Journal of Criminal Law and Criminology

Volume 63 | Issue 4 Article 4

1973

Statutes and Ordinances: The Fighting Words Requirement: Gooding v. Wilson, 405 U.S. 518 (1972)

fendents involved. Only Justices Marshall and Brennan ruled that capital punishment violated the eighth amendment under all circumstances. Justices Douglas, Stewart, and White find the lack of uniformity with which the death penalty is imposed objectionable. A mandatory death penalty for certain offenses would eliminate the arbitrary, capricious, and freakish aspects of the death penalty as presently administered, along with restoring the deterrent value Justice White believes has been lost. While mandatory capital punishment might satisfy Justices Douglas, Stewart, or White that the death penalty would no longer be imposed in a cruel and unusual manner, the dissenting opinions of Justices Blackmun, Burger, and Powell indicate that they would consider a mandatory death sentence cruel and unusual because the jury as the primary indicator of society no longer retains its discretion to be merciful. Thus, even a death penalty which is imposed uniformly and without discretion or discrimination, might be held unconstitutional by the Court in future decisions. While *Furman* took three defendants off death row, there is no clear holding that others may not constitutionally be sentenced to die.

STATUTES AND ORDINANCES

The "Fighting Words" Requirement:

Gooding v. Wilson, 405 U.S. 518 (1972)

In *Gooding v. Wilson*[1] the United States Supreme Court, for the second time in less than a year, struck down a public disorder law as unconstitutional on its face.[2] The Court held that a Georgia abusive language statute, which had not been construed by the state's courts to apply only to "fighting words,"[3] was on its face void for vagueness and overbreadth.[4]

The case stemmed from an August 18, 1966 anti-war demonstration before the headquarters of the 12th Corps., United States Army.[5] The defendant and others attempted to block the door so that inductees could not enter. When police requested them to vacate the entrance, the demonstrators refused to do so. A scuffle ensued during which the defendant committed assault and battery on two police officers and uttered the "opprobrious and abusive words" cited in the indictment.[6] The defendant was convicted in state superior court on two counts of using language which violated the Georgia statute.[7] In affirming his conviction, the Supreme Court of Georgia rejected the defendant's contention that, among other infirmities, the law in question was void for vagueness and overbreadth.[8] The United States District Court for the Northern District of Georgia granted the defendant's petition for a writ of habeas corpus declaring that the Georgia statute as construed by the state's courts was unconstitutionally vague and overbroad on its face.[9]

The Supreme Court reached the same conclusion and agreed with the lower court's reasoning in doing so.[10] Writing for the majority,[11] Mr. Justice

[1] 405 U.S. 518 (1972).

[2] The first time was in Coates v. City of Cincinnati, 402 U.S. 611 (1971), a case involving a Cincinnati ordinance which made it illegal for three or more persons assembled on a sidewalk to annoy those passing by. *See* text accompanying notes 36–40 *infra*.

[3] The "fighting words" test was first clearly articulated in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), a case which upheld a New Hampshire opprobrious language statute because the New Hampshire courts had limited it to "fighting words," that is, words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

[4] The Georgia statute provided in pertinent part: "Any person who shall without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." GA. CODE ANN. §26-6303 (1953).

[5] 405 U.S. 518, 519 n.1.

[6] The defendant allegedly said to one policeman: "White son of a bitch, I'll kill you." He allegedly said to another: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 520 n.1.

[7] *Id.* at 518.

[8] Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967). The Georgia Supreme Court held that the language of the statute conveyed "a definite meaning as to the language forbidden measured by common understanding and practice." *Id.* at 533, 156 S.E.2d at 448.

[9] Wilson v. Gooding, 303 F. Supp. 952 (N.D. Ga. 1969), *aff'd*, 431 F.2d 855 (5th Cir. 1970).

[10] 405 U.S. 518, 524.

[11] Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of this case.

Brennan first stressed that a statute punishing speech must be so drawn or construed as not to impinge upon expression protected by the first amendment.[12] Brennan then upheld the defendant's right to raise the issues of vagueness and overbreadth. He argued that overbroad laws dealing with first amendment rights tend to deter constitutionally protected conduct; therefore, claimants should be permitted to attack such statutes on grounds of vagueness and overbreadth regardless of whether or not their particular actions would have been constitutionally prohibited under a precisely drawn statute.[13]

Apparently the Court found the Georgia law unacceptable as written because most of its discussion was directed toward determining whether or not the law had been narrowed to constitutional dimensions by authoritative interpretations of the Georgia courts.[14] In pursuing this analysis, the majority relied heavily on *Chaplinsky v. New Hampshire*,[15] a case challenging a New Hampshire statute which made it illegal to annoyingly, derisively, or offensively address another in a public place.[16] The United States Supreme Court had upheld the statute because the Supreme Court of New Hampshire years earlier had limited the law's application to "fighting words" or words which "by their very utterence inflict injury or tend to incite an immediate breach of the peace."[17] Such words, the Supreme Court had concluded, were beyond the pale of constitutional protection and thus a statute limited to them was valid.

The appellants in *Gooding* maintained that the Georgia courts had limited the Georgia law in the same manner as the New Hampshire courts had limited theirs, but the majority disagreed.[18] They said that previous state appellate decisions had not construed the statute as applying only to "fighting words" so consequently the statute was unconstitutional.[19]

Chief Justice Burger and Justice Blackmun filed dissenting opinions. The thrust of the Chief Justice's dissent was that the "narrow language" of the Georgia statute had little potential for application outside the realm of "fighting words" and that the Georgia cases considered by the majority supported rather than undermined his position.[20] He felt that in view of this and what he considered the majority's tacit admission that the defendant's conduct was not protected by the

[12] 405 U.S. 518, 520.

[13] *Id.* at 520–21. The Court, *id.* at 521, relied on Justice White's disquisition on this subject in Coates v. City of Cincinnati, 402 U.S. 611, 619–20 (1971) (dissenting opinion):

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. The result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights."

[14] Nowhere in its decision did the majority discuss the validity of the statute as written; however, in its discussion of the constitutionality of the law as construed by the Georgia courts, the majority deals with the statute as though its terms, as written, were unconstitutionally vague and overbroad. *See* 405 U.S. 518, 525–27. *See also* text accompanying note 19 *infra*. Chief Justice Burger's dissent chided the majority for making such an assumption of invalidity. *Id.* at 529.

[15] 315 U.S. 568 (1942).

[16] The New Hampshire law stated:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in the street or other public place; nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

N.H. PUB. L, ch. 378, §2 [1926].

[17] 315 U.S. at 572.

[18] 405 U.S. at 524.

[19] At 405 U.S. 525, the Court dealt with three Georgia cases which it claimed defined the words "abusive" and "opprobious" in a manner inconsistent with the "fighting words" standard. In Lyons v. State, 94 Ga. App. 570, 95 S.E.2d 478 (1956), a conviction under the statute was sustained where the defendant awakened ten women scout leaders by shouting, "Boys, this is where we are to spend the night . . . get the G__ d__ bed rolls out . . . let's see how close we can come to the G__ d__ tents." *Id.* at 571, 95 S.E.2d at 579. In Fish v. State, 124 Ga. 416, 52 S.E. 737 (1905), the Georgia Supreme Court held that a jury question was presented by the remark, "You swore a lie." Jackson v. State, 14 Ga. App. 19, 80 S.E. 20 (1913), held that a jury question was presented by the words, "God damn you, why don't you get out of the road."

Regarding the meaning of the phrase "tendency to cause a breach of the peace," the Supreme Court cited the aforementioned cases as well as Elmore v. State, 15 Ga. App. 461, 462, 83 S.E.2d 799 (1944), which construed the term to mean words that would provoke a violent reaction, although not necessarily an immediate one. The Court also cited Samuels v. State, 103 Ga. App. 66, 67, 118 S.E.2d 231, 232 (1961), which defined the phrase in a manner encompassing all public violations of the public peace and tranquility. 405 U.S. at 525–27.

In response to the dissent's criticism of its citation of fifty year old cases, the Court pointed out that both Fish v. State, *supra*, and Jackson v. State, *supra*, were cited in Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967), making them authoritative interpretations of the statute in question by the state's highest court. 405 U.S. at 526 n.4.

[20] 405 U.S. at 529.

first amendment,[21] that the majority had misapplied the overbreadth doctrine.[22] He argued that in prior decisions the Court had used the doctrine with restraint, invalidating on their face only those statutes whose potential for sweeping and improper application was readily apparent.[23] Justice Blackmun agreed with the Chief Justice that the statute was constitutional on its face and urged that the majority's decision emasculated *Chaplinsky v. New Hampshire*[24] and left the states defenseless in the face of obnoxious behavior.[25]

The decision in *Gooding* is an example of the Supreme Court's readiness to scrutinize carefully public disorder statutes which affect first amendment rights. Designed to deal with conduct which disrupts the peace and order of society, disorder laws traditionally have been loosely drawn, employing broad, vague language and thus allowing law enforcement officials a considerable degree of latitude.[26] Such laws present critical first amendment questions because the rights of speech and assembly often are impaired by their definition and operation.

The Supreme Court's review of disorder laws has involved two types of situations—those in which time, manner and place of speech or assembly are regulated and those in which the content of speech or the substance of conduct are restrained.[27] In the former cases, the Court has upheld the validity of those statutes supported by a compelling state interest and narrowly drawn to prohibit activities detrimental to that particular interest.[28] When considering laws seeking to regulate the content of speech in the interest of public peace, the Supreme Court has required the states to demonstrate a greater degree of justification than in the cases of laws regulating time, place and manner of speech and assembly. The emphasis in this area has been on the reactions of listeners to the speech in question. Speech which incites others to violate the law may be punished, but the reaction of the audience alone is not enough.[29] A speaker may be constitutionally prosecuted only if he had a specific intent to provoke immediate lawbreaking and spoke in a situation which would render such a consequence likely.[30]

The Court has relied a great deal on the void for vagueness and overbreadth doctrines in dealing with the conflict between disorder statutes and first amendment rights. The void for vagueness test asks whether a statute is on its face "so vague that men of common intelligence must guess at its meaning and differ as to its application."[31] Any criminal or regulatory statute failing to meet this minimum standard must fall for lack of fair notice required by the due process provision of the fourteenth amendment.[32] Under the overbreadth doctrine, any criminal statute capable of sweeping

[21] Although the majority never admitted that the defendant's conduct could have been prohibited under a properly drawn statute, its lengthy discussion of the right of a claimant in certain situations to raise the charges of vagueness and overbreadth even when his conduct is not constitutionally protected seems to support Chief Justice Burger's conclusion. *See* text accompanying note 13 *supra*.

[22] 405 U.S. at 530–33.

[23] *Id.* Chief Justice Burger cited a portion of Justice Black's opinion in Younger v. Harris, 401 U.S. 37, 52–53 (1971), to support his position.

[24] 315 U.S. 568 (1942). Justice Blackmun claimed that the decision in *Gooding*, when taken with Cohen v. California, 403 U.S. 15 (1971), indicated that the Court was paying only "lip service" to *Chaplinsky*. 405 U.S. at 537. *Cohen* held that the non-oral use of offensive words ("Fuck the Draft") was not punishable because the words as used did not fall into a category that the government could prohibit. Cohen v. California, *supra* at 20–22. Apparently Justice Blackmun felt that in giving constitutional protection to the vulgar language that was used in *Cohen* and in *Gooding*, the majority rejected dicta in *Chaplinsky* which said that certain words, including those that are lewd, obscene, profane, libelous, and insulting, are not entitled to constitutional protection. Chaplinsky v. New Hampshire, *supra* at 572.

[25] 405 U.S. at 536.

[26] *See* Meltzer & Trott, *Disorderly Conduct*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 311, 314–15 (1964); Note, *Public Disorder Statutes in Iowa: An Evaluation of Existing Statutes and the Proposed Revision*, 57 IA. L. REV. 862, 863–64 (1972); Comment, *Wisconsin's Disorderly Conduct Statute: Why It Should Be Changed*, 1969 WIS. L. REV. 602, 606–08.

[27] The following discussion relies on the dichotomy outlined in Note, *supra* note 26, at 874–77.

[28] Thus the Court has invalidated flat statutory bans on picketing, Thornhill v. Alabama, 310 U.S. 88 (1940), as well as laws forbidding the distribution of handbills merely to keep the streets clean, Lovell v. City of Griffin, 303 U.S. 444 (1938), or to protect privacy, Martin v. City of Struthers, 319 U.S. 141 (1943), while it has upheld laws calling for prior licensing of parades or the use of loudspeakers on the grounds of public convenience and privacy. Fox v. New Hampshire, 312 U.S. 569 (1941); Kovacs v. Cooper, 336 U.S. 77 (1949). To protect the integrity of the judicial process, the Court has sustained laws against picketing courthouses. Cox v. Louisiana, 379 U.S. 559 (1965).

[29] Bachellor v. Maryland, 397 U.S. 564 (1970); Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[30] Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957); Feiner v. New York, 340 U.S. 315 (1951).

[31] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). An excellent discussion of the void for vagueness doctrine can be found in Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[32] *See* Note, *supra* note 31, at 68 n.2 for the origins of the doctrine.

application into areas of constitutionally protected activities must be held invalid.[33] While the two concepts are generically distinct, when laws covering first amendment activities are at issue, the Supreme Court has used them in a manner which leaves them virtually indistinguishable.[34]

In dealing with allegedly vague or overbroad public disorder statutes, the Court usually has proceeded cautiously, considering the facts of the particular case and then determining the constitutionality of the law in question only as applied to the specific fact situation.[35] *Coates v. City of Cincinnati*[36] represented a departure from this format and *Gooding* appears to further this departure. In *Coates* the Court considered a Cincinnati ordinance that made it illegal for three or more people assembled on a city sidewalk to "annoy" those passing by. Without considering the facts of the case and admitting that the ordinance encompassed many types of conduct that the city could constitutionally prohibit, the Court concluded that the law was unconstitutional because it specified no precise standard of conduct[37] and that it reached constitutionally protected areas of free assembly and association.[38]

The majority in *Coates* cited no precedents supporting its decision to review the facial validity of the Cincinnati ordinance irrespective of the defendant's conduct,[39] but the majority in *Gooding* was quite explicit in this respect.[40] It relied on a line of cases headed by *Dombrowski v. Pfister*,[41] which held that where the statute at issue purports to regulate or prescribe rights of speech or press protected by the first amendment, the defendant is entitled to attack it on grounds of vagueness and overbreadth even though it may be neither vague nor overbroad nor otherwise invalid as applied to his conduct.[42]

The Court's decision in *Gooding*, when taken with *Coates*, seems to indicate that a majority of the Justices have rejected the ad hoc approach to cases involving public disorder statutes and are ready to assess the facial constitutionality of such laws regardless of the circumstances of the particular case. Furthermore, in view of the fact that the law invalidated in *Gooding* was at least as narrowly drawn and construed as some of the public disorder statutes that have survived judicial scrutiny in the past,[43] it would appear that the

---

[33] *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415 (1963). For a comprehensive and insightful analysis of the overbreadth doctrine *see* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[34] This is possible because both doctrines are responsive to the fact that precision and predictability of government intervention are crucial to the protection of first amendment rights and that vague or overbroad statutes tend to deter the exercise of these rights. Note, *supra* note 33, at 874.

Justice Brennan discussed the relationship of the two doctrines in NAACP v. Button, 317 U.S. 415, 432–33 (1963):

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

[35] *See, e.g.*, Bachellor v. Maryland, 397 U.S. 564 (1970); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). The Court's caution sometimes resulted in confusion. In his concurring opinion in *Cox*, *supra* at 577, Justice Black agreed with what he believed to be the majority's conclusion that the Louisiana breach of peace statute was unconstitutional on its face. Nevertheless, in *Brown* the Court reversed similar convictions under the same law not because it was invalid on its face, but because the record demonstrated that the petitioners had not violated it. Brown v. Louisiana, *supra* at 141 (Fortas, J., for the plurality).

[36] 402 U.S. 611 (1971).

[37] *Id.* at 614. The Supreme Court concentrated on the word "annoying" in pinpointing the ordinance's vagueness:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no conduct is specified at all.

Id.

[38] *Id.* at 615–16.

[39] Justice White's dissent, however, provides a good review of the case law supporting the majority's position. *See* Coates v. City of Cincinnati, 402 U.S. 611, 619–20 (1971) (White, J., dissenting).

[40] 405 U.S. at 521.

[41] 380 U.S. 479 (1965).

[42] *Id.* at 491–92. For other cases that use this line of reasoning see United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullett, 370 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1963).

This approach is a marked departure from the traditional rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be taken as applying to other persons or situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960) and the cases cited therein.

[43] *See, e.g.*, Bachellor v. Maryland, 397 U.S. 564 (1970); Edwards v. South Carolina, 372 U.S. 229 (1963). In *Edwards* the Court did not strike down the state common law crime of breach of the peace despite the fact that the South Carolina courts defined it in virtually the same language that the Court found unacceptable in *Gooding*, 405 U.S. at 527. *See* text accompanying note 19 *supra*.

Court has embarked in a new direction. The Supreme Court seems ready to subject public disorder laws to more exacting standards and to strike them down unless they are precisely directed at specific harms which justify government intervention in the first amendment area.

Of Whitman, Thoreau, and Constitutional Law: Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

In *Papachristou v. City of Jacksonville*,[1] the United States Supreme Court for the first time considered the constitutionality of a vagrancy law.[2] In striking down the Jacksonville ordinance as unconstitutionally vague, the Court delivered a staggering blow to the "grabbag"[3] type of vagrancy law and rendered questionable the status of all vagrancy legislation.

This case involved eight defendants who were convicted in a Florida municipal court of violating a Jacksonville vagrancy ordinance.[4] Four of the eight, two white females and two black males, were arrested early on a Sunday morning and charged under the ordinance with "prowling by auto."[5] The arresting officers denied that the racial mixture in the car had played any part in the decision to make the arrest, but claimed that they had acted because the defendants had stopped near a used-car lot that had been broken into several times previously.[6] Another defendant was convicted of being a vagabond because he was loitering in downtown Jacksonville on a weekday morning, had no identification, and offered an explanation that the arresting officers did not believe.[7] Two other defendants were convicted as "common thieves" in cases stemming from separate arrests.[8] The

[1] 405 U.S. 156 (1972).

[2] The Court had dealt with such laws on prior occasions without reaching the issue of their constitutionality. In Edelman v. California, 344 U.S. 357 (1953) it considered a case involving a vagrancy statute, but dismissed it as improperly before the Court. Justices Black and Douglas dissented, arguing that the statute was void for vagueness. *Id.* at 365 (Black, J., dissenting). In Hicks v. District of Columbia, 383 U.S. 252 (1966) the Court, in a per curiam decision, dismissed the writ of certiorari as improvidently granted. Douglas again dissented. He condemned the vagrancy law in question as an attempt to regulate the status of a vagrant, something that he felt no law could do. Citing Robinson v. California, 370 U.S. 660 (1962), which held that imprisonment for merely being a narcotics addict amounted to cruel and unusual punishment, Douglas said that economic or social condition could not be made a crime any more than being a drug addict could. Hicks v. District of Columbia, *supra* at 257 (Douglas, J., dissenting). In Johnson v. Florida, 391 U.S. 596 (1968), the Supreme Court reversed the defendant's conviction for "wandering and strolling" under a Florida vagrancy statute where the evidence showed that the defendant was sitting on a bench at the time of the arrest. The Court held that the conviction violated due process because the record lacked evidence to support the judgment. *Id.* at 598. In their dissent, Justices White and Harlan contended that the Court should have reached the defendant's claim that the statute was unconstitutionally vague. *Id.* at 599.

[3] The characterization is that of Judge Will in reference to a Chicago disorderly conduct law in Landry v. Daley, 280 F. Supp. 968, 969 (N.D. Ill. 1968). The Chicago ordinance, like the Jacksonville vagrancy ordinance and many other vagrancy laws, prohibited many diverse types of behavior under a single heading. *See* note 4 *infra*.

[4] The JACKSONVILLE FLA. ORDINANCE CODE §25-57 (1965) under which the defendants were tried and convicted provided that:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court be punished as provided for Class D offenses.

Class D offenses at the time of the defendants' arrests and convictions entailed 90 days in jail, a $500 fine, or both. 405 U.S. at 156 n.1.

[5] 405 U.S. at 159.

[6] There was no evidence that the used-car lot had been broken into on the night in question. *Id.*

[7] The defendant, a part-time produce worker and part-time organizer for a Black political group, claimed that he and a companion were waiting for a friend who was to lend them an automobile so that they could apply for a job at a produce company. Because it was cold and he had no jacket, the defendant waited for a while in a dry cleaning establishment, but left when requested to do so. The store owners summoned the police. *Id.*

[8] Upon arriving at a girl friend's apartment, one of the defendants had seen police there and attempted to leave. He stopped and got out of his car when ordered to do so. The police searched the car and the defendant. Finding nothing incriminating, they charged him with being a "common thief" because he was reputed to be one. The other defendant was arrested when he reached his home early one morning. He was stopped because he was traveling at a high rate of speed

eighth defendant, whom the police claimed was well known as a thief, narcotics pusher, and "generally opprobrious character," was arrested for "disorderly loitering on the street" and "disorderly conduct—resisting arrest with violence" when he struggled with a police officer who was searching him preparatory to placing him in a police car.[9] The convictions were affirmed by the Florida Circuit Court in a consolidated appeal and the defendants' petition for certiorari was denied by the District Court of Appeals.[10] The United States Supreme Court granted certiorari.[11]

The Supreme Court found the Jacksonville vagrancy ordinance unconstitutional. Writing for a unanimous Court,[12] Justice Douglas held the law unconstitutionally vague because it failed to give adequate notice as to the conduct forbidden and because it encouraged arbitrary and erratic arrests and convictions.[13] Under its vague terminology, normally innocent behavior could be cause for conviction: insomniacs could be arrested as "common night walkers," recession victims as "persons able to work but habitually living on the earnings of their wives or minor children," the country club set as persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served."[14]

A second aspect of the ordinance's vagueness that concerned Douglas was the unfettered discretion which it gave the Jacksonville police—a discretion which permitted and even encouraged arbitrary and discriminatory law enforcement.[15] He pointed out that because many vagrancy laws (and Florida's in particular) were justified as attempts to deter future criminal activity,[16] they allowed arrests based only upon suspicion and not upon probable cause as required by the fourth and fourteenth amendments.[17] While acknowledging that such laws gave the police an effective way to round-up "so-called undesirables," and that sometimes those arrested actually anticipated committing future criminal acts, Douglas contended that the connection between vagrancy and future criminality was too tenuous for a rule of law.[18]

In discussing the potential for abuse of the law in this case and the imprecision of such terms as "wandering," "strolling," and "loafers," Douglas asserted that the ordinance impinged upon some of the amenities of life.[19] Although he admitted that these amenities were not mentioned in either the Constitution or the Bill of Rights, Douglas believed that they deserved the Court's protection.[20]

Significant for what it says, Douglas' opinion is almost as interesting for what it does not say. It does not say that vagrancy laws are unconstitutional because they punish a status. The decision does not mention the word status and one must look in vain for any reference to *Robinson v. California*.[21] In view of his dissent in *Hicks v. Dis-*

yet no speeding charge was ever placed against him. *Id.* at 160.

[9] According to his testimony, the police officer intended to arrest the defendant unless he had a good explanation for being on the street. *Id.*

[10] Brown v. City of Jacksonville, 236 So. 2d 141 (Fla. 1970).

[11] 403 U.S. 917 (1971).

[12] Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.

[13] 405 U.S. 156, 162 (1972).

[14] *Id.* at 163–64.

[15] *Id.* at 168.

[16] In Johnson v. State, 202 So. 2d 852 (Fla. 1967), *rev'd on other grounds*, 391 U.S. 596 (1968), the Supreme Court of Florida upheld the Florida vagrancy statute as necessary to "deter vagabondage and prevent crimes." 202 So. 2d at 855. *See also* Smith v. State, 239 So. 2d 250, 251 (Fla. 1970) for a similar view.

[17] The fourth amendment prohibits unreasonable searches and seizures and stipulates that no search or arrest warrants shall be issued except "upon probable cause." U.S. CONST. amend. IV. The Supreme Court has long held that an arrest without a warrant is valid only if based upon probable cause. *See* Ker v. California, 374 U.S. 23 (1963). The Supreme Court has applied this standard to the states through the due process clause of the fourteenth amendment. Beck v. Ohio, 379 U.S. 89 (1964).

[18] 405 U.S. 156, 171. Douglas' contention appears to be supported by empirical data. *See* McClure, *Vagrants, Criminals and the Constitution*, 40 DENVER L. CENTER J. 314 (1963).

[19] Douglas argued that these amenities were embedded in the writing of Whitman, Thoreau, and Vachel Lindsay:

> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed suffocating silence.

405 U.S. 156, 164.

[20] This view is similar to that expressed by Douglas in Griswold v. Connecticut, 381 U.S. 479, 482–86 (1965), a case which struck down a Connecticut law prohibiting dissemination of information about birth control methods. Douglas held that the law violated the defendant's privacy and, although he could find no mention of privacy in the Constitution, Douglas contended that certain zones of privacy were protected by penumbras emanating from several of the specific guarantees of the Bill of Rights. *Id.* at 482–86.

[21] 370 U.S. 660 (1962). *Robinson* held that impris-

trict of Columbia,[22] where he attacked a vagrancy law as an unconstitutional attempt to regulate status, Douglas' silence on this issue perhaps can best be explained by the fact that the ordinance's vagueness was its most readily apparent constitutional defect.[23]

The Court's decision in *Papachristou* strikes at an ancient institution. Vagrancy laws have existed since the time of Edward III and the first Statute of Laborers.[24] Originally formulated to guarantee a cheap supply of labor when England's labor force was dispersed and decimated by the decay of feudalism and the Black Plague, the early vagrancy laws made it illegal to be unemployed or to migrate from one county to another to avoid work or to seek better wages.[25] With the sixteenth century and the enclosure movement, which forced many Britons off their fields and on to the highways,[26] the vagrancy laws underwent a shift in emphasis.[27] Now the laws were directed not only at controlling the labor supply, but also at thwarting probable criminals and in time their character became decidedly more criminal than economic.[28]

In America virtually all jurisdictions enacted vagrancy laws early in their history and many have retained them, often little changed, to this day.[29] Some make a passive status such as unemployment or poverty[30] criminal while others ban activities usually considered innocuous, such as loitering or wandering about.[31] There are those that punish lewdness,[32] drunkenness,[33] or other acts deemed odious by society,[34] and those that include what are often viewed as separate crimes in other jurisdictions.[35] Many vagrancy laws are similar to the Jacksonville ordinance in that they list a myriad of classifications of vagrancy.[36]

Whatever their structure, vagrancy laws traditionally have stood almost impregnable before the assaults of litigants and commentators alike.[37] The first real break-through occurred with the case of *Fenster v. Leary*.[38] Fenster had been arrested three times in three months under a New York State vagrancy statute and had been charged with being "a person who, not having visible means to maintain himself, lives without employment."[39] Each time he was acquitted. Apparently concerned about the likelihood of future arrests, Fenster sought a prohibition against further prosecutions under the statute on the grounds that it was unconstitutional. Prohibition was denied in the lower courts, but the court of appeals reversed, holding that the statute unconstitutionally made criminal an individual's conduct which in no way impinged on the rights and interests of others and which had little more than a "tenuous" connection with crime and the preservation of order.[40]

Since *Fenster*, many federal and a few state court decisions have declared state and local vagrancy laws either partially or wholly unconstitutional. While it is difficult to generalize about these decisions, they have several features worth

onment merely for being a narcotics addict amounted to cruel and unusual punishment. Justice Douglas cited the case in his dissent in Hicks v. District of Columbia, 383 U.S. 252, 257 (1966), to condemn a vagrancy law as an unconstitutional attempt to regulate status.

[22] 383 U.S. 252 (1966). *See* note 21 *supra*.

[23] For discussions of vagrancy as a status crime, see Murtagh, *Status Offenses and Due Process of Law*, 36 FORD. L. REV. 51 (1967); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); and Note, *Vagrancy—A Study in Constitutional Obsolescence*, 22 FLA. L. REV. 384 (1970).

[24] 23 Edw. 3, c. 1 (1349). Note, *supra* note 23, at 387–92 provides a good, concise history of vagrancy legislation in England.

[25] 23 Edw. 3, c. 1 (1349); 25 Edw. 3, c. 7 (1350).

[26] Enclosure was the process whereby the scattered holdings which characterized the medieval manors were consolidated into larger units, often at the expense of tenant farmers. *See* W. NOTESTEIN, THE ENGLISH PEOPLE ON THE EVE OF COLONIZATION 72–73 (1954), for a graphic description of the process.

[27] Note, *supra* note 23, at 389.

[28] *Id.*

[29] *Id.* at 394.

[30] *See, e.g.*, MISS. CODE ANN. §2666 (1942); MO. ANN. STAT. §563.340 (1943); S.C. CODE ANN. tit. 16, §565 (1962); TENN. CODE ANN. §39-4701 (1956); WASH. REV. CODE §9.87.010 (1965).

[31] *See, e.g.*, MISS. CODE ANN. §2666 (1942); MO. ANN. STAT. §563.340 (1943); S.C. CODE ANN. tit. 16, §565 (1962); WASH. REV. CODE §9.87.010 (1965).

[32] *See, e.g.*, WASH. REV. CODE §9.87.010 (1965).

[33] *See, e.g.*, OKLA. STAT. ANN. tit. 21, §1141 (1956); WASH. REV. CODE §9.87.010 (1965).

[34] *See, e.g.*, OKLA. STAT. ANN. tit. 21, §1141 (1956) (family abandonment); WASH. REV. CODE §9.87.010 (1965) (using drugs).

[35] MISS. CODE ANN. §2666 (1942) (selling alcohol without a license); OKLA. STAT. ANN. tit. 21, §1141 (1956) (fortune telling).

[36] MISS. CODE ANN. §2666 (1942); MO. ANN. STAT. §563.340 (1943); OKLA. STAT. ANN. tit. 21, §1141 (1956); S.C. CODE ANN. tit. 16, §565 (1962); WASH. REV. CODE §9.87.010 (1965).

[37] For attacks on vagrancy laws, *see* Foote, *Vagrancy-type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782 (1963). *See also* those articles listed at note 23 *supra*.

[38] 20 N.Y.2d 309, 229 N.E. 2d 426, 282 N.Y.S. 2d 739 (1967).

[39] *Id.* at 311, 229 N.E. 2d at 427, 282 N.Y.S. 2d at 741.

[40] *Id.* at 312-13, 229 N.E. 2d at 428, 282 N.Y.S. 2d at 742.

noting. The majority of those laws invalidated were found unconstitutionally vague[41] although some fell for violating due process,[42] overbreadth,[43] exceeding the state's police power[44] and other constitutional infirmities.[45] Only a few, notably *Baker v. Bindner*[46] and *Alagata v. Commonwealth*,[47] followed the logic of *Fenster* and Douglas' dissent in *Hicks v. District of Columbia*.[48] The most common type of vagrancy legislation that encountered constitutional difficulties was that which made it a crime to be without visible means of support.[49] Loitering laws also fared poorly.[50] Yet despite these attacks, vagrancy laws remained on the books in most American jurisdictions[51] resulting in confusion and tension between the federal and state courts.[52]

The Supreme Court's decision in *Papachristou* should clarify the situation in those jurisdictions where vagrancy laws are couched in vague and archaic language similar to that used in the Jacksonville ordinance. In view of the Court's unanimity and the temper of its decision in *Papachristou*, it would appear that in the future it will be quick to condemn vagrancy laws which are loosely cast. Those charged with writing the rules of society might well take heed and eliminate the vagrancy concept entirely, imposing sanctions only when there is clear and definite proof of the commission of specific criminal acts.

[41] *See, e.g.*, United States v. Kilgren, 431 F.2d 627 (5th Cir. 1970); Scott v. District Attorney, 309 F. Supp. 833 (E.D. La. 1970), *aff'd*, 437 F.2d 500 (5th Cir. 1971); Goldman v. Knecht, 295 F. Supp. 897 (D. Col. 1969); Kirkwood v. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1969); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); Ricks v. District of Columbia, 414 F.2d 1111 (D.C. Cir. 1968); Smith v. Hill, 285 F. Supp. 556 (N.D.N.C. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Arnold v. City and County of Denver, 171 Colo. 1, 464 P.2d 515 (1970); Knowlton v. State, 257 A.2d 409 (Me. 1969); Alagata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967).

[42] *See, e.g.*, Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969); Knowlton v. State, 257 A.2d 409 (Me. 1969); Alagata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967).

[43] *See, e.g.*, Scott v. District Attorney, 309 F. Supp. 833 (E.D. La. 1970), *aff'd* 437 F.2d 500 (5th Cir. 1971); Gordon v. Schiro, 310 F. Supp. 884 (E.D. La. 1970); Decker v. Fillis, 306 F. Supp. 613 (C.D. Utah 1969); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

[44] *See, e.g.*, Gordon v. Schiro, 310 F. Supp. 884 (E.D. La. 1970); Goodman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969).

[45] *See, e.g.*, Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (discriminates against those without property); State v. Grahovic, 52 Hawaii 527, 480 P.2d 148 (1971) (violates fifth amendment).

[46] 274 F. Supp. 658 (W.D. Ky. 1967).

[47] 353 Mass. 287, 231 N.E.2d 201 (1967).

[48] 383 U.S. 252, 257 (1966) (Douglas, J., dissenting). *See* note 2 *supra*. *See also* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

[49] *See, e.g.*, Gordon v. Schiro, 310 F. Supp. 884 (E.D. La. 1970); Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969); Boughton v. Brewer, 298 F. Supp. 260 (S.D. Ala. 1969); Kirkwood v. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1969); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Knowlton v. State, 257 A.2d 409 (Me. 1969); Alagata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967).

[50] *See, e.g.*, Gordon v. Schiro, 310 F. Supp. 884 (E.D. La. 1970); Scott v. District Attorney, 309 F. Supp. 833 (E.D. La. 1970), *aff'd*, 437 F.2d 500 (5th Cir. 1971); Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969); Boughton v. Brewer, 298 F. Supp. 260 (S.D. Ala. 1969); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); Decker v. Fillis, 306 F. Supp. 613 (C.D. Utah 1969); Ricks v. District of Columbia, 414 F.2d 1111 (D.C. Cir. 1968); Smith v. Hill, 285 F. Supp. 556 (N.D.N.C. 1968); Arnold v. City and County of Denver, 171 Colo. 1, 464 P.2d 515 (1970).

[51] For a list of state vagrancy statutes *see* Note, *supra* note 23, at 394 n. 98.

[52] The situation in Florida epitomized this tension and confusion. In 1967 in Johnson v. State, 202 So. 2d 852 (Fla. 1967), *rev'd on other grounds*, 391 U.S. 596 (1968), the Florida Supreme Court upheld the state's vagrancy statute as constitutional on its face. Two years later when the same statute came before the United States District Court for the Southern District of Florida in Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969), the court declared it void for vagueness and overbreadth. Nevertheless in Brown v. City of Jacksonville, 236 So. 2d 141 (Fla. 1970), *rev'd sub nom.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), when the defendants relied on *Lazarus* on the permise that the Florida vagrancy statute was in all material respects identical to the Jacksonville ordinance under which they were convicted, the Florida Circuit Court rejected their contention saying that a "decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state." Brown v. City of Jacksonville, *supra* at 142. The merry-go-round continued. A month later, the United States Court of Appeals for the Fifth Circuit in United States v. Kilgren, 431 F.2d 267 (5th Cir. 1970), cited *Lazarus* in invalidating a West Palm Beach ordinance which duplicated the language of the Florida and Jacksonville laws. Two months later, in Smith v. State, 239 So. 2d 250 (Fla. 1970), *vacated and remanded*, 405 U.S. 172 (1972), the Florida supreme court again upheld the constitutionality of the state's vagrancy statute.