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Constitutional Law—Unconstitutionality of City Ordinance Against Lounging or Loitering on Public Streets

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In his dissent, Judge Desmond seems to extend the meaning of the term judicial proceedings beyond its traditional scope. Heretofore it has applied only to formal court room proceedings and not to informal questionings.[39] In New York, by statute, the right to counsel accrues upon arraignment.[40] The dissent would give a defendant the right to have counsel present at any informal questionings which take place after indictment.[41]

There has been little judicial restriction on the right of the police to question an accused at any time.[42] The right of the accused is to remain silent. It is a personal right and is not dependent upon whether or not he has retained an attorney.[43] Perhaps it is a hollow right when a person is initially accused of a crime since at that moment the accused, often under pressure from the police, does not have the presence of mind to exercise it prudently.[44] On the other hand, interrogation is a useful technique in criminal investigations and often results in the immediate release of the innocent. Even so, the state would not be prejudiced if the police were denied the opportunity to question a defendant in secret after an indictment has been returned, since at that time the state has a prima facie case and presumably enough evidence to sustain the charge.

While the position of the dissent may not appear logically justified, it seems to reflect a general dissatisfaction with the New York doctrine as to the admissibility of illegally obtained confessions and a desire to limit its scope.

Unconstitutionality of City Ordinance Against Lounging or Loitering on Public Streets

The Fourteenth Amendment of the Constitution imposes the requirement that penal legislation avoid "the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment . . . ."[45] *People v. Diaz*[46] called for the appli-

39. Mitchel v. Cropsey, 177 App.Div. 663, 164 N.Y.S. 336 (2d Dep't 1917).

40. N. Y. CODE CRIM. PROC. §§188, 189, 296-a, 308, 699. *But see Gilmore v. U. S.*, 129 F.2d 199 (1942), where the court held that the defendant's constitutional right to the assistance of counsel accrues with the returning of an indictment against him.

41. *But see Ciceria v. La Gay*, 78 S.Ct. 1297 (1958), where the court held on almost identical facts that the constitutional right to counsel had not been violated. But note that no indictment was outstanding when questioning took place.

42. See Crooker v. California, 78 S.Ct. 1287 (1958).

43. In re Black, 47 F.2d 542 (1931).

44. See dissent by Justice Douglas in Ciceria v. La Gay, *supra* note 40 and Crooker v. State of California, *supra* note 41. *Cf.* People v. McMahon, 15 N.Y. 384 (1857), and People v. Mondon, 103 N.Y. 211, 8 N.E. 496 (1886). *But see* People v. Ferola, 215 N.Y. 285, 109 N.E. 500 (1915); WIGMORE, EVIDENCE §851 (3d ed. 1940).

45. Screws v. United States, 325 U.S. 91, 157 (1945).

cation of this principle in assessing the constitutionality of a local ordinance of Dunkirk, New York, which provided, as pertinent, that

> [n]o person shall lounge or loiter about any street or street corner in the City of Dunkirk.

The defendant had stopped to converse with a representative of the Migrant Division of the Department of Labor of Puerto Rico assigned to assist migrant laborers with their personal and social problems. The local police, noticing a group of persons of Puerto Rican descent standing in a group together on the street ordered it to disperse, and when the defendant did not remove arrested him for violation of the ordinance.

The Court of Appeals struck down the ordinance on the ground that it was too vague to define a crime. Where loitering statutes have been upheld, the Court pointed out, they have been phrased in such a form as to prevent a cognizable offense, as to which the loitering is an ancillary element. In short, the loitering is used in such statutes to point up the act for which the arrest is made, such as the breach of the peace, soliciting for immoral purposes, etc.[47] Had the ordinance contained an element of intent to perpetrate a known offense, for example, the wilful obstruction of pedestrian traffic, the Court would very likely have found the sufficient standard from which one could differentiate between conduct which is innocent and that which is calculated to harm.[48]

While the problem of vagueness is one constantly plagueing draftsmen, it is particularly important where the activity proscribed includes or may be interpreted to include activity constitutionally protected by the Fourteenth Amendment. Thus, in *Winters v. New York*,[49] involving a vague statute seeking to restrict the publication of material concentrating on lewd, criminal or otherwise violent material, the statute was struck down, inasmuch as it embraced an area which included acts protected by the free speech provisions of the constitution and was thus necessarily vague.

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.[50]

46. 4 N.Y.2d 469, 176 N.Y.S.2d 313 (1958).
47. The Court referred specifically to Penal Law, section 722, subdivisions 3 and 8, which prohibit loitering under such circumstances.
48. Compare *Screws v. United States, supra* note 45, wherein a statute which would ordinarily have been susceptible to attack for vagueness was upheld inasmuch as it required a specific *wilful* intent.
49. Winters v. New York, 333 U.S. 507 (1948).
50. *Id.* at 509.

The unanimous decision of the Court of Appeals in the instant opinion is well within the principle quoted above from the *Winters* case. Although the rationale would not seem to be subject to dispute of any substantial legal significance, it is likely that research would disclose numerous local ordinances which would run afoul of the *Diaz* decision.[51]

Statute Unconstitutional for Vagueness

In *People v. Firth*,[52] the Court of Appeals was confronted with the constitutionality of a traffic law which provided:

> No person shall operate a motor vehicle or a motor cycle upon a public highway at such speed as to endanger the life, limb or property of any person, nor at a rate of speed greater than will permit such person to bring the vehicle to a stop without injury to another or his property.[53]

Defendant driver struck a child causing serious personal injuries, and was subsequently charged and convicted of violating the above statute.

In unanimously affirming the judgment of the lower appellate court[54] which had reversed the conviction, the Court of Appeals held that the statute neither set forth a sufficient definition of criminal conduct nor contained an ascertainable standard by which a judge or jury could measure a driver's conduct. The Court pointed out that notwithstanding a violation of the statute was only a so-called "traffic infraction",[55] the statute's constitutional status was to be determined by the usual rules of criminal law.[56]

In construing the statute the Court analyzed each of its prohibitory provisions separately. As to the first prohibition, it pointed out that any speed would be capable of endangering life, limb or property; while a fair reading of the statute's second prohibition would indicate that any driver who could not stop his car in time to avoid an accident would, *ipso facto*, be driving at an

51. *E.g.* BUFFALO, N. Y., CITY ORDINANCES, ch. IX, §16, provides:
> . . . [n]o person shall idly sit, stand or lounge upon or in any street, lane, alley or bridge or park . . . .

52. 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957).
53. N. Y. VEHICLE AND TRAFFIC LAW §56, subd. 1.
54. 5 Misc.2d 439, 159 N.Y.S.2d 794 (Cy. Ct. 1957). Accord: People v. Gaebel, 2 Misc.2d 458, 153 N.Y.S.2d 102 (Cy. Ct. 1956); People v. Horowitz, 4 Misc.2d 632, 158 N.Y.S.2d 166 (Cy. Ct. 1956). Contra: People v. Sprague, 204 Misc. 99, 120 N.Y.S.2d 725 (Cy. Ct. 1953); People v. Burkhalder, 203 Misc. 532, 117 N.Y.S.2d 609 (Cy. Ct. 1952). See also Commonwealth v. Pentz, 247 Mass. 500, 143 N.E. 322 (1924).
55. N. Y. VEHICLE AND TRAFFIC LAW §2, subd. 29.
56. People v. Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377 (1955).