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## Constitutional Law—Vagrancy, Loitering, and Related Offenses Held Unconstitutional because of Vagueness and Overbreadth: *Baker v. Binder*, 274 F.Supp. 658 (W.D. Ky. 1967)

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CONSTITUTIONAL LAW—VAGRANCY, LOITERING AND RELATED OFFENSES HELD UNCONSTITUTIONAL BECAUSE OF VAGUENESS AND OVERBREADTH—*Baker v. Binder*, 274 F.Supp. 658 (W.D. Ky. 1967).

Beginning in the early spring of 1967 and continuing for several months thereafter, the plaintiffs were engaged in a series of demonstrations in and about the city of Louisville, Kentucky. Plaintiffs were seeking to publicize alleged discrimination in the sale and rental of housing in the community and to urge the passage of an open housing ordinance by the Board of Aldermen.

Soon after these activities were commenced, a group known as the "hecklers", who were dedicated to maintaining the status quo in the sale and rental of housing, began assembling at the anticipated locations of demonstrations and taunting the open housing advocates. The police, fearing an actual confrontation between these diverse groups, intervened and made a number of arrests, primarily from the plaintiffs' group. Further, as the demonstrations and heckling continued, these law enforcement officials obtained a restraining order designed to curtail the plaintiffs' activities. The effect of the order was to allow demonstration activities only at designated times and to require advance notice to the police of the place of assembly. The order also limited the number of plaintiffs in each demonstration and required that the route of each demonstration be specified. Subsequently, by stipulation, the restrictions of this order were somewhat relaxed.

The plaintiffs, individually and by class representation, brought a suit which was double edged in nature: for declaratory judgment relief as to the constitutionality of certain city ordinances, state statutes and the circuit court's restraining order on one hand, and injunctive relief against the enforcement of such laws against the plaintiffs and their class, enforcement allegedly instituted by defendants with the specific purpose and resultant effect of curtailing plaintiffs' peaceful protest against the alleged racial discrimination in the sale and rental of housing in Louisville.

The U.S. District Court by a two to one decision held that the defendants were not "guilty of selective enforcement of the laws against these plaintiffs so as to frighten or coerce them."<sup>1</sup> The court went on to praise the performance of the police and stated that "the enforcement activity in these circumstances does not appear to us to have been dedicated to a halting of the demonstrations, but rather to a separation of the adversaries and to the pro-

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<sup>1</sup> 274 F. Supp. 658 (W.D. Ky. 1967).

tection of all concerned, including the general public.”<sup>2</sup> On this point, the court concluded that:

Accordingly, we feel that the plaintiffs have failed by the proof to support their allegation that the police, faced with the choice between constitutional guarantees and actual control of the populus, they (the police) chose suppression of constitutional rights rather than other avenues of control. We find no unconstitutional use of an otherwise constitutional statute.<sup>3</sup>

But having forecast what was to follow, the court proceeded to issue its surprising decision—holding six statutes and ordinances unconstitutional because they were vague and overbroad and of a potentially sweeping application.

The following statutes of the State of Kentucky were declared unconstitutional:

1) Criminal Syndicalism

Any person who commits, aids or counsels any crime, physical violence, destruction of property, intimidation, terrorism or other unlawful act or method to accomplish any political end or to bring about political revolution shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both.<sup>4</sup>

The court reasoned that this statute was too broad and was susceptible of sweeping application since it would be a criminal offense to “counsel” an unlawful method to accomplish a political end. The court relied on *Keyishian v. Board of Regents*<sup>5</sup> in which the United States Supreme Court struck down a state statute prohibiting persons from “advising” about the doctrine of unlawful overthrow of the government because “mere advocacy of abstract doctrine is apparently included.”<sup>6</sup> Applying this rationale, the court held the Kentucky Criminal Syndicalism statute unconstitutional.

2) Conspiracy; banding together for unlawful purpose

No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.<sup>7</sup>

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<sup>2</sup> *Id.* at 660.

<sup>3</sup> *Id.*

<sup>4</sup> KY. REV. STAT. § 432.020 (1962). See also NEB. REV. STAT. § 28-815 -17 (Reissue 1964).

<sup>5</sup> 385 U.S. 589 (1967).

<sup>6</sup> *Id.* at 600.

<sup>7</sup> KY. REV. STAT. § 437.110 (1) (1962). See also NEB. REV. STAT. § 28-301 and § 28-804 (Reissue 1964).

The court found this statute too broad as it makes it a crime for two or more persons to go forth together for the purpose of "disturbing another." "It appears written as embrative of terms of expression and is susceptible of being read to include such functions as peaceable assembly."<sup>8</sup> The court relied on a number of Supreme Court cases which hold that one of the functions of freedom of speech is to invite dispute<sup>9</sup> and that criminal penalties for "disturbing" persons fail to provide a sufficient standard of responsibility.<sup>10</sup>

### 3) Vagrancy

(1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

(2) "Vagrant," as used in subsection (1) of this section and KRS 436.530 means:

(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city.<sup>11</sup>

The court stated that this statute is a "catch all" not specific in expression as to what it really seeks to prohibit nor what type of conduct is violative of the prohibition. Perhaps, such was its aim and intent; that it snare those felt to be vaguely undesirable."<sup>12</sup>

The court held this statute to be unconstitutional because of vagueness and overbreadth as movement is essential to freedom and the rights of citizens cannot be dependent on one's property status. The court concluded that:

It does not give fair notice; it is arbitrary as to its standards and is grossly susceptible of over reaching federal constitutional guar-

<sup>8</sup> 274 F. Supp. at 661.

<sup>9</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948).

<sup>10</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). See also *Edwards v. South Carolina*, 372 U.S. 229 (1963).

<sup>11</sup> KY. REV. STAT. § 436.520 (1962). See also NEB. REV. STAT. § 28-1115 -1119 (Reissue 1964).

<sup>12</sup> 274 F. Supp. at 662, citing Mr. Justice Frankfurter in *Winters v. New York*, 333 U.S. 507, 540 (1948).

antees by lending itself for ready use by officials against those deemed to merit their displeasure.<sup>13</sup>

The following ordinances of the City of Louisville were declared unconstitutional:

1) Parading Without a Permit

It shall be unlawful for any person to conduct or to participate in any street assemblage, parade or procession, other than a funeral procession, upon any street except upon a permit issued by the Director of Safety. Application for such permits shall be made in such form as the Director of Safety shall prescribe not less than 12 hours before the time intended for such assemblage, parade or procession. Such permit or an order accompanying it shall designate the places of gathering or formation and of dispersal of such assemblages, parades or processions, and the route of march or travel, and the streets or portions of streets which may be used or occupied therein, and the time and duration of such assemblage, parade or procession; provided, however, that no permits for parades or processions of an advertising nature shall be granted at any time in the Central Traffic District between the hours of 8:00 A.M. and 6:00 P.M.<sup>14</sup>

The court held that this ordinance was void as it failed to incorporate adequate standards to govern the discretion of the issuer of the parade permits. Consequently, the ordinance was plainly unconstitutional under *Cox v. State of Louisiana*.<sup>15</sup>

2) Disorderly Conduct

No person shall conduct himself in a disorderly manner in the City.<sup>16</sup>

All parties to the suit were in agreement that the ordinance provided no definition of the term "disorderly conduct." However, the defendants contended that this defect was not crucial since "the common man is familiar with the term and its application."<sup>17</sup> Furthermore, the defendants contended that the vagueness of the ordinance was cured by *City of Pineville v. Marshall*<sup>18</sup> which limited disorderly conduct to "words and acts which tend to disturb the peace or endanger the morals, safety or health of the community, or of a class of persons or family."<sup>19</sup>

<sup>13</sup> *Id.* at 662. See also *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939) and *Thornhill v. State of Alabama*, 310 U.S. 88 (1940).

<sup>14</sup> LOUISVILLE, KY. ORDINANCE 321.01. See also LINCOLN, NEB. CODE ch. 408 § 020 (1968) and OMAHA, NEB. CODE ch. 30.04 § 010, § 030 (1959).

<sup>15</sup> 379 U.S. 536 (1965).

<sup>16</sup> LOUISVILLE, KY., ORDINANCE 507.02. See also NEB. CONST. art. 3, § 10; LINCOLN, NEB. CODE ch. 9:52 § 020 (1968); OMAHA, NEB. CODE ch. 13.08 § 040, ch. 29.04 § 140 (1959).

<sup>17</sup> 274 F. Supp. at 663.

<sup>18</sup> 222 Ky. 4, 299 S.W. 1072 (1927).

<sup>19</sup> *Id.* at 9, 299 S.W. at 1074.

However, the court held that the constitutional defect had not been overcome as narrower disorderly conduct statutes had been struck down by the Supreme Court.<sup>20</sup> Consequently the ordinance was struck down as "it leaves to the executive and judicial branches too wide a discretion in the application of the law and too readily permits them to make a crime out of what is protected activity."<sup>21</sup>

3) Loitering and Related Offenses

It shall be unlawful for any person to engage in the following acts:

(a) Loitering. Any person, without visible means of support, or unable to give a satisfactory account of himself, found loitering or strolling in, about, or upon any street, alley, or other public way or public place, or at any public gathering or assembly, or in or around any store, shop or business or commercial establishment, . . . gambling establishment, or establishment where intoxicating liquor is sold without a license, or is conducting himself in a lewd, wanton or lascivious manner in speech or behavior.<sup>22</sup>

The court recognized that similar ordinances had been held to be constitutional<sup>23</sup> but ruled that it could not stand as consistent with recent expressions of the Supreme Court.<sup>24</sup> Therefore, the court declared the ordinance unconstitutional—again because "it appears overbroad and vague."<sup>25</sup>

The ordinance would punish any person who "loiters" in a public place and is unable to give a satisfactory account of himself. The court raised a number of pertinent questions which evidenced the constitutional shortcomings of such an ordinance.

We do not believe that the requirement that an offender "give a satisfactory account of himself" passes constitutional tests. It places sole determination in the discretion of the policeman on the beat. The standard of "satisfactory account" is not certain, for what may be satisfactory to one may be unsatisfactory to another, and the meaning of the word "satisfactory" itself is not susceptible of any standard of exactness. What kind of "satisfactory"? Legal or moral satisfaction? What is the time limit to be embraced within the giving of "a satisfactory account" that will excuse the offender in the sole discretion of the police officer who demands it? A satisfactory account at that instant or a satisfactory account of past

<sup>20</sup> *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1948). See also *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966).

<sup>21</sup> 274 F. Supp. at 663.

<sup>22</sup> LOUISVILLE, KY. ORDINANCE 525.01(a). See also LINCOLN, NEB. CODE ch. 9.52 § 220 (1968) and OMAHA, NEB. CODE ch. 25.61 (1959).

<sup>23</sup> See e.g., *Hicks v. District of Columbia*, 197 A.2d 154 (D.C. Ct. App. 1964).

<sup>24</sup> *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

<sup>25</sup> 274 F. Supp. at 664.

activity? If of past activity, is that not guilt without proof? Does the mere fact that one cannot give a satisfactory account of himself to the pleasure of the inquiring officer make him guilty of an unspecified crime? Such unbridled discretion cannot be constitutionally vested in the policeman or the court.<sup>26</sup>

District Judge Brooks dissented as he believed that *Dombrowski v. Pfister*,<sup>27</sup> which the majority had relied upon, did not compel the abandonment of the doctrine of abstention. The majority read *Dombrowski* as holding the abstention doctrine inappropriate when "statutes are justifiably attacked on their face as abridging free expression or as applied for the purpose of discouraging protected activities."<sup>28</sup> The majority thus concluded:

Any unconstitutional statute, attempting to regulate First Amendment rights, which has been invoked, or as here, in reasonable anticipation of future events will be invoked, against a member of society, does, in and of itself, result in a suppression of constitutional rights, i.e., "chilling effect".<sup>29</sup>

The dissent, however, asserted that this case was distinguishable from *Dombrowski*. Since "[t]he plaintiffs' proof has completely failed to establish any of the factual allegations of their complaint and amended complaint upon which they relied for invoking the jurisdiction of this court,"<sup>30</sup> the fact that the ordinances and statutes in question may be subject to constitutional challenge "should not of itself permit federal interference with a state's good-faith administration of its criminal laws."<sup>31</sup>

Furthermore, the dissent contended that the plaintiffs had failed to prove that irreparable injury, based on a substantial loss of federal rights, would occur if they were to await the state court's disposition and ultimate review by the Supreme Court. The dissent stated that "the Kentucky Declaratory Judgment Act, KRS Chapter 418, provides expeditious procedure by which the constitutionality of the challenged statutes and ordinances can be determined without invoking federal jurisdiction."<sup>32</sup> The dissent concluded that the Supreme Court had consistently followed the doc-

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<sup>26</sup> *Id.*

<sup>27</sup> 380 U.S. 479 (1965).

<sup>28</sup> *Id.* at 489-90.

<sup>29</sup> 274 F. Supp. at 660.

<sup>30</sup> *Id.* at 665.

<sup>31</sup> *Id.*

<sup>32</sup> 274 F. Supp. at 665-66. See *Cassidy v. City of Bowling Green*, 368 S.W.2d 318 (Ky. 1963); *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557 (1948); *City of Harrodsburg v. Southern Ry. Co.* in *Kentucky*, 278 Ky. 10, 128 S.W.2d 233 (1939).

trine of abstention in attacks upon state laws<sup>33</sup> and urged that this doctrine should have been followed here.

Thus by a two to one decision a heavy blow was struck against Kentucky's vagrancy laws. The way the tide of the law is flowing, similar laws in other states may well be in jeopardy as *Baker v. Binder* may well reflect the current revolution in legal services for the poor as well as the continuing evolution of social and legal values. The voiding of vagrancy and similar statutes may well become common in all the courts of the land.

Loitering and disorderly conduct statutes have long been criticized as being catch-alls whereby the sensibilities of certain citizens may be protected from certain activities which they consider offensive.<sup>34</sup> And vagrancy statutes have been attacked for making no activity a crime. However, the roots of these laws run deep and their history may be traced back to feudal times when they were utilized by the lords to "protect" themselves from undesirables. Vagrancy statutes then developed as the criminal side of the poor laws.<sup>35</sup> Apparently the philosophy behind such modern day statutes is that a vagrant is a probable criminal; that there is some correlation between vagrancy and criminal conduct.

Fortunately, in recent years such statutes have, with increasing frequency, been coming under the watchful eye of the courts.<sup>36</sup> Such statutes have occasionally been struck down for their vagueness. President Roosevelt vetoed one such statute which made a vagrant out of "any person leading an idle life . . . and not giving a good account of himself."<sup>37</sup> The President stated that "while this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense."<sup>38</sup> President Roosevelt pointed out that the statute was so broadly drawn that "in many cases it would make a vagrant of an adult daughter or son of a well-to-do family who, though amply provided for and

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<sup>33</sup> *Harrison v. N.A.A.C.P.*, 360 U.S. 167 (1959); *Martin v. Creasy*, 360 U.S. 219 (1959); *Shipman v. DuPre*, 339 U.S. 321 (1950); *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *City of Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942); *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

<sup>34</sup> On the other hand, American music and literature has even immortalized the vagabond. Consider the success of Mr. Roger Miller's 1965 "hit" song *King of the Road*.

<sup>35</sup> 3 STEPHEN, *HISTORY OF CRIMINAL LAW IN ENGLAND* 266 (1883).

<sup>36</sup> *Johnson v. Florida*, 88 S. Ct. 1713 (1968).

<sup>37</sup> See S. REP. NO. 821, 77th Cong., 1st Sess. at 2 (1941).

<sup>38</sup> *Id.*

not guilty of any improper or unlawful conduct, has no occupation and is dependent upon parental support."<sup>39</sup>

Crimes of status have long been found to be offensive and yet these vagrancy laws have been retained in communities across the nation. Such statutes cannot help but increase the poor's disrespect for law as these statutes reinforce the view that the "system" discriminates against the poor. And if the state really wishes to discourage idleness, a more realistic approach would be for Congress and the state legislatures to enact the job programs which are now being so adamantly sought by the nation's poor. Furthermore, if such statutes exist only to clear the streets so as to protect the sensitivities of society's "good citizens," why do we insist on jails? Why not provide living quarters, food and medical attention?

But there is an even greater fear than that created by the simple irrationality of these statutes. If the state is allowed to classify mere offensive presence as being criminal or to punish one for being poor, then the state could build on that unbridled power and classify *any* conduct or status as criminal. Events in this political year have shown that actual repression is a real threat.

Perhaps the problem could be lessened by more careful drafting of such statutes to prevent overbreadth, vagueness and potential room for illegal applications of the police power. But any statutes of this nature which restrict a person's freedom of choice and freedom of movement should only be acceptable if the state can articulate a valid societal interest which demands protection. The burden should clearly be on the state to offer such evidence and none so far has been shown to exist. The state should be required to offer evidence of some relationship between vagrancy, loitering, disorderly conduct and "actual" criminal conduct. One author has seriously challenged the mere assumption which now exists that there is some clear correlation.<sup>40</sup> If the state cannot carry this burden and show some relationship between vagrancy and criminal conduct, then the state has no interest which merits protection by such statutes.

*Robinson v. California*<sup>41</sup> held that it is unconstitutional to define an involuntary status as criminal. This decision should be made applicable to vagrancy laws. However, despite the growing awareness of the existence and plight of our nation's poor, it would be difficult in individual cases to prove that one's status was involun-

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<sup>39</sup> *Id.*

<sup>40</sup> Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 627 (1956).

<sup>41</sup> 370 U.S. 660 (1962).

tary. Consequently, the rule of *Robinson* should be broadened to prohibit the existence of criminal statutes based solely on economic status even if such status is voluntary.

Justice William O. Douglas brought the issue close to home when he wrote in 1960:

Vagrancy and arrest on suspicion are not distant, remote, speculative; they are just around the corner in many of our communities. It is what takes place in this block and in this neighborhood that gives the true reading on the health of our democratic way of life and on the actual vigor of our Bill of Rights.<sup>42</sup>

Efforts should be made to reexamine these catch-all statutes to determine whether they protect a valid interest of our society or merely restrict our freedoms. If a valid state interest can be offered, then such statutes would be justified, although it is obvious that they would still need serious revamping. New statutes should then be drawn which direct attention to specifics: specific state interests and specific activities to be restricted. If no legitimate interest exists, then *Baker v. Binder* may fairly indicate that it is simply time to void such laws and concentrate on eliminating poverty instead of simply legislating against it.

H. Bruce Hamilton '69

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<sup>42</sup> Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L. J. 1, 14 (1960).