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Locomotion, Liberty and Legislation

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LOCOMOTION, LIBERTY AND LEGISLATION

SCOPE

The infirmities of the Montana vagrancy statute[1] are so clear that anyone advocating its enforcement should be embarrassed. Yet, this is the position the Montana Chamber of Commerce has taken. It is possible that the Chamber, which is now advocating its application to protect "invaded communities and property owners"[2] from hippies, has provided the impetus for its revision. It is apropos that the Chamber's inference was that prosecution for vagrancy could be employed as a scare device against undesirables. "Most of the hippies do not want to get involved with the law for various reasons. . . . If they move on, the case could be dropped."[3] It is this selective application against minority, under-privileged and socially undesirable groups of people that has caused this type of statute to be declared invalid.

The Montana vagrancy statute has never been reviewed on appeal. Therefore, a review of some California decisions is presented for purposes of discussion and background information. The Montana statute and several city ordinances can be analyzed in light of these decisions and a number of recent federal court decisions. Legislation in line with the public property and personal liberty dictates of the United States courts will be suggested.

HISTORIC GLIMPSE

The concept of vagrancy is not new. The first recorded English vagrancy law was the Statute of Labourers.[4] No doubt it was considerably easier to require adherence to such a statute when society was agrarian, twenty miles was a day's travel, and governing was by the caste system. In those days a person's class or status dictated the privileges he could enjoy. According to the statute,[5] if one belonged to the working class and refused to work, he could be sent to jail until such time as he found someone to work for him or returned to work himself. The crime was one of condition or status — being of the working class and being idle. The needs of the King in 1349 and the liberty enjoyed by his subjects were considerably different from the needs and liberty of a Democratic society under the Constitution of the United States in 1971.

[1]Revised Codes of Montana, § 94-35-248 (1947) [hereinafter cited as R.C.M. 1947] R.C.M. 1947, § 11-936. This section gives the cities and town councils power to define, restrain and punish vagrants. In response to this authorization, ordinances almost identical to the state statute have been enacted.

[2]*Hippies—Hello & Goodbye*, THE MONTANA CITIZEN 10 (April, 1971) [Published Monthly by the Montana Chamber of Commerce].

[3]*Id.*

[4]23 Edw. III (1349) (repealed Statute Law Revision 1863).

[5]*Id.*

However, changes were made in interpretation of the statute as the English society became more mobile, and different reasons for application became apparent.[6] People that desired not to work but yet remained in their own county were no longer prosecuted for being idle.[7] Those that did travel from place to place were deemed vagabonds[8] or tramps.[9] These individuals were often undesirable because they tended to be professional beggars, swindlers or gamblers.[10] The public associated them with the criminal element. It is in this context that the vagrancy concept was brought to the United States.

THE VAGRANCY STATUTE UPHELD

In the early 1900's (long before the Warren court clarified the meaning of due process and fundamental liberty) advocates argued that vagrancy and loitering statutes were vague. One of these cases, *Ex parte McCue,*[11] involved a statute[12] which provided: "Every idle or lewd or dissolute person, or associate of known thieves . . . is a vagrant." The California court rejected the due process argument and held[13] that any practice that tends to weaken or corrupt the morals of those engaged in it is a proper subject to be governed by the police power of the state. Although the court recognized that a constitutional right to due process existed, it declared that such right could not render ineffective laws which are generally admitted to be essential to the safety and well-being of society.[14] The court stated:

> One charged, as was petitioner, with being an idle, lewd, and dissolute person, is sufficiently advised of the character of the offense. To say that the Legislature must specify the many evils and corrupt practices which might constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary.[15]

However, the court in the *McCue* case left the door ajar for later attacks. The court in dicta added that the Legislature could not competently denounce mere idleness as a crime without some qualification.[16] Lewd and dissolute, however, were thought to be sufficiently clear.[17]

[6]PERKINS, PERKINS ON CRIMINAL LAW at 428 (2nd ed. 1969).

[7]*Id.*

[8]WEBSTER'S THIRD NEW WORLD DICTIONARY (2528) defines a vagabond as "one who wanders from place to place with no fixed dwelling or if he has one not abiding in it and who is without visible means of support."

[9]PERKINS, *supra* note 6.

[10]*Id.*

[11]*Ex parte* McCue, 17 Cal. App. 765, 96 P. 110 (1908).

[12]Cal. Pen. Code § 647 (1872) (as amended 1903) (repealed stats. 1961, c. 560 p. 1672 § 1).

[13]*Ex parte* McCue, *supra* note 11 at 111.

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]In *State v. Harlowe,* 174 Wash. 227, 24 P.2d 601 (1933), the court was faced with a

Because the void for vagueness argument failed to obtain relief, a different attack was tried in 1934.[18] In *Cutler,* the petitioner made a three-pronged attack[19] on the statute[20] claiming that it was too broad, that is should be strictly construed in favor of a citizen's liberty, and that roaming, loafing and idling are not wrongful acts per se and the prohibition of such acts seriously infringes on the individual's right of liberty. The California court denied the petition, stating that the purpose of the statute was "to curb the wandering propensities of individuals who might offer a menace to the peace and well-being of society in any locality whereto they might repair."[21] The court further stated that the well-disposed and orderly citizen needed protection from the depredations of the idle and vicious.[22] The court held that pointless and useless wandering from place to place within the state without any excuse was the very kind of conduct that the statute was aimed at controlling. *McCue* was distinguished with the simple statement[23] that roaming was not the same thing as idling and the "additional qualification" required by *McCue* was met by the language "without any lawful purpose."[24] It would seem that the crack in the door purposefully left by *McCue* was now closed; at least it was closed in California and several other states.[25]

THE CRACK REOPENS

In 1931 the Federal court of the Ninth Circuit, in *Territory of Hawaii v. Anduha,*[26] reviewed the vagrancy statute[27] of the Territory of Hawaii. The court cited *McCue* in support of its position and declared the statute to be unconstitutional because it was too broad.

> In any view we take of it, the act trenches upon the inalienable rights of the citizen to do what he will and when he will, so long as his course of conduct is not inimical to himself or to the general public of which he is a part.[28]

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similar statute and quoted almost the entire opinion in *McCue.* In its own language the court went to to say that it deemed vagrancy parasitic and if tolerated "would sap the very life upon which it feeds." The court held that although the terms "lewd, disorderly and dissolute" had no statutory definition, they are of common and general use and easily understood by those of average intelligence.

[18]*Ex parte* Cutler, 1 Cal. App.2d 273, 36 P.2d 441 (1934).

[19]*Id.* at 442.

[20]Cal. Pen. Code § 647(3) (1872) (as amended 1931) (repealed stats. 1961, c. 560 p. 1672 § 1).

[21]*Ex parte* Cutler, *supra* note 18 at 444.

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.* at 445. City of Portland v. Goodwin, 210 P.2d 577, 187 Ore. 409 (1949); Beail v. District of Columbia, 82 A.2d 756 (D.C. 1951); Fenster v. Criminal Court of City of New York, 259 N.Y.S.2d 67, 46 Misc.2d 179 (1965).

[26]Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931).

[27]Session Laws Hawaii 1929, Act 256 § 1. The statute provided that any person who shall habitually loaf, loiter, and/or idle upon any public street or highway or in any public place shall be guilty of a misdemeanor.

[28]Anduha, *supra* note 26 at 173.

The case has also been cited in support of the void for vagueness doctrine based upon the following language: "These words idle, loiter, and loaf have no sinister meaning and imply no wrongdoing or misconduct on the part of those engaged in the prohibited practices."[29]

Probably the greatest significance of *Anduha* is its language that discusses and defines[30] some of the personal rights of each citizen. Although declaring that the statute infringed on these liberties, the court did not indicate from which amendment these rights were derived. It simply stated that the rights existed before the Constitution and that they had been made a part of the fundamental law. It can be anticipated then that *Anduha* could be used as authority for three different arguments for declaring a vagrancy statute unconstitutional. It is authority for an attack on the basis of the void for vagueness doctrine.[31] It supports an attack based on overbreadth, and finally, it helps determine whether certain kinds of conduct will be protected as a fundamental liberty.[32]

Anduha first appeared in a 1938 California decision, *Phillips v. Municipal Court of Los Angeles,*[33] but only in the dissenting opinion. In issue was another subdivision of the vagrancy statute.[34] The court held that it was permissible to use the term loiter in the statute if the place to be protected was a public school and the people to be protected

[29]*Id.*

[30]*Id.* at 172. "Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there they will be protected under the law, not only in their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony would be most oppressive and unjust, and destroy all the rights which our constitution guaranties. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land."

[31]Ricks v. District of Columbia, 414 F.2d 1097 (1968). In this case, *Anduha* was cited as authority in striking down the District of Columbia vagrancy law. Some discussion in the case was directed to the chilling effect that a vague statute has on constitutional guaranties. "Since most people shy away from legal violations, personal liberty is unconstitutionally dampened when one can but doubt whether he is actually free to pursue particular conduct." Ricks, *supra* at 1101.

This writer is entirely in agreement with this statement. However, the majority of decisions have been based on the over-breadth doctrine. It may also be easier to depict the chilling effect when approached from the standpoint of overbreadth. For these reasons, the preponderance of cases cited will have turned on the basis of the statute or ordinance being unconstitutionally overbroad.

[32]Such fundamental rights were not protected against invasion by the States. It was as if these rights were a Federal common law right to protect the people from interference of the national government.

[33]Phillips v. Municipal Court of Los Angeles, 24 Cal. App.2d 453, 75 P.2d 548, 550 (1938).

[34]Cal. Pen. Code § 647 (1872) (as amended 1931) (repealed stats. 1961, c. 560 p. 1672 § 1).

were children. In dissent,[35] Justice McComb stated that innocuous conduct cannot be made a criminal offense.[36]

Finally, in 1942 in an habeas corpus proceeding[37] in which petitioner sought relief from prosecution under a local loitering ordinance[38] against labor pickets, *Anduha* was cited as authority by Justice Traynor in declaring the section unconstitutional. The court stated:[39]

> The sweeping prohibition of section 2 would apply equally against peaceful pickets, shoppers engrossed in a window display, invalids in wheelchairs, acquaintances who stand engaged in conversation. The entire section is therefore invalid even though Yuba County might validly prohibit excessive and unneccessary obstructions of the streets and highways.

However, the petitioner failed to carry the burden of proof that he had not been convicted of the one valid provision of the ordinance prohibiting acts of violence and his petition was denied.

THE DILEMMA

Anduha was not actually raised in issue in California again until 1961[40] when another section of the vagrancy statute[41] was challenged as being vague. The court, striving to find the statute a proper exercise of power, stated:[42]

> Manifestly one who goes to a bus station or railroad station and waits for the purpose of buying a ticket, boarding the conveyance, meeting a relative or friend actually expected to arrive, or with

[35]Phillips, *supra* note 33 at 549-50.

[36]*Phillips* was followed in *State v. Starr*, 57 Ariz. 270, 113 P.2d 356 (1941), which also involved loitering near a public school. The court there distinguished *Anduha* and stated that it applied to public streets, highways and public places. "Public school grounds and premises are not free to any and everyone like a public street or highway or public park. Public school grounds and premises are dedicated to the use of persons eligible to attend the schools, their officers, teachers and employees. Others entering are invitees or licensees or trespassers and subject to the rules of law applicable to their situation." Starr, *supra* at 358-59. The court ignored the fact that petitioners were not on the school grounds, but rather had been arrested for loitering within three hundred feets of the grounds, a statutory offense. The real issue therefore was not whether trespassing on the school grounds could be proscribed, but whether loitering within three hundred feet of a public school could be prohibited.

[37]*Ex parte* Bell, 19 C.2d 488, 122 P.2d 22 (1942).

[38]Yuba County, California, Ordinance § 2—It is unlawful for any person to loiter, stand or sit upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage therein or thereon of persons or vehicles passing or attempting to pass along the same, or so as to in any manner annoy or molest persons passing along the same.

[39]*Exp parte* Bell, *supra* note 37 at 28.

[40]*In re* Cregler, 14 Cal. Rptr. 289, 363 P.2d 305 (1961). The court held that prohibiting loitering in bus stations by a person who had been convicted of being a thief was not unconstitutionally vague and indefinite. This holding was reminiscent of *Phillips* where the place was a school and the people specifically protected were children. Although this writer does not agree with either holding, he does see a distinguishable difference between legislation that would protect children and legislation that would continue to penalize ex-convicts.

[41]Cal. Pen. Code § 647(4) (West 1955) (repealed stats, 1961, c. 560 p. 1672 § 1).

[42]*In re* Cregler, *supra* note 40 at 307.

> any other legitimate objective, is not loitering within the sense of the statute. Loitering as forbidden includes waiting, but mere waiting for any lawful purpose does not constitute loitering.

The court further stated that loitering has a sinister[43] or wrongful, as well as a reasonably definite, implication. The word, as used in the statute, "obviously connotes lingering in the designated place for the purpose of committing a crime as opportunity may be discovered."[44] The court used *Phillips v. Municipal Court*[45] as authority. In light of the rule of *Phillips* and the presumption of validity that any statute is permitted, the court stated that the rules of *In re Bell*,[46] *In re McCue*[47] and *Territory of Hawaii v. Anduha*[48] will not be discussed.

Looking at the state of the law in California ten years ago, three things are reasonably clear. Certain public areas could be declared off limits, and citizens found within that vicinity could be declared vagrants. Citizens who had been convicted of, or who confessed to, being pickpockets or burglars and had no visible means of support could be declared vagrants and duly prosecuted. Finally, loitering was defined in California to mean lingering in a designated place apparently awaiting an opportunity to commit a crime. But the California position was typical of the position of most of the states. In retrospect, it appears that the situation had changed very little from the time the Statute of Labourers was enacted. Instead of unemployed members of the working class, suspicious persons or persons, simply in the wrong place at the wrong time, were subject to prosecution.

THE PRIVILEGE

In 1940 Mr. Justice Murphy stated[49] that some of the freedoms set forth in the First Amendment were among the fundamental liberties secured to all persons by the Fourteenth Amendment. In 1963[50] it became clear that such fundamental freedom included the right to petition for the redress of grievances. Although it was decided as long ago as 1819[51] that the Constitution was not to be narrowly construed, it was not until 1965 in *Griswold v. Connecticut*[52] that life and substance were given to the guarantees set forth in the Bill of Rights. Reading *Anduha* in light of *Griswold*, one of the liberties guaranteed to all persons in the United States is the right of locomotion. When *Anduha* was decided it, of course, limited only interference by the Federal govern-

[43] *Id.*
[44] *Id.*
[45] Phillips v. Municipal Court, 24 Cal. App.2d 453, 75 P.2d 548 (1938).
[46] *In re* Bell, 19 C.2d 488, 122 P.2d 22 (1942).
[47] *In re* McCue, 17 Cal. App. 765, 96 P. 110 (1908).
[48] Anduha, *supra* note 26.
[49] Thornhill v. Alabama, 310 U.S. 88, 95 (1940).
[50] Edwards v. South Carolina, 372 U.S. 229, 235 (1963).
[51] McCullock v. Maryland, 17 U.S. 316 (1819).

ment. *Griswold* causes *Anduha* to be read as a guarantee against interference by the States. It is not to be contended that such a freedom is absolute. The States and municipalities have the power to establish rules of order for the safety of, and to enhance the liberty of, all citizens;[53] but individuals are free to go about the public streets and places of a city so long as their concerns are lawful.[54]

At the time of this writing, no loitering or vagrancy statute has been before the United States Supreme Court. It is unlikely that any statute drafted in the traditional language will ever reach that court.[55] There are a number of decisions from the lower Federal courts in recent years declaring these statutes unconstitutional. These are worthy of consideration for their application of constitutional principles.

THE PRIVILEGE APPLIED IN THE SIXTIES

In 1967 the Kentucky vagrancy statute and the Louisville loitering ordinance were challenged as vague and overbroad.[56] These two laws[57] were drafted in terms of able-bodied persons failing to seek or accept work or loitering about public places and failing to give a satisfactory account of themselves. In striking down the loitering ordinance, the court cited *Anduha* as authority. "Failing to give a satisfactory account of oneself,"[58] it was held, gives unlimited discretion to a police officer to determine what is satisfactory. In declaring the vagrancy statute to be unconstitutional, the United States District Court declared that the statute was strictly a catch-all statute failing in specifics. Allowing itself a candid observation, the court commented[59] that such a statute might have been loosely drawn intentionally to trap those felt to be undesirable. The court then firmly declared[60] that movement is essential to freedom, and property status, that is, a person's livelihood, is not to be a determining factor of the rights of citizenship.

[53]Griswold v. Connecticut, 381 U.S. 479, 483 (1965). ". . . specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance."

[54]Cox v. New Hampshire, 312 U.S. 569, 574 (1941). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations . . . has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend."

[55]Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

[56]United States v. Kilgen, 431 F.2d 627, 631 (5th Cir. 1970). ". . . we think it bordering on the fantastic to contend that everything listed in this relic of the English Statutes of Laborers can come within the power of the state to forbid, with criminal sanctions in this day."

[57]Baker v. Bindner, 274 F. Supp. 658 (D. Ky. 1967).

[58]Baldwin's Kentucky Revised Statutes § 436.520 Vagrancy (1969); Louisville, Ky., Ordinance 525.01(a), Loitering and Related Offenses.

[59]Baker, *supra* note 56 at 664.

[60]*Id.* at 662.

[60]*Id.*

On the basis of *Robinson v. State of California,*[61] criminal laws must be directed toward actions and not personal status. A person can not be arrested on the basis of suspicion or even probable cause to believe that he is a narcotics addict, homosexual, indigent or is dissolute.[62] In *Hughes v. Rizzo*[63] the court determined that the reason for the arrest of a number of young people was to rid a public park of undesirables, specifically "hippies". This kind of struggle between society, *i.e.,* "the establishment", and those groups of people thought to be undesirable is an historic one. Nonetheless, a state's police power cannot be used to "suppress one class of idlers in order to make a place more attractive to other idlers of a more desirable class."[64]

Goldman v. Knecht,[65] a case from the Federal District Court of Colorado, is of particular interest, since the vagrancy statute[66] was examined in detail and the alleged violators were of the class designated as "hippies".[67] Two arrests were made under the statute. The first arrest, made at a basement apartment, resulted in a prosecution before this injunctive action was initiated. Ten people were arrested and all but the two plaintiffs were released. The second arrest under the same statute was made while trial was pending on charges resulting from the first arrest. The police again released some of those arrested, but determined that the plaintiffs and eight of their companions should be held. This second arrest took place at a mountain campsite in conjunction with the execution of a narcotics search warrant. None of the narcotics found could be linked to the plaintiffs. The loitering statute, which had been revised in 1963, was loosely drafted in terms of loitering or strolling about, frequenting public places and leading an immoral and profligate life. The court declared[68] that the regulation was concerned with the person rather than his behavior and thus potentially subjected

[61]Robinson v. State of California, 370 U.S. 660 (1961).

[62]Hughes v. Rizzo, 282 F. Supp. 881, 884 (E.D. Penn. 1968).

[63]*Id.* This was an action under the Civil Rights Act, 42 U.S.C. § 1983, to restrain officials from harassing the plaintiffs.

[64]Anduha, *supra* note 26 at 173; Goldman v. Knecht, 295 F. Supp. 897, 902 (D. Colo. 1969). "Initially vagrancy was conceived as an economic measure which sought to shore up the crumbling structure of feudal society by prohibiting mobility among the laboring class. Vagrancy statutes were subsequently used in the post-feudal society as a means of protecting a local community from the financial burdens and potential criminality of undesirable strangers."

[65]Goldman v. Knecht, *supra* note 64.

[66]Colorado Revised Statutes § 40-8-19 (1963).

[67]*People v. Coulon,* 78 Cal. Rptr. 95, 98 (1969), recognized the term as adequate for group identification. "Hippie has wide currency as a description of a contemporary social phenomenon. The term denotes an unconventional young person in rebellion against competitive middle-class values, who usually consorts with his own kind and tends to symbolize his rebellion by hirsuteness and picturesque garb. As a group description, it signifies persons sharing a limited set of common characteristics. In college communities many students adopt the external appearance of hippies, making the term dubious as a physical identification. In a rural area such as Siskiyou County common sense and judicial notice combine to permit recognition of the term as a generalized description of external appearance, adequate for the purpose of group identification."

[68]Goldman v. Knecht, *supra* note 64 at 904.

every able-bodied citizen of Colorado to criminal penalty for doing inherently innocuous acts. Although the court thought this result unlikely, it held that this fact was indicative of the wide range of conditions that could be grounds for prosecution. Therefore, if the statute were to be enforced at all, the persons to be prosecuted would necessarily be selected arbitrarily at the whim of a policeman. "An enactment which is devoid of precise definition does not satisfy our basic notion that government must be by law and not by the whim of man."[69] The statute was found to be extremely broad and vague and was held in violation of the Fourteenth Amendment's guarantee of due process.[70]

In *Wheeler v. Goodman*,[71] a group of twelve "hippies" sought injunctive and declaratory relief under the Civil Rights Act of 1964 to prevent systematic harassment under the North Carolina vagrancy statute.[72] The statute was similar to the one in *Goldman v. Knecht, i.e*, no means of livelihood, idleness, no visible property, and a profligate lifestyle. The Charlotte police had arrested plaintiffs fifteen times in thirty-six days. On one occasion they had even entered the plaintiff's house on the premise that they had heard profane language. The plaintiffs, after being fingerprinted and photographed, were released under a "*nolle prosequi* with leave."[73] Citing *Baker v. Bindner*[74] as authority, the court struck down the statute, declaring it to be a catch-all and an infringement of the plaintiffs' constitutional rights. The court stated:[75]

> Freedom to conform to community behavior patterns is not liberty, but state regimentation. There can never be total freedom of action for the individual, since behavior that is harmful to others cannot be permitted. But toleration of nonconformity is the test of a mature strong government. In the United States belief and noninjurious behavior are not punishable. A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiawanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights. In short, it is no crime to be a hippie.

[69]*Id.* at 906.

[70]The court also held that the statute denied equal protection. It is the only case found which reached that conclusion.

[71]Wheeler v. Goodman, 306 F. Supp. 58 (D. N.C. 1969).

[72]General Statutes of North Carolina § 14-336.

[73]Wheeler v. Goodman, *supra* note 71 at 60. This action is similar to that being advocated by the Montana Chamber of Commerce. However, such procedure is clearly not a proper exercise of power. In *Menard v. Mitchell*, 430 F.2d 486, 493-94 (D.C. Cir. 1970) it was said: "Many individuals have unjustly acquired arrest records . . . In the District of Columbia alone, literally thousands of persons were once arrested for 'investigation' and then released; but their records often remain. Dragnet arrests are at best matters of recent memory. Even worse are those occasions, far more comman than we would like to think, where invocation of the criminal process is used—often with no hope of ultimate conviction—as punitive sanction. Hippies and civil rights workers have been harassed and literally driven from their houses by repeated and unlawful arrests, often made under statutes unconstitutional on their face. Innocent bystanders may be swept up in mass arrests made to clear the streets either during a riot or during lawful political demonstrations. Use of the power to arrest in order to inflict summary punishment is, of course, unconstitutional . . . ."

[74]Baker v. Bindner, *supra* note 56. Specifically on the facts of this case the First, Fourth, Fifth and Fourteenth Amendment privileges were in issue.

[75]Wheeler v. Goodman, *supra* note 71 at 62.

The argument that the vagrancy statute can be used effectively as a deterrent to crime was argued in *Wheeler v. Goodman* just as it has been argued over the years. The court met that argument by saying that, just as certain liberties are not absolutes, neither is crime prevention an absolute value.[76]

> Methods of prevention are constantly weighed against the personal liberties enshrined in the Constitution. Here the outrageous police action under color of the vagrancy statute is far too high a price to pay for crime prevention.[77]

The use of such a statute to arrest in order to harass or even inflict summary punishment is blatantly unconstitutional.[78]

The final case[79] that is to be reviewed herein brought the Salt Lake City vagrancy ordinance.[80] into question. That ordinance is almost identical with the Montana vagrancy statute.[81] The plaintiff had been arrested for vagrancy and loitering and confined for twelve hours in the city jail. Several months later the complaint against him was simply dismissed. Since the plaintiff intended to remain in the city, he instituted an action to have the statute declared unconstitutional so he would not have to live in fear of it being applied to him again. The court held[82] that the statute would chill the liberty of lawful movement, presence, and physical status. It declared the following three sections to be unconstitutional:[83]

> Salt Lake City Ordinance 32-1-6. Vagrancy defined.
>
> (1) A vagrant is every person (except an Indian) without visible means of support who has the physical ability to work, and who does not seek employment, nor labor when employment is offered to him; or
>
> (3) Every person who roams about from place to place without any lawful business; or
>
> (6) Every person who wanders about the street at late or unusual hours of the night, without any visible or lawful business; . . .

The court refrained from passing on the other provisions of the ordinance.

It becomes clear then that, as the privileges that a citizen of these United States enjoys have become more clearly defined and understood, the doctrine of due process has required broader application. Although the freedom of locomotion is not absolute, it certainly is

[76] *Id.* at 65.
[77] *Id.*
[78] *See* quoted material, *supra* note 73.
[79] Decker v. Fillis, 306 F. Supp. 613 (D. Utah 1969).
[80] Salt Lake City Ordinance, § 32-1-6.
[81] R.C.M. 1947, § 94-35-248.
[82] Decker, *supra* note 79 at 617.
[83] *Id.*

fundamental; being fundamental it must receive appropriate protection.[84] This is not to say that the states no longer have the power to legislate to protect the interests of the majority of its citizens.[85] However, such legislation must be drafted so as to protect the rights of the citizens as a whole, with an absolute minimal erosion of the rights of the citizen as an individual.[86]

LEGISLATION FOR THE SEVENTIES AND BEYOND

The problems that a state undergoes as it prepares legislation in an area in which a fundamental liberty is involved are extensive. Laws based on bias, prejudice, moral convictions and religious beliefs, the motivating forces for much of the legislation declared unconstitutional in the last ten years, will no longer be tolerated.

> The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at his home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.[87]

Drafters must clearly define the objective which the statute is intended to attain.[88] The majority of the citizens of a state cannot legislate standards of moral conduct for its citizens unless the conduct to be prohibited is patently offensive to "reasonable thinking" citizens. It is clearly within the power of the state to prohibit public fornication, loud and abusive noises, insulting and provocative language, and obstruction of public passages.

Another of the bases for vagrancy statutes has been the concern that people in unusual places at unusual times are there for criminal purposes.[89] This fear has often been proved valid. Statutes properly drafted to control such objectionable conduct are valid. Assuming that

[84]Fenster v. Leary, 282 N.Y.S.2d 739, 229 N.E.2d 426, 428 (1967). Quoting Judge Fuld in an earlier case the court stated: "The police power is 'very broad and comprehensive' and in its exerice the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other . . . . But, in order for an exercise of the police power to be valid, there must be 'some fair, just and reasonable connection' between it and the promotion of the health, comfort, safety and welfare of society."

[85]Cox v. New Hampshire, *supra* note 53.

[86]*See* quoted material, *supra* note 84.

[87]*In re Cox,* 90 Cal. Rptr. 24, 474 P.2d 992, 1005 (1970) gives credit for this quote to the Michigan Supreme Court in *Ferguson v. Giles,* 82 Mich. 358, 46 N.W. 718 (1890).

[88]This writer would discourage the mere copying of legislation from other states, particularly in areas in which fundamental liberties are involved. Statutes of other states will be examined *infra* for purposes of example and illustration of what type of statute may be permissible.

[89]Goldman v. Knecht, *supra* note 64 at 902. This law has been used since the 14th century to advance economic, social and moral objectives, prohibit mobility among serfs, and to protect communities from the financial burdens and potential criminality of undesirable strangers.

the state desires to control public loitering to the extent that it is affecting or is about to affect the rights of other members of society, what kind of legislation is permissible?

One guide that is available, other than case law research, is the American Law Institute's Model Penal Code, Section 250.6.[90] The Model Act sets forth two criteria that must be met before a person may be arrested for loitering. First, the time, place or manner in which the loitering occurs must be unusual for law-abiding citizens. Second, the circumstances under which the act occurs must be such as to warrant alarm for the safety of either persons or property in the vicinity. Should the actor flee upon sight of the officer, refuse to identify himself, or attempt to hide himself from the officer, such officer may consider these circumstances in determining whether alarm is justified. However, the person must be afforded an opportunity to dispel any alarm which the police officer has relied upon in making the arrest.

A New York court was faced with a statute based on a prior draft of this Model Penal Code in *People v. Beltrand*.[91] Subdivision 6, Section 240.35 of the New York Penal Law states:[92]

> A person is guilty of loitering when he . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

The court pointed out that there are two elements to the crime. Element number one, "loitering without apparent reason," was unconstitutional for the same reasons as the statute in *Anduha, i.e.,* the statute unreasonably interfered with a person's freedom of locomotion.[93] Element number two, "under circumstances which justify suspicion," was declared unconstitutional due to interference with a person's Fourth Amendment rights.[94] Loitering had not been limited[95] as suggested by the proposed Model Act "under circumstances that warrant alarm for the safety of persons or property in the vicinity."[96] A statute which "fails to distinguish between innocent conduct and action which is calculated to cause harm may not be sustained."[97] The substantial changes made in the final draft to the Model Penal Code as pointed out by the author's

[90]American Law Institute, Model Penal Code Proposed Official Draft, May 4, 1962, § 250.6 Loitering or Prowling.

[91]People v. Beltrand, 314 N.Y.S.2d 276, 63 Misc.2d 1041 (1970).

[92]*Id.* at 280.

[93]*Id.*

[94]*Id.* The requirement of probable cause, designed to protect Fourth Amendment freedoms, was not met by the term reasonable suspicion. In fact reasonable suspicion is the very antithesis of probable cause.

[95]*Id.*

[96]Model Penal Code, *supra* note 90.

[97]People v. Bertrand, *supra* note 91 at 282.

comments to that Code persuaded the court that a contrary holding would be improper.

In one case,[98] a statute,[99] drafted in accordance with the suggestions of the Model Act, was reviewed and the court declared that statute to be valid. The plaintiff in *Camarco v. City of Orange*[100] pursued a declaratory judgment action to have the revised loitering ordinance declared unconstitutional. A prior action against Mr. Camarco under the former ordinance was dismissed because the statute failed to set forth norms and standards.[101] The court found that loitering per se was not a crime under the Orange ordinance.[102] Only loitering as defined under Section 1 and being practiced so as to infringe on the individual rights of other citizens was prohibited.[103] Therefore, protected conduct could not be punished. The court also declared[104] that under Section 3 a policeman did not have unlimited discretion since he could not arrest until after the request to move on had been made; the critical difference is that no request to move on could be made without a showing that the loitering was being done in a manner which interfered with the privileges of another.

The Montana Criminal Law Commission has drafted a proposal[105] which includes a new section to replace the present Montana vagrancy

[98]Camarco v. City of Orange, 111 N.J. Super. 400, 268 A.2d 354 (1970).

[99]Orange, N.J. City Ordinance §, An Ordinance to Prevent Loitering Within the City of Orange

Section 1. Definitions. As used in this Section.
(a) "Loitering" shall mean remaining idle in essentially one location and shall include concepts of spending time idly, loafing or walking about aimlessly, and shall include the coloquial [sic] expression "hanging around."
(b) "Public place" [unavailable].

Section 2. Certain types of Loitering Prohibited. No person shall loiter in a public place in such manner as to:
(a) Create or cause to be created a danger of a breach of the peace.
(b) Create or cause to be created any disturbance or annoyance to the comfort and repose of any person.
(c) Obstruct the free passage of pedestrians or vehicles.
(d) Obstruct, molest, or interfere with any person lawfully in any public place as defined in Section 1 (b). This paragraph shall include the making of unsolicited remarks of an offensive, disgusting or insulting nature or which are calculated to annoy or disturb the person to, or in whose hearing, they are made.

Section 3. Discretion of Police Officer.
Whenever any police officer shall, in the exercise of reasonable judgment, decide that the presence of any person in any public place is causing or is likely to cause any of the conditions enumerated in Section 2, he may, if he deems it necessary for the preservation of the public peace and safety, order that person to leave that place. Any person who shall refuse to leave after being ordered to do so by a police officer shall be guilty of a violation of this Section.

[100]Camarco, *supra* note 98.

[101]*Id.* at 355.

[102]*Id.* at 358.

[103]*Id.*

[104]*Id.*

[105]Proposed Montana Criminal Code of 1970, § 94-8-105 Failure of Suspicious Persons to Cooperate

(1) Where a person appears in an unusual place or at an unusual hour, and under

statute. It conforms to the suggestions made by the American Law Institute's Model Code provision. Perhaps it goes even a few steps farther in insuring clarification, since it is not drafted in terms of loitering. Instead, it is drafted in terms of "unusual place" and "unusual hour" under circumstances creating a "reasonable suspicion" that the actor "has committed or is about to commit an offense." This critical language would appear to meet the criteria of probable cause to arrest dictated by the Fourth Amendment.[106] At the same time it appears to be narrowly drafted and should withstand attacks based on either vagueness or overbreadth. It certainly could not be successfully argued that any citizen could be arrested at high noon on the main street of his city under such a statute. Nor could it be argued that the average citizen is not made aware of the criteria that constitute the offense. The English language is capable of explicit drafting, but laws cannot be so specifically drafted that they are inapplicable in a variety of circumstances. "Unusual place" and "unusual hour" are arguably as narrow as necessary to preserve fundamental liberties, yet as broad as necessary to insure application to differing circumstances. The hands of the police officer are not tied by the language "under circumstances creating a reasonable suspicion that he has committed or is about to commit an offense." However, a great deal of discretion has been denied that officer. The potentiality for treatment because of bias has been restricted, but the motivating purpose, preservation of peace and order and preservation of life and property, is still capable of accomplishment.

CONCLUSION

In the Fifties and Sixties a number of problems similar to the loitering and vagrancy situation discussed herein were encountered by our society. These problems need not have arisen. But it is always easier to learn from review than it is to observe the day-to-day changes. This note has attempted to demonstrate by review that the present loitering and vagrancy statutes and ordinances are not permissible state regulations.

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circumstances creating a reasonable suspicion that he has committed or is about to commit an offense, a peace officer may after identifying himself, order the person to identify himself and explain his suspicious activity. A person commits the offense of failure to cooperate if he refuses or knowingly fails to obey such an order.
(2) A person convicted of the offense of failure to cooperate shall be fined not to exceed fifty dollars ($50) or be imprisoned in the county jail for a term not to exceed five (5) days, or both.
(3) It shall be a defense if a person's refusal to obey such an order proves justified. Drafters' Comment: This section replaces R.C.M. 94-35-248, Vagrancy. The main intent of the section is to provide a legitimate means of removing persons from any place where they might be found under suspicious circumstances. The failure of the peace officer, especially one without a uniform, to properly identify himself to a person falling under this provision, is an example of a probable justified refusal under subsection (3).

[106]In *Beltrand, supra* note 91, one of the infirmities of the statute was that it used the word "suspicion" without qualification. Arguably, reasonable suspicion and probable cause mean the same thing.However, it would remove a potential attack on the statute if it were changed to "probable cause to believe" rather than "reasonable suspicion."

Activities that could have been prohibited at one time are no longer subject to state interference. The easiest explanation for the change is that, as the fundamental liberties inherent to all persons of this country have become more clearly defined, the various laws limiting these liberities have necessarily been invalidated.

This note has been approached from a personal freedom/public property point of view. What of these same personal freedoms when they come into contact with the rights of the individual property owner? What of Montana's problems when, after July 1, 1971, all nineteen-year-old persons will be given their majority? Will they be allowed equal access to business premises that heretofore have been closed to them? What of the politely worded sign that appears in so many business establishments in this state, "We reserve the right to refuse service to anyone?" Can a businessman open his doors only to whomever he desires? Can the corner grocer sell food to the citizens of the community and refuse to sell to any tourists, hippies, or persons in uniform? Does it make a difference that the business premises is a shopping center, a service station, a jewelry store, a tavern, or a private hospital?

These questions are still unanswered. California has statutorily declared[107] that all persons within its jurisdiction shall have equal access to the services and facilities of all business establishments.[108] A similar provision may well be a sound proposal for Montana's new state constitution. It is this writer's conviction that the fundamental liberties of all persons, exercised insofar as consonant with the use of the property, should be protected on business premises and similar areas open to the public which are nevertheless classified as private property. This is the lesson of the Fifties and Sixties to be applied to legislation for the Seventies and Beyond.

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[107]Cal. Civ. Code § 51 (West 1954 as amended stats. 1961, c. 1187 p. 2920 § 1). This section shall be known and may be cited as the Unruh Civil Rights Act. All persons within the jurisdiction of this State are free and equal and no matter what their race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every color, race, religion, ancestry or national origin.

[108]In *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), it was stated: "Ownership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) is in accord with Marsh. These cases further state that ". . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. Marsh, *supra* at 508; Logan Valley Plaza, *supra* at 319-20.

Reading these two cases together with the Unruh Civil Rights Act, *supra* note 107, one could conclude that all fundamental freedoms are protected on business premises in California insofar as they are "consonant with the use to which the property is actually put." Just as it has been shown that loitering in public places is crime, it follows that requesting service or attempting to make a purchase in a store could not be penalized under the guise of a trespass statute.