra*.

²⁸ MASS. GEN. LAWS ANN. ch. 272, § 53 (1956).

²⁹ MICH. COMP. LAWS § 750.167 (1948, as amended by Pub. Law 110, 1956).

³⁰ MINN. STAT. ANN. § 614.57[2] (1947).

³¹ MINN. STAT. ANN. § 614.57 [6] (1947); and see note 17 *supra*.

³² ARIZ. REV. STAT. ANN. § 13-991 (1) (1956); CAL. PEN. CODE § 647 (1); MONT. REV. CODES ANN. § 94-35-248 (1) (1947); UTAH CODE ANN. § 76-61-1 (1953).

³³ NEV. REV. STAT. § 207.030 (10b) (1957).

³⁴ N.Y. CODE CRIM. PROC. § 887 (7).

³⁵ OKLA. STAT. ANN. tit. 21, § 1141 (4) (1958).

³⁶ R.I. GEN. LAWS ANN. § 11-45-1 (1956).

³⁷ HAWAII REV. LAWS § 314-1 (1955).

II

The vagrancy law of California is a direct descendant of the ancestors of the statutes of the older states.³⁸ It is faithful to the concept of status as a basis for punishment,³⁹ and, while its language may not be as colorful as those which are more faithful to the original models, it is just as vague, just as indiscriminate and just as subject to abuse as any of the others.⁴⁰ It has received frequent consideration in the appellate courts, but in com-

³⁸ CAL. PEN. CODE. § 647. The statute is essentially the same as it was when first enacted in 1872. The prototype for the 1872 version (Cal. stat. 1855, ch. 175, p. 217, as amended by Cal. stat. 1863, ch. 525, p. 770) contains the Indian exception but limits it to "Digger Indians." It also contains a provision, wisely dropped in 1872, that persons "commonly known as 'Greasers' or the issue of Spanish and Indian blood" who are vagrants and who go armed may be punished. In its present form, the statute reads:

- "1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or,
 2. Every beggar who solicits alms as a business; or
 3. Every person who roams about from place to place without any lawful business; or,
 4. Every person known to be a pickpocket, thief, burglar or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or,
 5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,
 6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or,
 7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,
 8. Every person who lives in and about houses of ill-fame; or,
 9. Every person who acts as a runner or capper for attorneys in and about police courts or city prison; or,
 10. Every common prostitute; or,
 11. Every common drunkard; or,
 12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any building or structure located thereon and which is inhabited by human beings, without visible or lawful business with the owner or occupants thereof;
- Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

³⁹ *People v. Denby*, 108 Cal. 54, 40 Pac. 1051 (1895); *District of Columbia v. Hunt*, 163 F.2d 833 (D.C. Cir. 1947); *State v. Suman*, 216 Minn. 293, 12 N.W. 620 (1943); *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601 (1933); *Rex v. Oiseberg*, 56 Can. Crim. Cas. Ann. (1931).

⁴⁰ See Hall, *The Law of Arrest In Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Note, *Use of Vagrancy-Type Laws For Arrest and Detention Of Suspicious Persons*, 59 YALE L.J. 1351 (1950); Foote, *Vagrancy-Type Law And Its Administration*, 104 U. PA. L. REV. 603 (1956).

mon with the laws of other jurisdictions it has withstood attack and survived all manner of criticism with a remarkable degree of endurance. The reasons for the existing state of arrested development in this branch of the criminal law are matters for speculation that need not be touched upon here; of far more importance is the obvious necessity to devise new legislation that accords with modern concepts and harmonizes with the main body of the law.

This necessity, so far as California is concerned, became clear with the decision of the supreme court in the case of *In re Newbern*.⁴¹ Although this case went no further than to hold the classification "common drunkard" to be void for vagueness, by necessary implication it left the parallel classification, "common prostitute," equally bereft of legal meaning and quite plainly indicated that a forthright application of the "void for vagueness" standard⁴² may hereafter be expected when other provisions of the statute are called into question.

In its opinion the court defines the requirement for reasonable certainty in legislation by adopting the language of the United States Supreme Court in *Lanzetta v. New Jersey*.⁴³ So tested, it concluded that the term "common drunk" was ambiguous on its face. In support of this result, the court pointed out that Webster⁴⁴ assigns some fourteen definitions to the term "common" but that no dictionary consulted by the court so much as lists "common drunkard." It conceded that other courts had interpreted "common drunkard" in terms of habitual intoxication but this, in the opinion of the court, left the meaning in an equally imprecise and uncertain state. At common law, the offense of being a common drunk was unknown; it is not mentioned in Blackstone. In fact, "habitual drunkard" is a term found for the first time in English law in what the court characterizes as a "fairly recent" statute, the Habitual Drunkards Act of 1879.⁴⁵

Language from a single precedent in the case law of other jurisdictions, *State ex rel. Larkin v. Ryan*,⁴⁶ is quoted with emphasis to illustrate that "habitual drunkenness" is not a term of clear definition. Apt as the language in *Ryan* is, it should be noted that it is not squarely in point and that it was, in effect, overruled by the Wisconsin court in *Pollon v. State*.⁴⁷

In the only prior California decision directly in point, *People v.*

⁴¹ 53 Cal. 2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960). See note 15 *supra*.

⁴² *People v. McCaughan*, 49 Cal. 2d 409, 414, 317 P.2d 974, 977 (1957).

⁴³ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). *Lanzetta* is particularly significant because it held that the New Jersey vagrancy-type statute which made certain persons punishable who were members of a "gang" was "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ."

⁴⁴ WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1952).

⁴⁵ 42 & 43 Vict., c. 19, § 3.

⁴⁶ 70 Wis. 676, 36 N.W. 823 (1888).

⁴⁷ 218 Wis. 466, 261 N.W. 224 (1935).

Daniel,⁴⁸ an opinion of the appellate department of the Stanislaus County superior court which held that the term "common" in the California statute defining a common drunkard as a vagrant was synonymous with "habitual or frequent," the court cited *Pollon* to this effect. *Daniel*, however, is disapproved by *Newbern*, the supreme court finding no compelling reason to accept the definition suggested in that case.

In an earlier opinion, the appellate department of the San Joaquin County superior court considered the meaning of "common prostitute" as that term is used in the vagrancy section of the Penal Code.⁴⁹ As in *Daniel*, the court felt that the term "common" was used to designate repetitive conduct. For that reason and because "common prostitution is undoubtedly a way of life . . ." the court held that this kind of vagrancy could not be inferred from a single act. In the course of this opinion, it is pointed out that the concept of vagrancy has been "arbitrarily expanded (or perverted)" in both Great Britain and the United States. In its pristine sense, the court believed, vagrancy included nothing more than the idle, wandering loafer.

This is historically questionable since the earliest statutes included a cast of characters adequate to a production of *The Beggars' Opera*,⁵⁰ but it is accurate in the sense that in essence those described as vagrants, rogues and vagabonds were regarded by society as nonproductive drones who were dangerous because of their potential criminality.⁵¹ It is worth noting, however, that England's Vagrancy Act of 1824,⁵² in contrast to the statutes in this country, placed almost exclusive emphasis on *conduct* and did not purport to attach criminality to *status* alone. Thus, although it identified the common prostitute as does the California statute, she was not made punishable unless she wandered in the public streets "behaving in a riotous or indecent manner;" the wanderer was punishable if he wandered for the purpose of begging or if he entered another person's property without permission and could not give a good account of himself; the loiterer only if he was found in certain specified places with intent to commit a felony or if in possession of tools for the purpose of breaking and entering another's property.

Before *Newbern* was decided the California decisions were written so as to suggest that the validity of the vagrancy statute was taken for granted. Those convictions which were not sustained generally resulted in reversal because the evidence was found to be insufficient to support

⁴⁸ 168 Cal. App. 2d 788, 337 P.2d 247 (1959).

⁴⁹ *People v. Brandt*, 306 P.2d 1069 (App. Div. Cal. Super. Ct. 1956).

⁵⁰ For a complete and fascinating inventory, see ADELOTTE, *ELIZABETHAN ROGUES AND VAGABONDS* (1913).

⁵¹ See Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

⁵² 5 Geo. 4, c. 83.

the charge.⁵³ In the rare cases in which doubt was expressed or limitations imposed on the scope of the law, the courts were concerned with the extent to which idleness and loitering could be included within the vagrancy concept. Thus, when the district court of appeal sustained the provisions of the second part of Penal Code Section 647a,⁵⁴ which prohibit loitering about a school, Justice McComb dissented by invoking the words of Chief Justice Beatty in the case of *In the Matter of Williams*:⁵⁵ "As to the provisions relating to 'loitering,' I have very serious doubts. They are so vaguely comprehensive" In an earlier case it was said that it is not competent for the legislature to denounce mere inaction as a crime without some qualification, but the court found that idleness was so qualified in the statute because it was coupled with lewdness and dissoluteness.⁵⁶ Similarly, the word "roaming" as it is used in the third subdivision of the code section is not to be understood as unqualified idleness since it is coupled with the condition "without any lawful business."⁵⁷ The most pertinent expression of judicial reservation, made just four years before *Newbern*, is found in *People v. Wilson*. There, with reference to idleness as an element of vagrancy, the court wrote:

That subdivision of the section is apparently based on the outdated concept that it is a criminal offense not to work. Under it, every unemployed person, every housewife and every retired person conceivably could be arrested for vagrancy. If it be assumed that the section is constitutional, we certainly do not think it should be interpreted as broadly as respondent contends.⁵⁸

As doubts and limitations go, these few are of little substance or effective consequence. Most of the cases reflect an attitude of almost unquestioned

⁵³ E.g., *People v. Brandt*, note 49 *supra*; *People v. Carskaddon*, 49 Cal. 2d 423, 318 P.2d 4 (1957), construing a supplementary vagrancy statute, CAL. PEN. CODE § 647a.(1). See note 54 *infra*; similarly, the United States Supreme Court held that a conviction under the terms of a municipal loitering ordinance deprived the defendant of due process because "it was totally devoid of evidentiary support." The validity of the ordinance itself was unquestioned. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

⁵⁴ *Phillips v. Municipal Court*, 24 Cal. App. 2d 453, 75 P.2d 548 (1938). The code section reads: "Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant." To the contention that these words may embrace far more than criminal conduct, the majority wrote: "the mere fact that some innocent people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children require [*sic*] such legislative action." *Id.* at 455, 75 P.2d at 549. Compare *State v. Starr*, 57 Ariz. 270, 113 P.2d 356 (1941).

⁵⁵ 158 Cal. 550, 111 Pac. 1035 (1910).

⁵⁶ *In re McCue*, 7 Cal. App. 765, 96 Pac. 110 (1908). In *Edelman v. California*, 344 U.S. 357 (1953), Mr. Justice Black, dissenting, expressed the opinion that "dissolute person," as used in the California vagrancy law was both ambiguous and vague, particularly as applied to the defendant for making street-corner speeches expressing criticism of the police. The origin of "lewd or dissolute" probably lies in the description "loose and dissolute" which appears as early as 1656 in Cromwell's statute (Commonwealth, c. 21).

⁵⁷ *In re Cutler*, 1 Cal. App. 2d 273, 36 P.2d 441 (1934).

⁵⁸ 145 Cal. App. 2d 1, 6, 301 P.2d 974, 977-78 (1956).

tioning acceptance of the theory and application of the vagrancy law. This characteristic serves to point up the fact that the decision in *Newbern* is not only the first successful attack on the constitutionality of Penal Code Section 647, but that it also marks a clear break with traditional judicial tolerance of the propositions that it is permissible for vagrancy to differ from other crimes, that one who comes within its categories acquires a continuing status as a petty criminal and that, for this offense, the otherwise indispensable elements of a crime, act and intent, need not apply.⁵⁹

There is little dissent from the conclusion that the vagrancy law is archaic in concept, quaint in phraseology, a symbol of injustice to many and very largely at variance with prevailing standards of constitutionality. It has survived, nonetheless, and survived not only in its antique forms but with a variety of curious accretions that have been added from time to time as the particular needs of social change and regional customs have required. To note this fact in terms of social requirement is not inadvertent; the vagrancy laws, bad as they may be, serve a necessary purpose and remain as essential means by which law enforcement agencies discharge their primary function of preserving law and order and preventing the commission of crime. The realization of this fact makes the police tenacious in their defense of the law and judges unwilling to impose limitations, which might have serious implications for the public safety.⁶⁰

The beggar or "moocher" need not and cannot be tolerated in the modern community; persons found in public places so intoxicated as to endanger their safety or to be unable to control their behavior must be restrained and protected; the pimp, the panderer and the prostitute cannot be permitted to flaunt their services at large; the lewd and dissolute must be halted when their conduct outrages public decency or threatens harm to the schoolchild; and the loiterer in dark places, the Peeping Tom and the prowling trespasser are obvious dangers to the public peace and the safety of persons and property.

These categories of antisocial conduct however, call for review and for re-examination. It surely is no longer necessary for the security of peace and good order to denounce as a criminal the non-California Indian who is voluntarily unemployed. There are thousands of pensioners in the modern welfare state who fall within the literal meaning of this definition of vagrant but who are not regarded, for that reason, as being guilty of any offense against the public economy. Nor is it either necessary or consistent

⁵⁹ *People v. Craig*, 152 Cal. 42, 47, 91 Pac. 997, 1000 (1907). The following extract from the opinion is frequently quoted: "Vagrancy differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms."

⁶⁰ See Ames, *A Reply to "Who Is a Vagrant in California,"* 23 CALIF. L. REV. 616 (1935). This was written in response to a Note which appears in the same volume at 506.

with reasonable standards of personal liberty to hold that mere wandering about under the stimulus of wanderlust may be made a crime by legislative fiat.⁶¹ As for runners or cappers for attorneys "in and about police courts and city prisons," police courts have not only been abolished in California⁶² but the conduct denounced is far more effectively and comprehensively dealt with in the State Bar Act.⁶³ Finally, while it may be said that the resident of the house of ill fame perhaps ought to be made punishable, at least for his deplorable taste, such establishments have long been outlawed and are subject to speedy closure by the application of an uncomplicated and drastically effective abatement law.⁶⁴ If the foregoing categories be added to those of "common drunk" and "common prostitute" which were erased by the supreme court in *Newbern*, it will be apparent that there isn't much left in the California vagrancy statute that is either necessary or useful to law enforcement or removed from the prospect of successful challenge in the courts.

In these circumstances the time is surely at hand to modernize the vagrancy concept or, better yet, to abandon it altogether for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner without the evasions and hypocrisies which so many of our procedural rules force upon them. This may be done by drafting legislation having to do with conduct rather than status, legislation which will describe the acts to be proscribed with precision and which will be free of the hazy penumbra of medieval ideas of social control characteristic of existing law.

III

So to state the solution is simple; the drafting of the terms of statutes, however, which will meet such specifications is a task of some difficulty, and one for which there are no models in the law which may be looked to as a point of beginning. This fact became apparent in California in July of 1958 when a subcommittee of the Assembly Interim Committee on Judiciary met in San Francisco and heard, among other things, protests against alleged repressive police practices. Arrests for vagrancy became a subject

⁶¹ "[I]t 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." Jennings, J., in *In re Cutler*, 1 Cal. App. 2d 273, 280, 36 P.2d 441, 445 (1934).

⁶² CAL. CONST. art. VI, § 11 (amend. 1950); See Gibson, *Reorganization of Our Inferior Courts*, 24 CALIF. S.B.J. 382 (1949).

⁶³ See CAL. BUS & PROF. CODE § 6151.

⁶⁴ CAL. PEN. CODE § 11225-235.

of inquiry and this in turn led to a consideration of the vagrancy statute. In common with a number of others who were present, I told the members of the committee that the law was seriously defective, outmoded and very much in need of amendment. Heedless of what should have been easily foreseeable consequences, I added the observation that the matter of drafting a modern vagrancy statute ought to be relatively free of difficulty and well within the competence of anyone with a modicum of experience in the field.

An invitation to demonstrate the validity of this opinion was promptly extended by the chairman of the subcommittee.⁶⁵ Acceptance was quickly followed by renewed appreciation of the perils of heedless volunteering since it became evident at once that the dearth of useful precedent in contemporary legislation meant that the work of drafting would present unusual problems. In the end, a draft of a proposed statute was produced. It was intended to be tentative, since there was little opportunity to discuss the subject with others, and to serve as an outline of the topics and subject matter which appeared to require study in the course of revising the law. As events occurred, however, these purposes were only partially served. Instead, a few of the proposals embodied in the draft were incorporated in a legislative bill⁶⁶ which was, in other respects, so defective as to be unacceptable to those responsible for law enforcement in California. Nevertheless, the bill generated wide and unexpected interest in the legislature and

⁶⁵ The Honorable John A. O'Connell, Member of the Assembly for the 23rd Assembly District (San Francisco).

⁶⁶ Assembly bill 2712. (Introduced in the 1959 regular session of the California legislature.) The text follows:

"SECTION 1. Section 647 of the Penal Code is repealed.

SEC. 2. Section 647 is added to said code, to read:

647. Every person who:

(a) Engages in lewd, lascivious or dissolute conduct in any public place or in any place open to the public or exposed to the public view;

(b) For pecuniary profit, solicits or engages in any act of prostitution;

(c) Accosts other persons in any public place or in any place open to the public and begs or solicits alms as a business;

(d) While loitering, prowling or wandering upon the private property of another, peeps into any inhabited building or structure without lawful authority and without the permission and consent of the owner or occupant thereof;

(e) Lodges in any building, structure or place, whether public or private, without lawful authority and without the permission and consent of the owner or occupant thereof, or of the person in control thereof;

(f) Loiterers in or about public toilets or parks;

is guilty of a misdemeanor and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

SEC. 3. Section 647.1 is added to said code, to read:

647.1. With respect to the matters covered by Section 647 of the Penal Code as enacted in 1872 and subsequently amended, repealed by the Legislature at its 1959 Regular Session, and the matters covered by Section 647 of the Penal Code as enacted at said session, the Legislature declares the policy of the State to be that persons shall be punished for their acts, not their status."

among the public before it succumbed to the veto of a reluctant Governor.⁶⁷

There is every prospect now that renewed efforts will be made in the 1961 legislative session to carry on the work of revision and reform. For the purpose of making the record clear and to widen understanding of the genesis of last year's vagrancy bill, the draft which inspired its introduction is set out hereafter together with brief commentaries outlining the purpose and background of its various sections.

As a matter of convenience and to facilitate comparison with Assembly bill 2712, the suggested statute appears here in the same legislative form in which it was originally drafted. It was not then nor is it now intended as a final solution nor is it offered as the best of all possible alternatives. It is designed rather, as a starting point for discussion, as a stimulus which may evoke more satisfactory solutions and in the hope that it may serve in some measure as a contribution to the development of the law. The draft follows:

The people of the State of California do enact as follows:

Section 1. Section 647 of the Penal Code is repealed.

Section 2. Section 647 of the Penal Code is enacted to read:

*647. Disorderly Conduct. Every person who commits any of the following acts shall be guilty of disorderly conduct.*⁶⁸

1. Who engages in lewd or dissolute conduct in any public place or in any place (open to the public or) exposed to public view;

This provision is drafted to cover the subject matter of existing subsection 5 which provides that a "lewd and dissolute person" is a vagrant. It departs from the concept of status and deals directly with socially harmful lewd or dissolute conduct, that is, such conduct when it occurs in public view. It is based in part upon a similar approach in the Michigan vagrancy statute.⁶⁹ Except for the addition of the words in parenthesis, the first section of the assembly bill is identical.

⁶⁷ "I am sympathetic to the overall purpose of the bill which was to punish individuals only for wrongful actions and not simply because of their status. But I found that in accomplishing this laudable objective the proposed legislation unfortunately removed from police control certain dangerous conduct, regulation of which is necessary in the public interest." Letter From Governor Edmund G. Brown to Ernest Besig, Esq., Director of the American Civil Liberties Union of Northern California, August 26, 1959.

⁶⁸ It is not necessary, of course, to use the label "disorderly conduct." Assembly bill No. 2712 simply provided that every person who committed certain specified acts was guilty of a misdemeanor. There is an advantage, however, in furnishing a label beforehand; otherwise California's many police agencies (or the press) will invent a variety of labels as a matter of record keeping and statistical convenience. The resulting lack of uniformity obviously would be undesirable.

⁶⁹ See note 29, *supra*; the following have been held to come within the description of "lewd or dissolute" as the words are used in CAL. PEN. CODE § 647 (5): a narcotic addict,

2. *Who solicits or who engages in any act of prostitution;*

This is a simple description of the conduct to be proscribed. It was drafted before the decision in the *Newbern* case which has, by necessary implication, deleted the term "common prostitutes" from the list of those who are vagrants. The qualification "for pecuniary profit" added by the Assembly bill seems unnecessary.⁷⁰

3. *Who accosts other persons in any public place (or in any place open to the public) for the purpose of begging or soliciting alms (as a business);*

This section is drafted to meet the problem of controlling begging by describing specific acts. It is aimed at the conduct of the individual who goes about the streets accosting others for handouts. It is framed in this manner in order to exclude from the ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army worker who solicits funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control. The bracketed words, which were added in Assembly bill 2712, improve the original draft.

4. *Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious (or any unlawful) act;*

The existing law classes as a vagrant every person who "loiters in or about public toilets in public parks." Assembly bill 2712 left these words unchanged except that it substituted "or" for "in," thus making it an offense to loiter in a public park. This is hardly an improvement. The original proposal, as it appears above, excluding the words in brackets, requires that the loitering which is proscribed be that which is accompanied by lewd intent. This is precisely what the present law is aimed towards, hence there is little or no reason for not being specific.⁷¹ It seems undesirable too to limit the application of the statute to what may be construed to be only publicly maintained facilities as is the case with the existing law. The words in brackets are suggested as an alternative in the event it may appear to be desirable to widen the scope of the draft so that it would include, for example, those situations in which automobile service station toilet facilities are used for the sale or administration of narcotics.

5. *Who loiters or wanders upon the streets or from place to place with-*

People v. Jaurequi, 142 Cal. App. 2d 555, 298 P.2d 896 (1956); a sodomist, People v. Babb, 103 Cal. App. 2d 326, 229 P.2d 843 (1951); a window peeper, People v. Allington, 103 Cal. App. 2d 911, 229 P.2d 495 (1951); and a nude dancer, People v. Scott, 113 Cal. App. 778, 296 Pac. 601 (1931); see Note, 39 CALIF. L. REV. 579 (1951).

⁷⁰ By definition, a prostitute is one who engages in sexual intercourse for hire. People v. Head, 146 Cal. App. 2d 744, 304 P.2d 761 (1956).

⁷¹ Fountain v. State Board of Education, 157 Cal. App. 2d 463, 320 P.2d 899 (1958).

out apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do;

This provision was not included in Assembly bill 2712. It is a difficult subject to treat with any degree of satisfaction but one which requires serious and careful consideration because of the practical necessities of police responsibility for the preservation of law and order. The draft is designed to replace subdivisions 3 and 6 of the present code section by providing a more specific description of the kind of suspicious person that the police are bound to deal with. At the heart of the problem here is the great desirability of stating the terms of police authority in such a way as to minimize abuse without impairing the ability to take necessary action.⁷² To write any law in complete accord with this standard is probably impossible but this is not a valid argument for simply denying the police power to take any action with respect to the "suspicious person." The draft attempts to spell out the limits of the policeman's authority and to declare some obligation on the part of the citizen to account for himself when his loitering arouses suspicion.⁷³

6. Who is found in any public place in such a condition of drunkenness (intoxication) that he is unable to exercise care for his own safety, or, by reason of his drunkenness (intoxication) interferes with (or obstructs or prevents) the free use of any street, sidewalk or other public way;

This provision was also omitted from Assembly bill 2712. It would fill the gap left by the decision in *Newbern* by providing a uniform, definite standard for police control of the public drunk who is a nuisance to others and a danger to himself. The words in brackets are suggested as alternatives.

⁷² The provision in the draft requiring the suspicious loiterer to identify himself and to explain the reason for his actions upon the request of a peace officer is consistent with the authority which such officers have long possessed in California. A dictum in the earliest case in which the private person's responsibility to respond to reasonable police inquiry is discussed is in point with respect to the suspicious loiterer: "A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification." *Gisske v. Sanders*, 9 Cal. App. 13, 16, 98 Pac. 43, 45 (1908). Years later, the California Supreme Court adopted this conclusion in *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955). For an illustrative suspicious person case and a useful summary of the law, see *People v. West*, 144 Cal. App. 2d 214, 300 P.2d 729 (1956).

⁷³ "The bill proposed to repeal subdivisions 3 and 6 of the present law without substituting any kind of control over those whose conduct afforded occasion for legitimate suspicion. I am aware that police action in this regard has led to criticism, and I agree that the present law should be revised. But I do not think that the possibility of abuse justifies completely denying any controls at all. Legislation in this area would be effective if it gave some definition of authority and obligation to which the private citizen and the policeman could reasonably and fairly conform." Letter From Governor Edmund G. Brown to Ernest Besig, Esq., Director of the American Civil Liberties Union of Northern California, August 26, 1959.

7. Who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any inhabited building or structure located thereon, without visible or lawful business with the owner or occupant thereof;

This is substantially the same as subdivision 12 of the code section as it now reads. Only the superfluous specification of habitation "by human beings" is dropped. In Assembly bill 2712 the section was greatly modified by restricting its application to the Peeping Tom alone. Both types of conduct denounced by the law, however, carry the same threat to the public peace, thus making any such limitation appear to be nothing more than arbitrary.

8. Who lodges in any building, structure or place, whether public or private, other than one which is maintained for lodging purposes, without the permission of the owner or person entitled to the possession or in control thereof.

This is the last section or category that appeared in the draft. It is a simplification of the wording of subdivision 7 of the present statute and an extension of its reach to cover public as well as private property. Assembly bill 2712 carries an almost identical provision which is better than the draft because of its omission of the unnecessary lodging house exception.

CONCLUSION

The abandonment of the concept of status as a basis for the imposition of penal sanctions which was advanced in the draft and adopted in the Assembly bill marks a break from the traditional vagrancy pattern and opens at least one door to the development of legislation in this field that will be responsive to the needs of and in accordance with the legal and social standard of contemporary society. The failure of the bill to become law was not because of this break. Its fatal imperfection was the fact that it was incomplete. It did not face up to the problem of defining law enforcement authority with respect to the person whose conduct is strongly suggestive of incipient criminality; it left unfilled the need for uniform, state-wide legislation for the control of public intoxication; and it would have disarmed the citizen as well as the police in the presence of the furtive, prowling, nighttime trespasser.

Each of these situations involves conduct, not status. In each instance the conduct carries a serious threat to the public peace and safety. To impair the ability of the police to act in such cases would not be wise nor would it serve the ends of justice. Furthermore, the underlying problem of finding a means for coping with conduct of this nature would still remain

even if the state legislature were to abandon the search for solutions. Such abandonment in California would merely transfer the burden to local government⁷⁴ whose several hundred city councils and boards of supervisors would respond with an uncoordinated patchwork of hastily drafted ordinances. This would be worse than no change at all.

The task of revision, difficult as it may be, must go forward. The ancient vagrancy concept has been with us overlong. The antique statutes with their absurd categories of common drunkards, pipers and fiddlers, sturdy beggars and all their raffish companions await their retirement. To achieve this end, as the draft indicates, it is not necessary to sacrifice tools that are essential to the proper enforcement of the law nor to remove existing controls over conduct that threatens the public safety. There is no real obstacle in the way of progress here. All that is needed is a wise discretion and a firm adherence to the fundamental principles upon which a fair and effective system of criminal justice must depend.

⁷⁴ CAL. CONST. art. XI, § 11; *Simpson v. City of Los Angeles*, 40 Cal. 2d 271, 253 P.2d 464 (1953).