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Criminal Law—Subdivision of New York Loitering Statute Held Unconstitutionally Vague—The Effect of Considerations Which Are Collateral to the "Vagueness" Problem.

Kenneth Bersani

covery exception; it foreshadows the replacement of the common law principle governing entry to make a warrantless arrest with an "exigent circumstances" rationale; and, it expunges capital punishment from the New York Penal Law. It will be interesting to see whether the courts limit *Fitzpatrick* to the very difficult fact situation that it presented, or whether the expansive search and seizure principles articulated therein will be applied regularly.

JOHN M. MENDENHALL

CRIMINAL LAW—SUBDIVISION OF NEW YORK LOITERING STATUTE HELD UNCONSTITUTIONALLY VAGUE—THE EFFECT OF CONSIDERATIONS WHICH ARE COLLATERAL TO THE "VAGUENESS" PROBLEM.

Defendant observed standing behind a tree in front of a temporarily unoccupied house at one o'clock in the morning was questioned by police concerning his presence. Subsequently, he was arrested upon his failure to identify himself or to give a reasonably credible account of his behavior and convicted of loitering under New York Penal Law § 240.35 (6).[1] The appellate division affirmed and defendant appealed, by permission of an associate judge, to the court of appeals. In a four to three decision, the court reversed, *holding* that section 240.35 (6) violates due process of law in that its language is so vague as to fail adequately to inform an individual of the conduct which it prohibits. *People v. Berck,* 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973).

The court in the instant case was called upon to settle an issue which had caused considerable turmoil among lower tribunals in New York. In the five prior instances when local courts had undertaken to determine the constitutionality of subdivision six, two had

1. N.Y. PENAL LAW § 240.35(6) (McKinney 1967):
A person is guilty of loitering when he:

. . . .

6. 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 reasonable credible account of his conduct and purposes . . . .

Id.

found it valid and three invalid.[2] It is a settled principle of law that there is a strong presumption that a duly enacted statute is constitutional[3] and that the invalidity of a law must be demonstrated beyond a reasonable doubt.[4] That five courts of first instance felt obliged to deal with the validity of this law is some indication of the serious problems it posed.

MAJORITY OPINION

In the majority's view, the "overriding" deficiency of subdivision six was its vagueness.[5] Due process requires that a criminal statute give a person of ordinary intelligence fair notice that his contemplated activity is forbidden.[6] The statutory offense here had two elements: loitering without apparent reason and doing so under circumstances which justify suspicion that a person may be engaged or about to be engaged in a crime.[7] The court reasoned that the first element could not, by itself, give fair notice of the conduct prohibited. Its decision was based in part on a prior case, *People v. Diaz*,[8] in which it was held that an ordinance prohibiting loitering about any street corner in the city of Dunkirk was invalid. The second element was held to be equally vague in that there is "no commonly understood set of sus-

2. People v. Bambino, 69 Misc. 2d 387, 329 N.Y.S.2d 922 (Nassau County Ct. 1972) (invalid); People v. Taggart, 66 Misc. 2d 344, 320 N.Y.S.2d 671 (Suffolk County Dist. Ct. 1971) (valid); People v. Strauss, 66 Misc. 2d 268, 320 N.Y.S.2d 628 (Nassau County Dist. Ct. 1971) (valid); People v. Villaneuva, 65 Misc. 2d 484, 318 N.Y.S.2d 167 (Long Beach City Ct. 1971) (invalid); People v. Beltrand, 63 Misc. 2d 1041, 314 N.Y.S.2d 276 (N.Y.C. Crim. Ct. 1970), *aff'd on other grounds*, 67 Misc. 2d 324, 324 N.Y.S.2d 477 (Sup. Ct. 1971) (invalid).

3. *E.g.*, People v. Pagnotta, 25 N.Y.2d 333, 337, 253 N.E.2d 202, 205, 305 N.Y.S.2d 484, 488 (1969).

4. *E.g.*, *In re* Van Berkel, 16 N.Y.2d 37, 40, 209 N.E.2d 539, 541, 261 N.Y.S.2d 876, 878-79 (1965).

5. For a general discussion of the origins and application of the void for vagueness doctrine, see Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Comment, *Legislation—Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264 (1954); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

6. *E.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), *quoting* United States v. Harriss, 347 U.S. 612, 617 (1954); People v. Firth, 3 N.Y.2d 472, 474, 146 N.E.2d 682, 683, 168 N.Y.S.2d 949, 950 (1957).

7. The requirement of subdivision six that a person identify himself when stopped or give a reasonably credible account of his behavior has been interpreted in related cases to be procedural in nature and not a substantive element of the offense. *See, e.g.*, People v. Merolla, 9 N.Y.2d 62, 68, 172 N.E.2d 541, 545, 211 N.Y.S.2d 155, 159-60, *cert. denied*, 365 U.S. 872 (1961).

8. 4 N.Y.2d 469, 151 N.E.2d 871, 176 N.Y.S.2d 313 (1958).

picious circumstances of which all citizens are aware and to which the applicability of the statute is restricted."[9] Citing precedents in which similar provisions were upheld, the court found it to be the general rule that only those statutes whose operation is delimited by reference to a specified place[10] or a specified set of circumstances[11] can withstand the vagueness charge.

Although basing its decision primarily on this vagueness deficiency, the majority noted, by way of dicta, a number of collateral problems inherent in the statute. First, it was reasoned that a law so vaguely drawn would place "virtually unfettered discretion in the hands of the police and thereby [encourage] arbitrary and discriminatory enforcement."[12] Subdivision six, the court noted, contained no language which might be used by an officer as a guide in determining when a person was suspiciously loitering. Furthermore, arrest would be predicated upon the failure of an individual to give a reasonably credible account of himself. Citing a noted authority, the majority observed that this requirement, which makes the officer the judge of the adequacy of a person's account, may act to give "a charter of dictatorial power to the policeman."[13]

The majority also decided that the statute's inherent tendency to allow arrests for suspiciousness placed it in violation of "Fourth and Fourteenth Amendment" standards of probable cause.[14] It is unclear why the court spoke in terms of the probable cause requirement being violated by the language of the subdivision itself. Where warrantless arrests are concerned, courts have traditionally focused on police procedure in deciding questions of probable cause, looking at the information that an officer had in his possession at the time of arrest and whether it was sufficient to justify a reasonable belief that

9. People v. Berck, 32 N.Y.2d 567, 570, 300 N.E.2d 411, 413, 347 N.Y.S.2d 33, 36 (1973) [hereinafter cited as instant case].

10. People v. Merolla, 9 N.Y.2d 62, 172 N.E.2d 541, 211 N.Y.S.2d 155, *cert. denied,* 365 U.S. 872 (1961) (loitering within a pier facility); People v. Johnson, 6 N.Y.2d 549, 161 N.E.2d 9, 190 N.Y.S.2d 694 (1959) (loitering on school grounds); People v. Bell, 306 N.Y. 110, 115 N.E.2d 821 (1953) (loitering in a transportation facility).

11. People v. Pagnotta, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969) (loitering for the purpose of using or possessing narcotics).

12. Instant case at 571, 300 N.E.2d at 414, 347 N.Y.S.2d at 37.

13. *Id.,* 347 N.Y.S.2d at 38, *citing* Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like,* 3 CRIM. L. BULL. 205, 223 (1967).

14. Instant case at 572, 300 N.E.2d at 414-15, 347 N.Y.S.2d at 38-39, *citing* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

a crime was being committed.[15] Employing this sort of analysis, a policeman could be seen to have probable cause to arrest under subdivision six if he had information sufficient to support a reasonable belief that the defendant was acting suspiciously. The very tenuousness of such an analysis, however, may point up the court's true concern. The purpose of subdivision six is to prevent the occurrence of serious crime by allowing the police to intervene when they observe behavior which they believe to be evidence of criminal preparation.[16] At this stage, there presumably would not be enough information available to support an arrest even for attempt to commit the substantive criminal act. The court may have viewed the instant statute as an effort by the legislature to legitimize the otherwise illegal police procedure of arrest without probable cause by making the mere suspicious activity, which would generally form the basis of such an arrest, a substantive offense in itself. If such were the majority's reasoning, it might better have relied solely on the theory that the subdivision violated accepted standards of due process of law. By casting its argument in fourth amendment "probable cause" language, the majority tended only to obscure the accepted interpretation of that clause —and the real thrust of the court's concern.[17]

Finally, the majority briefly considered three additional deficiencies of the statute, the first being the problem of overbreadth. As was said in *People v. Bunis*,[18] to be valid, a criminal statute must have

15. *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967); Wong Sun v. United States, 371 U.S. 471 (1963). For a recent restatement of the probable cause standard, see Beck v. Ohio, 379 U.S. 89, 91 (1964).

16. *See* MODEL PENAL CODE § 250.12, Comment, at 60, 64 (Tent. Draft No. 13, 1961). The New York law was substantially derived from this provision. *See* People v. Beltrand, 63 Misc. 2d 1041, 1046, 314 N.Y.S.2d 276, 282 (N.Y.C. Crim. Ct. 1970), *aff'd on other grounds*, 67 Misc. 2d 324, 324 N.Y.S.2d 477 (Sup. Ct. 1971).

17. An alternative (though perhaps less likely) explanation of the court's reasoning might be found in the novel approach taken in the recent case, Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972) (en banc). Defendant was arrested under a Washington, D.C., vagrancy statute later declared unconstitutionally vague. Ricks v. United States, 414 F.2d 1111 (D.C. Cir. 1968). He was eventually convicted, however, for possession of narcotics found in a search made pursuant to his arrest. In holding that the evidence of this search must be excluded as the fruit of an illegal arrest, the court found the law in question to be so extremely vague as to leave it to an officer's conjecture what constituted probable cause under it. On this basis, the statute was held to violate the fourth amendment probable cause standard on its *face*. The dissent, however, criticized the majority for being concerned primarily with retroactive application of *Ricks* to the case at hand and with formulating a relatively meaningless doctrine to achieve that purpose. For a broader discussion of the implications of *Hall*, see Note, 47 N.Y.U.L. REV. 595 (1972).

18. 9 N.Y.2d 1, 172 N.E.2d 273, 210 N.Y.S.2d 505 (1961).

some fair and reasonable connection with the promotion of the health, safety and welfare of society; it would be unreasonable to criminalize conduct merely because it is, on occasion, objectionable.[19] Apparently, the court in *Berck* was alluding to this doctrine when it noted that the defendant in the case may have been waiting for an assignation with a lover and might have refused to explain his presence in order to protect her reputation. A statute which could be used to prohibit such innocent, if seemingly suspicious, behavior would not serve any "reasonable State interest consistent with the Fourth or Fifth Amendment."[20]

Second, subdivision six was said to violate the privileges and immunities clause of the fourteenth amendment by restricting the free movement of United States citizens through New York.[21] It is not clear how the court arrived at this conclusion. The case of *Edwards v. California*,[22] cited as precedent, dealt with a statute which forbade the transportation of indigent non-residents into California. The *Edwards* majority invalidated the law as an unreasonable restraint on interstate travel. In a concurring opinion, Justice Douglas suggested that a privileges and immunities argument would be more suitable in protecting the right of national citizens to move freely from state to state.[23] In any case, it is questionable that the New York statute, which deals with active conduct and not with the passive "status" of vagrancy as did the California law, can create a privileges and immunities problem any more than would any state statute making certain behavior criminal. Perhaps the court supposed that the New York law's vagueness would allow it to be used arbitrarily against those non-residents

19. *Id.* at 4, 172 N.E.2d at 274, 210 N.Y.S.2d at 507.

20. Instant case at 574, 300 N.E.2d at 415, 347 N.Y.S.2d at 39. Ordinarily, a court does not consider a constitutional question unless a party alleges, and offers evidence to prove, that the particular statute, *as applied to him,* violates a constitutional right. In the instant case there is no indication that defendant pleaded or proved that the statute was overbroad as applied to him. If he did not, the court was arguing from a hypothetical. One commentator, however, has concluded that the "vagueness" doctrine has been used by the Supreme Court for the purpose of avoiding the "standing" problem; a statute is invalidated on its *face,* not as applied to an individual. Note, *infra* note 37, at 96-101. This commentator's analysis is purely functional and does not answer the question of whether a court *ought* to depart from traditional standards of review in these cases.

21. *Id.*

22. 314 U.S. 160 (1941).

23. *Id.* at 179.

who are undesirable in the eyes of the police.[24] A fuller development of the majority's reasoning concerning privileges and immunities would have been useful.

Third, the majority declared that the subdivision, in requiring that a person give a reasonably credible account of himself, violated the fifth amendment right against self-incrimination.[25] This interpretation is a rather novel one in New York law. Previously, the court of appeals had dismissed "reasonable account" requirements as being mere procedural restrictions on an officer's right to arrest and not as a substantive element of the offense.[26] This requirement gave a person an opportunity to avoid being taken into custody by satisfactorily explaining his behavior to the arresting officer. The court now focuses on the choice presented to an individual in this sort of situation—either to remain silent and risk arrest for loitering—or to make a statement and chance self-incrimination. It is possible that the majority felt the need for some reconsideration of the effect of the typical "reasonable account" provision in light of *Miranda v. Arizona's*[27] clarification of the procedure which an officer must follow in informing an arrested person of his rights. Perhaps a *Miranda*-like warning must be given before an officer asks the person he has stopped for an account. In any event, as the dissent in the instant case indicated,[28] the future of this requirement, which is still present in other segments of the New York loitering law, is left unclear.

THE DISSENT

In contrast to the majority's reasoning, Judge Breitel, in dissent, argued that the subdivision's thrust could be salvaged through narrow construction. He considered this a worthwhile goal because of the provision's utility in thwarting crime at an early stage. In essence, he had two major objections to the majority's logic.

Responding to the charge of statutory vagueness, Judge Breitel

24. For a discussion of the use of a general vagrancy statute to harass nonresidents in Philadelphia, see Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603, 604-09, 617-24 (1956).

25. Instant case at 574, 300 N.E.2d at 416, 347 N.Y.S.2d at 40.

26. *See, e.g.,* People v. Merolla, 9 N.Y.2d 62, 68, 172 N.E.2d 541, 545, 211 N.Y.S. 2d 155, 159-60, *cert. denied,* 365 U.S. 872 (1961).

27. 284 U.S. 436, *rehearing denied,* 385 U.S. 390 (1966).

28. Instant case at 577, 300 N.E.2d at 417, 347 N.Y.S.2d at 42.

contended that the elements of the offense, when present in conjunction,[29] provide a sufficiently precise definition of the conduct prohibited. He reasoned that the second element, *i.e.*, the existence of circumstances giving rise to suspicion of intended criminal activity, was especially important in the context of the vagueness issue because it could be construed to require a showing of objective facts that would justify such a suspicion.[30] This standard would entail more than an "idiosyncratic" belief on the part of an officer. Furthermore, its application could be easily reviewed by the courts. This argument seems more responsive to the majority's concern with abuse of discretion than to the charge that subdivision six failed to inform an individual of the conduct prohibited. The appellate courts may be able to curb police abuse by refusing to uphold convictions where there is no showing in the record that the arresting officer had reasonable grounds to believe that the defendant had criminal intent. However, the problem of providing an individual with guidance adequate to enable him to avoid, entirely, situations in which his activity might be objectively suspicious would still remain. Furthermore, ultimate vindication in court would not protect an individual against the intrinsically harmful fact of his arrest. Perhaps this dilemma might be alleviated in future cases by enactment of a statute providing for expungement of arrest records if the defendant is found innocent or if his conviction is reversed for failure of the prosecution to meet the requisite standard of evidence.

Judge Breitel also failed to find persuasive the majority's contention that subdivision six fosters arrests for suspiciousness. In his opinion, arrests for suspiciousness are precisely what the statute must allow in order for it to be effective. Its purpose is to prevent crime by enabling police to intervene at a preliminary stage. At such a stage, an officer can make no more than a strong inference, based on objective fact, that a criminal act is intended. The crucial issues are whether such a standard—"less than probable cause . . . but more than . . . merely subjective distrust"[31]—is constitutionally acceptable, and if so, how it may be expressed in sufficiently definite terms to avoid the finding of vagueness. In Judge Breitel's view, the majority's

29. The elements of the statute in question must be present in conjunction. People v. Schanbarger, 24 N.Y.2d 288, 291, 248 N.E.2d 16, 17, 300 N.Y.S.2d 100, 101 (1969).

30. Instant case at 575, 300 N.E.2d at 417, 347 N.Y.S.2d at 41.

31. *Id.* at 577, 300 N.E.2d at 418, 347 N.Y.S.2d at 43.

opinion was inadequate because it struck down the existing provision without dealing with the essential issues—control of discretion and arrest for suspiciousness—in such a way as to guide the legislature in drafting a more acceptable general loitering statute.[32]

IMPLICATIONS OF THE INSTANT DECISION

Traditional vagrancy laws, of which loitering statutes may be considered a subcategory, have come under the attack of legal writers in recent years because of concern over the abuses they tend to perpetuate.[33] This concern was reflected in a recent Supreme Court decision, *Papachristou v. City of Jacksonville*,[34] in which a traditionally worded vagrancy statute was struck down because of its vagueness, overbreadth, inherent tendency to produce arrests for suspiciousness and susceptibility to arbitrary enforcement by the police. The instant case, however, does not deal with a statute adopted substantially from the

32. Judge Breitel also made the point that MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962), suggested by the majority as a more tightly drawn statute, in fact says little more than the New York law. Section 250.6 reads as follows:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

In Judge Breitel's opinion, the language "circumstances that warrant alarm" relates to that element in the New York law concerning circumstances which justify suspicion. Furthermore, of the three final disjunctive elements of the Code's provision, one, concerning defendant's refusal to account for himself satisfactorily is present in the New York statute, and another, that defendant try to conceal himself, is present in the facts of the case. In this regard it is interesting to note that a Portland, Oregon provision, essentially identical to the Model Penal Code section, has been declared unconstitutional by a municipal court. City of Portland v. White, No. H8729 (Portland Mun. Ct. June 10, 1971). For a discussion of this case and its implications, see Comment, *The Constitutionality of Oregon's Loitering Statute*, 51 ORE. L. REV. 624 (1972).

33. *See generally* Amsterdam, *supra* note 13; Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *supra* note 24; Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953).

34. 405 U.S. 156 (1972).

common law; rather, subdivision six was explicitly designed to avoid the infirmities that commentators had noted in traditional formulations.[35] To that end, the statute does not establish loitering as a "status" offense, as did traditional laws; the statute's avowed purpose is to prevent crime, not to rid the streets of "undesirables".

The court of appeals has now ended the controversy engendered below by subdivision six. However, the New York Penal Law contains eight other separately defined loitering offenses.[36] Furthermore, it is likely that a new attempt will be made by the legislature to draft a general loitering statute that will be constitutionally acceptable. The

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35. MODEL PENAL CODE § 250.12, Comment at 60, 64-65 (Tent. Draft No. 13, 1961).

36.

A person is guilty of loitering when he:

1. Loiters, remains or wanders about in a public place for the purpose of begging; or

2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; or

4. Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities; or

5. Loiters or remains in or about a school, college or university building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or student, or any other specific, legitimate reason for being there, and not having written permission from anyone authorized to grant the same;

. . . .

or

7. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; or

8. Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence.

Loitering is a violation.

N.Y. PENAL LAW §§ 240.35(1)-(5), (7), (8) (McKinney 1967).

A person is guilty of loitering in the first degree when he loiters or remains in any place with one or more persons for the purpose of unlawfully using or possessing a dangerous drug, as defined in section 220.00 of this chapter.

Loitering in the first degree is a class B misdemeanor.

Id. § 240.36 (McKinney Supp. 1972).

present court decision will influence both future litigation concerning the other loitering offenses and the course of legislative action. How well the court's arguments can be applied to these two areas of concern will be an important measure of the opinion's value.

REMAINING NEW YORK LOITERING OFFENSES

In striking down subdivision six, the court relied primarily on a void-for-vagueness theory. However, as one commentator has noted, this sort of argument may often be seized upon as a convenient reason for invalidating a statute which is actually felt to be most objectionable on grounds less legally compelling.[37] The majority's decision here may be analyzed in much the same manner—while speaking of *vagueness* as its overriding concern, the largest part of the court's opinion was given over to discussion of the *collateral* infirmities which the statute allegedly harbors.[38]

Of interest in this context is the failure of the court to reconsider the New York rule—upholding statutes which prohibit loitering in specific places[39] or for specific purposes[40]—in terms of these collateral infirmities. Admittedly, such statutes may adequately inform a person of the proscribed conduct, since an individual should be able to judge quite easily where and for what purpose he is loitering. That is not to say, however, that collateral deficiencies may not be present, sufficient in themselves to bring the statute's constitutionality into question.

For instance, those statutes which prohibit loitering for the purpose of committing a substantive criminal act (hereinafter referred to as Category I subdivisions) of necessity require that an officer divine an individual's intent. Realistically, he must do so by the observation of circumstance or by the receipt of reliable report which enables him to infer the existence of a criminal purpose. In this regard, there seems to be little practical difference between the discretion

37. Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 75, 81 (1960).

38. *See* notes 12-28 *supra* & accompanying text.

39. N.Y. PENAL LAW §§ 240.35(5), (8) (McKinney 1967). For text of these subdivisions, see note 4 *supra.* Cases cited note 10 *supra.*

40. N.Y. PENAL LAW §§ 240.35 (1)-(3), (7) (McKinney 1967); *id.* § 240.36 (McKinney Supp. 1972). For text of these subdivisions, see note 36 *supra.* People v. Pagnotta, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969).

granted by Category I subdivisions and that granted by subdivision six. Each requires that an officer evaluate suspicious circumstances. A like absence of articulated standards for determining when an officer may intervene and a like potential for abuse of discretion are also notable.

It may also be noted that Category I subdivisions are not saved by the fact they refer to specific criminal purposes rather than a general one as does subdivision six. The word "crime" is defined in the New York Penal Law to mean any felony or misdemeanor as enumerated in the body of the code.[41] A police officer, presumably aware of this definition, would be charged to evaluate conduct in terms of whether it bespeaks the individual's intent to commit a felony or misdemeanor. The Category I subdivisions merely single out specific felonies and misdemeanors which, in fact, have already been covered by the comprehensive language of subdivision six.[42] To illustrate the point, if an immense statute were drafted, which prohibited, in separate subdivisions, loitering for the purpose of committing each "crime" in the penal law, it would say nothing more in sum than subdivision six already conveys. It is hard to appreciate how the mere specificity of the Category I subdivisions does anything to curtail police discretion. These substantive crimes, *e.g.*, prostitution, begging, possession of narcotics and so forth, are those of which the "undesirables," discriminated against under the traditional vagrancy laws, were most often suspected;[43] it is unlikely that an officer intent upon arresting such a person would find his discretion limited by the requirement that his suspicions be directed to these specific areas.

The problem is essentially the same with statutes prohibiting loitering in particular places (hereinafter referred to as Category II subdivisions), despite the narrow construction that New York courts have given them in the past (*i.e.*, generally construed only to prohibit

41. N.Y. PENAL LAW § 10.00(6) (McKinney 1967).

42. Subdivisions one and seven of § 240.35 are exceptions in that the substantive acts involved, *i.e.*, begging and completing an unauthorized business transaction (or entertaining) in a transportation facility, are not made either misdemeanors or felonies in other parts of the code. That these relatively minor improprieties were handled under the loitering statute is probably the result of an historical connection between the substantive acts involved and the "loiterers" and "vagrants" who were generally supposed most often to commit them. In any case, the inclusion of these two subdivisions merely expands, to some small degree, the broad set of illegal purposes already proscribed by the otherwise comprehensive language of subdivision six.

43. *See generally* materials cited note 33 *supra*.

loitering under circumstances which indicate that a person is not a licensee or implied invitee of the organization in charge of the facility).[44] Police should not be expected to arrest all such "trespassers," but only those who cannot explain their conduct satisfactorily, as is explicity required by these subdivisions.[45] The potential for arbitrary police rejection of an explanation exists as much here as in subdivision six.

Considered in terms of the fourteenth amendment problems engendered by arrest on suspicion, the Category I subdivisions, requiring that an officer make essentially the same evaluation of behavior as under subdivision six, appear to suffer from the same constitutional infirmity. The subdivisions would only come into play where an individual's conduct would not allow an arrest on probable cause for the attempted or completed criminal act. Category II subdivisions have been justified in the past on the theory that "undesirables" frequent certain places and may prey upon the public if not removed.[46] What in fact results, under these statutes, are arrests made not for loitering *per se,* but for suspicion that persons who loiter in these areas may commit substantive crimes.

As to overbreadth, the possibility persists that loiterers with apparent *but nonexistent* criminal purpose will be taken into custody. Similarly, a person may loiter in a prohibited place for innocent reasons, yet be unable or unwilling to give an account of himself sufficient to avoid the statute's application.

Finally in this vein, those subdivisions requiring that an individual explain his conduct may fall victim to the court's new approach to the self-incrimination issues (once that approach is clarified). Furthermore, should the court, in future cases, decide to apply the "privileges and immunities" argument in its full implications, there is no reason why any of the other loitering offenses would not run afoul of it.

In sum, the various deficiencies considered in the instant case may be noted to exist in other subdivisions of the New York loitering law as well. Whether they are enough in themselves to justify invalidation is problematic. It may be pointed out that the constitu-

44. *E.g.,* People v. Bell, 306 N.Y. 110, 115, 115 N.E.2d 821, 822 (1953).

45. N.Y. PENAL LAW §§ 240.35(5), (8) (McKinney 1967).

46. People v. Johnson, 6 N.Y.2d 549, 552, 161 N.E.2d 9, 11, 190 N.Y.S.2d 694, 696-97 (1959); People v. Bell, 306 N.Y. 110, 113, 115 N.E.2d 821, 822 (1953).

tionality of various of these subdivisions or their predecessors has already been considered.[47] However, in light of the strong stance taken by the Supreme Court in *Papachristou*—and reiterated here by the court of appeals in the case of a much more narrowly drawn statute—it is likely that these prior decisions now require reexamination.

Implications for Future Legislative Action

Ultimately, the future of legislative action in this area—as well as the resolution of the issue of the validity of the remaining New York loitering offenses—depends upon an examination of the underlying competitive interests which must be reconciled whenever a statute attempts to define the circumstances which justify police intrusion into private affairs. In the instant case, the court ventured into a no man's land between law and sociology whose elusive boundaries make for correspondingly unclear decisions. For the individual affected by the statute, nothing less is at stake than the right to remain free both from unreasonable police interference and the obloquy and inconvenience attendant upon criminal arrest. On the other hand, society has a valid interest in protecting its members from the threat of imminent crime. Centrally at issue is the determination of what is the proper moment for the police to intervene in the course of an act perceived as criminal. The loitering statute pushes that moment back in time to a point where, at best, there is only an objective suspicion that a crime is in the offing. Although from a social viewpoint, intervention at this stage may seem desirable, it is questionable that the possession of so broad a prerogative on the part of the state is consistent with traditional protections granted to an accused by due process of law.

In attempting to resolve these competing interests, courts have evaluated the statutes before them by unusual means. In the instant case, for example, the majority, dealing with the issue of official abuse of discretion, did not contend that the statute's facilitation of indiscriminate arrest was its manifest purpose, in contrast with the judi-

47. *See* cases cited note 10 *supra*. Burmeister v. New York City Police Dep't, 275 F. Supp. 690 (S.D.N.Y. 1967); Schumann v. New York, 270 F. Supp. 730 (S.D.N.Y. 1967); People v. Pagnotta, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969); People v. Willmott, 67 Misc. 2d 709, 324 N.Y.S.2d 616 (Ocean Beach Village Justice Ct. 1971).

cial casting of traditional status-type vagrancy statutes. Instead, the court, in effect, took judicial notice of the fact that loitering laws of this type are particularly susceptible to abuse. That the majority was willing to look beyond statutory language and to consider the law's day-to-day operation is indicative of the high value placed upon the due process right the court sought to protect.

The court's dilemma in this area is perhaps compounded by the fact that loitering provisions form a venerable part of the common law whose application in the prevention of crime may well be something that the public has come to expect. It is only now, when commentators have undertaken to examine the constitutional aspects of these laws in light of an increased interest in the rights of the accused, that their deficiencies have been uncovered and have given the legal community pause.

How then to resolve these diverse interests? One simple expedient would be to do away with loitering statutes altogether. This approach was rejected by the drafters of the Model Penal Code on the grounds that it would constitute such a remarkable shift in the traditional penal law that it would not be accepted by many states.[48] If the rights of the individual to avoid unreasonable arrest achieve predominance, such a solution may yet become acceptable. In that case, alternatives to the problem of dealing with inchoate crime would have to be found. Foremost among these might be a greater reliance upon already existing statutes (*e.g.*, use of a criminal trespass or disorderly conduct statute in place of a statute prohibiting loitering in a particular area). Of course, these alternative statutes could not achieve full coverage of the field vacated by the loitering provisions, but it is presumed here that the "full field" has been declared unacceptably wide.

If the New York legislature is committed to the perpetuation of loitering statutes, it is possible that an attempt will be made to replace subdivision six using language essentially similar to that in the Model Penal Code provision cited by the majority.[49] Unfortunately, as was noted by the dissent, this provision does not provide much more resolving power than did subdivision six. The challenge is to design a law intended to frustrate crime in its early stages (by proscribing the wide spectrum of behavior that under certain circumstances may

48. MODEL PENAL CODE § 250.12, Comment at 65 (Tent. Draft No. 13, 1961).
49. *See* materials cited note 32 *supra*.

reasonably portend criminal purpose) without leaving unacceptably broad discretion with police officers.

To some extent, however, the execution of any criminal statute depends upon the proper exercise of police discretion. A system of enforcement which did not recognize the necessity—and desirability—of allowing an officer to rely on his own judgment in the field would be unthinkable. Judge Breitel faced the issue squarely and the narrow construction he proposed would produce a statute which would have utility if properly enforced. Arrest for suspiciousness may not be constitutionally objectionable if the standard actually employed demands that the inference of criminal intent be demonstrably founded on objective fact.

Despite its apparent reluctance, the court must eventually face these troublesome issues raised by Judge Breitel. It must either forego the strict standard which disallows arrest for suspiciousness—and approve of a statute that necessarily gives broad discretion to the police—or it must foreclose altogether upon the concept of loitering offenses, and with them the benefits society may derive from their existence.

KENNETH BERSANI