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STATUS OFFENSES AND DUE PROCESS OF LAW

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THE criminal law has long known and recognized vagrancy and public intoxication as penal offenses.[1] Recently, however, the courts have begun questioning the validity of penal statutes directed solely at status offenses. On July 7, 1967, the New York Court of Appeals, in the case of *Fenster v. Leary*,[2] declared the state's vagrancy statute unconstitutional on the grounds that it constituted an overreaching of police power and violated the requirements of due process of law. The *Fenster* decision represents a progression in judicial thinking on status offenses which deserves extended discussion.

I. THE *Fenster* LITIGATION

On three occasions in late 1964, each about a month apart, the New York City police arrested Charles Fenster for vagrancy. After each arrest, he was charged with being "a person who not having visible means to maintain himself, lives without employment,"[3] all in violation of section 887(1) of the New York Code of Criminal Procedure.[4] As almost invariably occurs, the first two charges resulted in acquittal.[5] Conviction, however, could have resulted in imprisonment for up to six months on each charge.[6]

Following his third arrest, Fenster sought an order pursuant to CPLR article 78 prohibiting the Criminal Court of the City of New York from hearing and determining the charge of vagrancy levelled against him. His application for the order was predicated on his claim that the vagrancy statute was unconstitutional. The New York Supreme Court denied the

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1. 17 Geo. 2, c. 5; 21 Jac. 1, c. 7; see 4 Blackstone, Commentaries 60, 183 (Beacon Press 1962); 3 J. Stephen, History of the Criminal Law of England 266-75 (1883); 3 L. Radzinowicz, A History of English Criminal Law 21, 52-54, 73-74 (1956); Foote, Vagrancy-type Law and its Administration, 104 U. Pa. L. Rev. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203 (1953); Perkins, The Vagrancy Concept, 9 Hastings L.J. 237 (1938); Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Calif. L. Rev. 557, 570-71 (1960).

2. 20 N.Y.2d 309, 229 N.E.2d —, 282 N.Y.S.2d — (1967).

3. No. 42805, New York City Crim. Ct. Pt. 11, Sept. 30, 1964; No. 18500, New York City Crim. Ct., Kings County Pt. B, Sept. 30, 1964; No. 20368, New York City Crim. Ct., Kings County Pt. B, Dec. 10, 1964.

4. N.Y. Code Crim. Proc. § 887, repealed N.Y. Sess. Laws 1967, ch. 681, § 90.

5. No. 42805 New York City Crim. Ct. Pt. 11, Sept. 30, 1964; No. 18500, New York City Crim. Ct., Kings County Pt. B, Sept. 30, 1964.

6. N.Y. Code Crim. Proc. § 892, repealed N.Y. Sess. Laws 1967, ch. 681, § 90.

application,[7] and the appellate division affirmed.[8] The court of appeals affirmed solely on the ground that the remedy of prohibition was discretionary.[9] Acquittal on the third vagrancy charge followed in the criminal court.[10]

Fenster then applied to a three-judge federal court in the Southern District of New York for a declaration of the statute's unconstitutionality. The district court denied this application on the ground that Fenster had a state remedy by way of a declaratory judgment,[11] and the Supreme Court of the United States affirmed.[12]

Initiating an action for declaratory relief in the New York Supreme Court, Fenster moved for summary judgment declaring section 887(1) of the Code of Criminal Procedure unconstitutional. Special term denied his motion and dismissed the complaint.[13] The court of appeals heard a direct appeal from this order and, by a vote of five-to-two, reversed the judgment and declared the statute unconstitutional.[14]

In reaching its decision in *Fenster*, the court of appeals reasoned that vagrancy "in no way impinges on the rights or interests of others" and that therefore a statute proscribing such harmless conduct as a penal offense bears no substantial relationship to the prevention of crime or the preservation of public order.[15] Writing for the majority, Judge Burke pointed out that "today the only persons arrested and prosecuted as common-law vagrants are alcoholic derelicts and other unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skid row and disturbing *by their presence* the sensibilities of residents of nicer parts of the community . . . ."[16] The court concluded, therefore, that the New York vagrancy statute overreaches the proper limitations of the police power and violates the requirements of due process of law.[17]

The rationale of *Fenster* exemplifies the most progressive judicial

7. Fenster v. Criminal Court of the City of New York, 46 Misc. 2d 179, 259 N.Y.S.2d 69 (Sup. Ct. 1965).

8. Fenster v. Criminal Court of the City of New York, 24 App. Div. 2d 840 (1st Dep't 1965).

9. Fenster v. Criminal Court of the City of New York, 17 N.Y.2d 641, 216 N.E.2d 342, 269 N.Y.S.2d 139 (1966).

10. No. 20368, New York City Crim. Ct., Kings County Pt. B, June 27, 1964.

11. Fenster v. Leary, 264 F. Supp. 153 (S.D.N.Y. 1966).

12. 386 U.S. 10 (1967).

13. 157 N.Y.L.J., May 18, 1967, p. 19, col. 1.

14. Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d —, 282 N.Y.S.2d — (1967).

15. Id. at 312-13, 229 N.E.2d at —, 282 N.Y.S.2d at —.

16. Id. at 315-16, 229 N.E.2d at —, 282 N.Y.S.2d at —.

17. Id. at 316, 229 N.E.2d at —, 282 N.Y.S.2d at —.

thinking on status offenses. In *Driver v. Hinnant*[18] and *Easter v. District of Columbia*,[19] two federal circuit courts had previously declared typical public intoxication statutes unconstitutional insofar as they applied to alcoholics. In effect, *Driver* and *Easter* had ruled that an alcoholic is without free will and that it would be unconstitutional to hold him responsible for his conduct. Legal commentators, however, have criticized *Driver* and *Easter* for focusing entirely on the sickness of alcoholism and ignoring the deeper problem represented by the status of chronic human deterioration.[20] *Fenster*, on the other hand, did not limit its decision to the victims of any specific pathology but referred, rather, to "alcoholic derelicts *and other unfortunates*."[21] Thus, *Fenster* holds that the status of chronic human deterioration known as vagrancy in no way disturbs the rights or interests of others and is, therefore, beyond the functional orbit of the criminal law.

II. Decisions of the United States Supreme Court

The United States Supreme Court has yet to consider the constitutionality of criminal statutes directed at the status of vagrancy. In the case of *Hicks v. District of Columbia*,[22] the Court dismissed as improvidently granted a writ of certiorari previously granted to consider the constitutionality of the petitioner's conviction under the District of Columbia's vagrancy statute. Mr. Justice Douglas, however, dissented from the dismissal, stating in his opinion, "I do not see how economic or social status can be made a crime any more than being a drug addict can be."[23]

The Supreme Court, moreover, has failed to indicate a readiness to rule on the issue decided in *Driver* and *Easter*, i.e., the constitutionality of applying public intoxication statutes to alcoholics. In *Budd v. California*,[24] the Court recently declined to review an appeal which questioned the validity of a California public intoxication statute.[25] Another opportunity

18. 356 F.2d 761 (4th Cir. 1966).

19. 361 F.2d 50 (D.C. Cir. 1966).

20. For a more detailed criticism of the Driver and Easter decisions, see Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966). The Driver and Easter cases have sparked a series of varied and somewhat confused legal comments. See, e.g., Judice, Public Intoxication, 30 Texas Bar J. 341 (1967); Alcoholism, Public Intoxication and the Law, 2 Colum. J. of L. & Soc. Prob. 109 (1966); Note, 1966 Duke L.J. 545; Note, 52 Cornell L.Q. 470 (1967).

21. 20 N.Y.2d at 315, — N.E.2d at —, — N.Y.S.2d at — (1967).

22. 383 U.S. 252 (1966).

23. Id. at 257 (citation omitted).

24. 385 U.S. 909 (1966).

25. Mr. Justice Fortas wrote a vigorous dissent, in which Mr. Justice Douglas joined.

to rule on this question, however, will be presented to the Court during the 1967 October Term in the case of *Powell v. Texas*.[26] Appellant Powell was convicted under a state public intoxication statute and has appealed to the Supreme Court on the issue of the statute's constitutionality. Although the appeal in *Powell* is predicated on the appellant's chronic alcoholism, hopefully the Supreme Court, if it accepts the appeal, will follow the progressive reasoning of the New York Court of Appeals in *Fenster* and address itself to the fundamental unconstitutionality of public intoxication statutes, and not merely their invalidity as applied to alcoholics.[27]

III. The Revised Penal Law

On September 1, 1967, the Revised Penal Law became effective in New York.[28] The Temporary State Commission on Revision of the Penal Law and Criminal Code, which prepared the new statute, described it as revising "virtually every substantial area of the existing Penal Law in varying degrees ranging from the mild to the drastic."[29] In most areas, the revision is commendably drastic. In the area of status arrests, however, virtually no reform has been achieved.

The Revised Penal Law, for example, contains a rather traditional public intoxication statute, which makes it an offense for any person to appear in a public place under the influence of alcohol to a "degree that he may endanger himself or other persons or property, or annoy persons in his vicinity."[30] By limiting the violation of public intoxication to situations where the inebriated individual endangers persons or property or annoys others, the Revised Penal Law represents a slight change from the former section, which had made it an offense for any person to be intoxicated in a public place even though he caused no danger or an-

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Unfortunately, however, the rationale of the dissent was essentially that of Driver and Easter. Id. at 909-13.

26. No. 405, appeal docketed, July 21, 1967.

27. Unfortunately, the influence of the Driver and Easter cases has been so great that a number of cases have appeared throughout the country, raising chronic alcoholism as a defense to a charge of public intoxication. Appeals based on this rationale are now pending in the highest courts of three states: Seattle v. Hill, No. 39050 (Washington Supreme Court); People v. Hoy, No. 51563 (Michigan Supreme Court); Commonwealth v. Owens, Dkt. No. 74393 (Middlesex Superior Court, on certification to the Supreme Judicial Court of Massachusetts). In Dunlap v. City of Atlanta, No. 29126 (Fulton Superior Ct., Ga. July 17, 1967), a public intoxication conviction in the Atlanta Municipal Court was reversed on the ground that the defendant was a chronic alcoholic.

28. N.Y. Sess. Laws 1965, chs. 1030-31, 1037-39, 1046-47.

29. See Commission Foreword to N.Y. Rev. Pen. Law at x.

30. N.Y. Rev. Pen. Law § 240.40.

noyance.[31] The public intoxication section of the Revised Penal Law, however, deviates somewhat from the provision of the Model Penal Code upon which it is based, section 250.5, which excludes imprisonment except for persons shown to be habitual drunkards by frequent prior convictions.[32]

In the area of vagrancy arrests, the Revised Penal Law also failed to achieve reform. To replace the vagrancy section of the Code of Criminal Procedure, the Revised Penal Law has adopted a general "loitering" provision which reads in part as follows: "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 reasonably credible account of his conduct and purposes . . . ."[33] This section of the Revised Penal Law is based on a similar section contained in Tentative Draft No. 13 of the Model Penal Code, whose constitutionality the Council of the American Law Institute itself seriously questioned. Tentative Draft No. 13 had made the basis of the loitering offense "circumstances which justify suspicion that . . . [an individual] may be engaged or about to engage in crime."[34] The Official Draft, however, changed the basis of the offense to "circumstances that warrant alarm for the safety of persons or property in the vicinity."[35] In submitting the Official Draft to the members of the American Law Institute, the Council pointed out that the change was "desireable to save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause."[36] Moreover, the commentary to the Model Penal Code's limited "loitering" section expressed doubt as to the propriety of including any such provision in a code of substantive penal law.[37]

The Revised Penal Law's rejection of the section in the Official Draft

31. N.Y. Pen. Law § 1221 (Supp. 1966), repealed by N.Y. Rev. Pen. Law § 500.00.

32. The Model Penal Code also suggested a requirement that the defendant be "manifestly" drunk, in order to require some aberrant behavior before an arrest would be justified. Model Penal Code § 250.11, comment at 56 (Tent. Draft No. 13, 1961) (now Model Penal Code § 250.5 (Off. Draft, 1962).

33. N.Y. Rev. Pen. Law § 240.35(6) (emphasis added).

34. Model Penal Code § 250.12 (Tent. Draft No. 13, 1961).

35. Model Penal Code § 250.6 (Off. Draft, 1962).

36. Model Penal Code, at 227 (Off. Draft, 1962).

37. Model Penal Code § 250.12, comment at 60 (Tent. Draft No. 13, 1961) (now Model Penal Code § 250.6 (Off. Draft, 1962) (emphasis added).

in favor of the more doubtfully constitutional provision of the earlier draft was ill-advised. The court of appeals had already stated that it would construe a loitering statute critically. In *People v. Diaz*,[38] the court sustained a challenge to the constitutionality of a city ordinance which prohibited loitering or lounging around any street or street corner. Judge Dye, writing for a unanimous court, observed: "While the term 'loiter' or 'loitering' has by long usage acquired a common and accepted meaning . . . without more, such term is enough to inform a citizen of its criminal implications and, by the same token, leave it open to arbitrary enforcement."[39] In any event, it would appear that under the rationale of *Fenster* both the new loitering section and the new public intoxication provision are unconstitutional.[40]

IV. Status Arrests in New York City

Following the decision of the court of appeals in *Fenster*, Chief Inspector Sanford D. Garelik, at the instance of Police Commissioner Howard R. Leary, issued an order calling attention to the decision and directing that "no arrest shall be made for violations of subdivision 1 of § 887(1), Code of Criminal Procedure."[41] Chief Garelik had issued a similar order on June 10, 1966, relative to section 722(2) of the Penal Law, the state's disorderly conduct statute.[42] This order directed the police to arrest derelicts for disorderly conduct only when the facts and evidence were sufficient to sustain such a charge. In the fiscal year immediately following Chief Garelik's order, July 1, 1966 to June 30, 1967, there were only 10,929 arrests for disorderly conduct compared to 41,808 for the period of July 1, 1965 to June 30, 1966.[43] This is in sharp contrast to what happened in the District of Columbia after the *Easter* decision where a dramatic increase in arrests for public intoxication occurred.

On September 1, 1967, however, the Revised Penal Law, including the provisions (of very doubtful constitutionality) on loitering and public

38. 4 N.Y.2d 469, 151 N.E.2d 871, 176 N.Y.S.2d 313 (1958).

39. Id. at 470, 151 N.E.2d at 872, 176 N.Y.S.2d at 315.

40. It is of interest in this connection that the Fulton Superior Court in Dunlap v. City of Atlanta, No. 29126 (Fulton Superior Ct., Ga. July 17, 1967), in reversing the public intoxication conviction, also reversed a loitering conviction against the defendant arising out of the same facts.

41. Order re: Arrests of Vagrants Charged with Code Crim. Proc. § 887(1) from Sanford D. Garelik, Chief Inspector, N.Y.C. Police Dep't, to All Commands, July 21, 1967 (C.I. Memo 40).

42. Order re: Arrests of Vagrants Charged with N.Y. Pen. Law § 722(2) from Sanford D. Garelik, Chief Inspector, N.Y.C. Police Dep't, to All Commands, June 10, 1966 (T.O.P. No. 206).

43. Letter from Elmer C. Cone, Assistant Chief Inspector, N.Y.C. Police Dep't, to the author, August 3, 1967, on file with the Fordham Law Review.

intoxication, became effective in New York City. It is too early to report on whether the New York police are making arrests under the new law.

V. THE PRESIDENT'S COMMISSION

In February of this year the President's Commission on Law Enforcement and Administration of Justice issued a report entitled *The Challenge of Crime in a Free Society*.[44] This report noted that although one third of the arrests and convictions in America each year are for public intoxication, "almost everyone in the criminal justice system and out of it has recognized that the criminal process is an irrational means of dealing with drunks."[45] In pointing out that the treatment of drunkenness as a penal offense seriously burdens and distorts the operation of the system of criminal justice, the Commission report observes: "Because the police do not often arrest the intoxicated person who has a home, there is in arrest practices an inherent discrimination against the homeless and the poor. Due process safeguards are often considered unnecessary or futile. . . .

"The handling of drunkenness cases in court hardly reflects the standards of fairness that are the basis of our system of criminal justice."[46] The President's Commission found also that the disproportionately large volume of drunkenness cases diverts necessary resources of the police, the courts and the correctional systems from serious criminal problems.[47] Consequently, the Commission concluded that drunkenness alone, as distinguished from disorderly conduct, should no longer be considered a crime.[48] In addition to the elimination of the criminal treatment of drunkenness unaccompanied by otherwise unlawful conduct, the Commission recommended the development of adequate civil detoxifi-

44. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967).

45. Id. at 14.

46. Id. at 235. In a report subsequently issued by the Commission, entitled Task Force Report: Drunkenness (1967), the following footnote appears at page 1: 1965 FBI Uniform Crime Reports 117 (table 25). In 1965, 1,516,548 drunkenness arrests were reported by 4,043 agencies, embracing a total population of 125,139,000. Projections based upon these figures indicate that there were over 2 million arrests in the entire country during 1965. An undetermined number of additional arrests for drunkenness are made under disorderly conduct, vagrancy, loitering, and related statutes. See, e.g., Foote, Vagrancy-Type Law and its Administration, 104 U. Pa. L. Rev. 603 (1956) (discussion of interchanging of statutes for like purposes); Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1-7 (1966) (description of the prior New York City practice of using a disorderly conduct statute to arrest nondisorderly inebriates).

47. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967).

48. Id.

cation centers, the coordination and extension of aftercare programs and the expansion of research into the problems of alcoholism.[49]

VI. Conclusion

It is significant that the President's Commisson did not involve itself in the issue of the invalidity of statutes as applied to alcoholics but addressed itself squarely to the fundamental question of the desireability and validity of statutes as applied to any person. Like the court of appeals in *Fenster* and the Advisory Committee of the American Law Institute, the President's Commission would limit all such arrests to instances in which the conduct of an inebriate or vagrant *disturbs others.*

Over two million derelicts are arrested annually in the United States under public intoxication, disorderly conduct, vagrancy, loitering and related statutes. While drunkenness may be the occasion for the arrest, human inadequacy is the gravamen of the offense.[50] The arrests are status arrests. Such punishment of the harmless and unfortunate is a cruel anachronism in our free society. The recommendations of the President's Commission and the progressive thinking of the court in *Fenster* promise effective treatment of the problems of drunkenness and amelioration of the conditions contributing to the existence of such chronic human inadequacy.*

49. Id.

50. Id. at 233.

* On October 9, 1967, after this article was in proofs, the United States Supreme Court noted probable jurisdiction in Powell v. Texas, which was discussed in the text accompanying notes 26 & 27. N.Y. Times, Oct. 10, 1967, at 77, col. 4.