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# Constitutional Law - Personal Liberty and Security - The Right of Locomotion

# COMMENT

## CONSTITUTIONAL LAW — PERSONAL LIBERTY AND SECURITY — THE RIGHT OF LOCOMOTION

THE CONTINUING effort of American municipalities to work out ordinances which provide the maximum in security and protection for the public usually takes concrete shape in the enactment of vagrancy or curfew laws designed to restrict disorderly or criminal elements engaged in anti-social activities. Ordinarily such enactments are merely reasonable excercises of the police power inherent in all effective municipal governments. Occasionally, however, such ordinances appear to raise serious questions, particularly where they are susceptible of construction in such a way that they appear to infringe upon constitutional liberties.

An example of such an ordinance may be found in *City of Portland v. Goodwin*,[1] in which the Supreme Court of Oregon upheld, against the defense that it abridged the defendants' right of locomotion,[2] an ordinance which made it unlawful for any person to roam or be upon any street between the hours of 1 and 5 a.m. without having and disclosing a lawfull purpose. The right invoked by the defendants is one which is not commonly thought about,[3] and its application with respect to curfew, vagrancy and kindred regulations has caused considerable divergence of opinion among the courts.[4] Since arrests under such ordinances constitute a large portion of the arrests made by the police,[5] it is obvious that a problem of more than theoretical importance is presented.

### SCOPE OF REGULATIONS BY MUNICIPAL ORDINANCES

It has been repeatedly pointed out that no liberties are absolute,[6] and that individual rights must often in specific cases give way to the overriding need for order and law.[7] But the precise extent to which the inherent police powers of the state can be used to restrict individual rights is an open question in many fields. Indeed, no

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[1] 210 P.2d 577 (Ore. 1949).

[2] *Id.* at 580.

[3] See Murray, Book Review, 26 N.D. Bar Briefs 208, 209 (April, 1950).

[4] Vagrancy ordinances have long been a sore spot in the law, Lisle, *Vagrancy Law: Its Faults and Their Remedy*, 5 J. Crim. L. & Criminology 498 (1914); Note, 23 Calif. L. Rev. 506 (1935), and it is widely recognized that the social conditions which originally brought about their enactment have materially changed. Note, 23 Calif. L. Rev. 506 (1935). There are very few cases dealing with the legality and permissible scope of curfew regulations for minors.

[5] See Note, 23 Calif. L. Rev. 506 (1935).

[6] Hall, *Free Speech in War Time*, 21 Col. L. Rev. 526,529 (1907).

[7] Wickersham, *The Police Power, A Product of The Role of Reason*, 27 Harv. L. Rev. 297 (1914).

authoritative or generally accepted definition of the term, "police power," has ever been formulated. The extent to which the police power can be used to restrict the right of locomotion, *i.e.*, the right of citizens to come and go as they please, has been considered by the courts very few times.

Certain principles are fundamental. The common use of the streets is far more than a license.[8] In the leading case of *Pinkerton v. Verberg*,[9] the Michigan court laid down what appears to be the best statement of the general rule, in affirming a judgment for the plaintiff recovered in a suit for false arrest by a police officer: "One may travel along the public highways or in public places," said the court, "and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the right of no other citizen, there they will be protected under the law not only in their persons, but in their safe conduct." [10]

In Ex parte *McCarver*,[11] a Texas court held invalid an ordinance which prohibited minors from remaining on the streets after 9 p,m, on the ground that it was an undue invasion of personal liberty, pointing out that the rule laid down by the ordinance was "paternalistic" and "as rigid as military law." This case, however, has been criticized by a California court, which upheld an ordinance making it a crime for any person having custody or control of any minor under 18 years of age to allow the minor to "remain or loiter" upon any street or public place in Los Angeles between 9 p.m. and 4 a.m.[12] The California court observed that, "If the *McCarver* case can be interpreted to prevent the enactment of any regulatory curfew legislation whatsoever, which we seriously doubt, it is out of step with the great weight of authority dealing with the right of legislative bodies to pass laws properly necessary for the regulation of minors." [13]

The cases dealing with the power of municipalities to restrict the use of the streets by immoral or disorderly persons are not in

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[8] Freund, Police Powers §165 (1904).

[9] 18 Mich. 573, 44 N.W. 579 (1889) where arrest of plaintiff was made on suspicion by an officer who believed the arrested woman to be a streetwalker, although she was traveling along the street in normal fashion.

[10] *Id.* at 44 N.W. 582.

[11] 39 Tex. Crim. App. 448, 46 S.W. 936 (1898). The argument of the Texas court in *Ex parte* McCarver that such a curfew ordinance was "paternalistic" would probably not be accepted today.

[12] People v. Walton, 70 Cal.App.2d 862, 161 P.2d 498 (1945) which appears to be grounded primarily upon the right of the legislature to control minors.

[13] *Id.* at 161 P.2d 502. *Ex parte* McCarver was distinguished on the ground that the California ordinance did not restrict the right of the minor to go upon the streets, but only from "remaining or loitering upon such street," and that the Texas ordinance was different in legal effect. The *McCarver* decision proceeded on the theory that the legislature had no more power to control minors than it had to control adults. If one accepts this premise, however, the decision appears to be sound as a matter of constitutional law.

accord. An ordinance prohibiting any woman from entering a liquor establishment or from standing within fifty feet of such a building has been held void as an unreasonable interference with individual liberty,[14] as has an ordinance forbidding any person from appearing on the street improperly attired – for example, in a bathing suit.[15] In *Dunn v. Commonwealth* [16] an ordinance was upheld prohibiting prostitutes from being on the streets between certain hours. Yet a number of cases have reached results apparently in conflict with this decision. Ordinances forbidding association with disorderly or immoral persons have been held invalid, on the ground that the criminal law may not intervene until a positive breach of the law is reached, or the act of the accused is such as to justify an implication of an intended breach of the law.[17] The South Dakota court said in *City of Watertown v. Christnacht*,[18] a case dealing with such an ordinance, that to sustain such an ordinance ". . . would prevent personal effort on the part of male citizens to ameliorate the condition of fallen women." [19]

As defined by subsequent decisions, the right of locomotion is interfered with when city officials prevent union officials from coming to a city to hold meetings,[20] or when a state requires a person engaged in hiring laborers for work outside the state to pay a tax in order to engage in such an occupation.[21] The opinion in the last case in a broad dictum indicated that "undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory

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[14] Gastenau v. Commonwealth, 108 Ky. 473, 56 S.W. 705 (1901) (ordinance failed to distinguish between moral and immoral women).

[15] People v. O'Gorman, 274 N.Y. 284, 8 N.E.2d 862 (1937).

[16] 105 Ky. 834, 49 S.W. 813 (1899). *But cf.* Gastenau v. Commonwealth, 108 Ky. 473, 56 S.W. 705 (1901); People v. O'Gorman, 274 N.Y. 284, 8 N.E.2d 862 (1937). The *Dunn* case does not appear to be authority for the ordinance sustained in the principal case, since it is undisputed that the legislature or municipality may forbid prostitution completely, as well as regulate it.

[17] City of St. Louis v. Fitz, 53 Mo. 582 (1873).

[18] 39 S.D. 290, 164 N.W. 62 (1917).

[19] *Id.* at 164 N.W. 62.

[20] C.I.O. v. Hague, 25 F.Supp. 127 (D. N.J. 1938). No state has the power to punish a criminal for coming from another state to it by reason of the fact that he had committed a crime in the former. *See* United States v. Miller, 17 F.Supp. 65, 67 (W.D.Ky. 1936). And, of course, any citizen has the right to pass freely from state to state. Crandall v. Nevada, 6 Wall. 35 (U.S.1867). Hillborn v. Briggs, 58 N.D. 612, 226 N.W. 737 (1929) involved an application for a writ of habeas corpus by a woman resident of North Dakota who had been taken into custody and confined at the county poor farm in Stutsman county on the ground that she was properly a resident of Minnesota. North Dakota laws at that time permitted the removal of paupers to their proper place of residence. The court granted the writ on the ground that the statutes did not purport to allow a person to be removed from the state, but did not determine whether a removal from one county to another in North Dakota could be accomplished over the protest of the person affected. The case came up for discussion at the 1949 meeting of the North Dakota Bar Association. See Proceedings, 26 N.D. Bar Briefs 112-113 (1950).

[21] *See* William v. Fears, 179 U.S. 270 (1900).

of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." [22]

VAGRANCY STATUTES

Probably the commonest restriction on the right of free movement is found in the vagrancy statutes. In their inception, these statutes were designed mainly to place the burden of supporting the poor on the home parish.[23] Yet it was recognized as early as 1914 that the laws of a medieval island country such as England where these statutes were originally adopted, were poorly fitted to conditions in the United States,[24] and the result has been that the common law definition of vagrancy — *i.e.*, that a vagrant was a person who wandered about from place to place, subsisting on charity, without any visible means of support, and not working although able to do so,[25] — has now largely given way to statutory definitions which are considerably more inclusive.[26] A good many vagrancy statutes today permit punishment for conduct which is simply immoral,[27] contrary to the accepted mores of society,[28] or ordinarily prohibited by other statutes.[29] It has been argued that vagrancy ordinances are of the nature of public regulations to prevent crime, rather than ordinary criminal laws.[30] The Virginia court has quoted with approval the view that, " if the condition of a person brings him within the description of either of the statutes declaring what persons shall be esteemed vagrants, he may be convicted and imprisoned, whether such condition is his misfortune or his fault. His own individual liberty must yield to the public necessity or the public good." [31] Such an approach is obviously subject to criticism on the ground that so construed, vagrancy statutes simply penalize poverty.

Cases construing statutory definitions of vagrancy have laid down several basic principles. Mere idleness [32] or associations

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[22] *Id.* at 274.
[23] Lisle, *op cit. supra,* note 4.
[24] *Ibid.*
[25] *In re* Jordan, 90 Mich. 3, 50 N.W. 1087 (1892); *Ex parte* Strittmatter, 58 Tex. Cr. 156, 124 S.W. 906 (1910); State v. Grenz, 26 Wash.2d 754, 175 P.2d 636 (1947).
[26] See such cases as People v. Belecastro, 356 Ill. 144, 190 N. E. 401 (1934); State v. Grenz, *supra* note 17.
[27] People v. Scott, 113 Cal. App. 778, 296 Pac. 601 (1931) (presentation of obscene theatrical entertainment).
[28] Jackson v. City of Dennen, 109 Colo. 196, 124 P.2d 240 (1942) (cohabitation of Negro and White persons as husbnad and wife under common law marriage). *But cf.* Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948), 25 N.D. Bar Briefs 212 (1949).
[29] State v. Hagen, 130 S.W. 250 (Mo. 1939) (non-support of family).
[30] Morgan v. Commonwealth, 168 Va. 731, 191 S.E. 791 (1937).
[31] *Id.* at 191 S.E. 793.
[32] *Ex parte* McCue, 7 Cal. App. 765, 96 Pac. 110 (1908). An emergency statute requiring every able-bodied man to work at least 36 hours a week has been held unconstitutional. *Ex parte* Hudgins, 86 W.Va. 526, 103 S.W. 327 (1920).

with persons of unsavory character is not enough to constitute vagrancy.[33] It has been established that a person cannot be convicted of vagrancy because of what he is "reputed to be" [34] or because he loiters in barrooms,[35] although if he loiters in such places without a lawful means of support, he may be convicted.[36] It has been pointed out further that it would be impracticable under vagrancy laws to ". . . punish, or even to forbid, improper intentions or purposes; for with mere guilty intention unconnected with overt act or outward manifestation, the law has no concern." [37] The early rule was that there must be a coexistence of at least two factors in the same person — wandering and the possession of no visible means of support — before a person could be convicted.[38]

In more recent cases, the close interrelationship of the vagrancy laws and the curfew statute upheld in *City of Portland v. Goodwin* may be illustrated by referring to the Washington case of *State v. Grenz*,[39] which upheld a conviction of vagrancy because the defendant was found wandering about late at night under suspicious circumstances without reference to his livelihood or vocation. The dissenting opinion might have been written for the *Portland* case: "The legislature has not the constitutional power to define as a crime the wandering about the streets at late and unusual hours of the night without being engaged in a visible or lawful business. Have we traveled so far along the highway to regimentation that an officious officer may accost a citizen at any time of the day or night and insist upon that citizen answering impertinent questions

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[33] *Ex parte* Smith, 135 Mo. 223, 36 S.W. 628 (1896). Here a vagrancy statute was held unconstitutional which prohibited association with other persons of unsavory character. A conspiracy statute would be constitutional, but one which controls a person's associations is not. ". . . Human laws and agencies have not yet arrived at such a degree of perfection as to be able, without some overt act done, to discern and to determine by what intent or purpose the human heart is actuated. . . . it would be wholly impractible for human laws to punish, or even to forbid, improper intentions or purposes; for with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern."

[34] People v. Belcastro, 356 Ill. 144, 190 N.E. 401 (1934).

[35] *Ex parte Branch*, 234 Mo. 466, 137 S.W. 886 (1911). *Cf.* Taylor v. Sandersville, 118 Ga. 63, 44 S.E. 845 (1903) which upheld an ordinance making it penal to idle, loiter, or loaf upon streets.

[36] *In re* Stegenga, 133 Mich. 55, 94 N.W. 385 (1903). That a person is not a vagrant because he wanders around without visible means of support, see *In re* Jordan, 90 Mich. 3, 50 N.W. 1087 (1892). To a different effect, *See Ex parte* Karnstrom, 297 Mo. 384, 249 S.W. 595 (1923), which declared a statute constitutional that made any person who tramped about without any lawful means of support a vagrant, with vagrancy not necessarily being of a continuous nature or status. But that a necessary element of vagrancy is its continuing nature, see *Ex parte* Tom Wong, 122 Cal.App. 672, 10 P.2d. 797 (1932); *Ex parte* Oates, 91 Tex. Crim. 79, 238 S.W. 930 (1921).

[37] *Ex parte* Smith, 135 Mo. 223, 36 S.W. 628 (1896).

[38] 23 Calif. L. Rev. 506 (1935).

[39] 26 Wash.2d 754, 175 P.2d 636 (1947).

of the officer? Does wandering create a presumption of an unlawful purpose?" [40]

## SUMMARY

In summation, the Portland ordinance appears on the facts and reasons presented by the Oregon court, to constitute an unreasonable infringement on personal liberty. The common use of the streets is far more than a license extended by the municipality or the state. It is a constitutional right, which can be abridged only so far as absolutely necessary for the protection of other citizens.[41] Blackstone defined personal liberty as the "... power of locomotion, of changing situation or moving one's person to whatever place one's inclination may direct without imprisonment or restraint, unless by due course of law." [42] The concept of liberty has changed radically since the days of Blackstone and the drafting of the Constitution, if citizens today can be arrested simply because they refuse to submit to police questioning when they choose to use the streets.

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[40] *Id.* at 175 P.2d 639. A California court has pointedly said that it is within the legislative power to define vagrancy to include ". . . those who indulge in pointless, useless wandering from place to place within a state, without any excuse for such roaming other than the impulse generated by what is sometimes denominated wanderlust. . . ." *Ex Parte* Cutler, 1 Cal.App.2d 273, 36 P.2d 441 (1934).

[41] Freund, Police Powers §86 (1904). The court in the *Portland* case indicated "That crimes of lust and violence are generally committed under the cloak of darkness is judicially known. We find that the ordinance bears a reasonable relation to the evil at which it is directed." It has been indicated that the usual presumption supporting statutory validity is not applicable to laws restricting guaranteed civil liberties. Thomas v. Collins, 323 U.S. 516, 530 (1945); 40 Col. L. Rev. 531 (1940).

[42] 1 Bl. Comm. *134-135, discussed in Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life," Liberty, and Property*, 4 Harv. L. Rev. 365, 377 (1891). Historically, the right of locomotion is protected by Fourteenth Amendment to the United States Constitution, which specifies that no person shall be deprived of life, liberty, or property without due process of law. When the phrase, "life, liberty, or property," was included in the Fourteenth Amendment, it was intended to provide to the citizen as against the states the same protection which had been given as against the Federal Government by the Fifth Amndment, which contains the identical phrase. *See* Hebben v. Smith, 191 U.S. 310, 325 (1903); Greenle v. Barber Asphalt Paving Co., 181 U.S. 324, 329 (1901); Warren, *The New Liberty Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 439 *et seq.* (1926). But the phrase has a much older history than that. Shattuck gives it an origin in the Teutonic law, with a possible earlier derivation from the laws of the Franconian and Saxon Caesars. Shattuck, *supra*, at 369. The clause appears in Anglo-Saxon law at the beginning of the Thirteenth century in the Magna Charta, which provided in Article 39: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." A confirmatory statute of a slightly later date enlarged this section by adding after the word "disseised" the words "of his freehold, or liberties, or free customs." It was this provision, paraphrased into the "life, liberty, or property" clause, which was inserted in our Constitution. Shattuck, *supra*, at 372. As used in this clause, the word "liberty" did not have the broad scope which it possesses today. It meant simply personal liberty, the right of locomotion. Shattuck, *supra*, at 376. The way in which the Fourteenth Amendment has been broadened by the Supreme Court to include such liberties as freedom of speech and religion has been carefully traced by Charles Warren. See Warren, *supra*.