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Orders to Move On and the Prevention of Crime

Police officers on patrol often observe suspicious conduct. Since this conduct may represent the first stages of crime, public safety often depends on the authority of the officers to investigate and intervene. A traditional method of intervention has been arrest for loitering or vagrancy. In *Papachristou v. City of Jacksonville,* however, the Supreme Court invalidated an ordinance against loitering and vagrancy. The Court found that the law failed to give notice of the prohibited conduct and invited arbitrary enforcement. After that decision, laws permitting arrests for vagrancy and loitering have increasingly fallen to constitutional challenge.

Invalidation of these laws has left a gap in the measures by which the police officer can prevent crime. When investigation does not dispel suspicion that a crime is about to occur, the officer needs to interrupt the activity that gave rise to his suspicion. But he has no legal method of intervention except arrest, and he can make an arrest only when he believes that a crime has already taken place. Although some


2. 405 U.S. 156 (1972).

3. Id. at 162.


Faced with the difficulty of preventing street crime, police continue to resort to vagrancy and loitering laws despite their doubtful constitutionality. In 1975 the police made 40,000 arrests for vagrancy and 146,400 arrests for loitering and curfew violations. They made an additional 36,500 arrests upon “suspicion.” United States *FEDERAL BUREAU OF INVESTIGATION,* [1975] *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 179 (1976). An arrest for suspicion permits detention and examination of the suspect by the police, after which the suspect is released without formal charge. By comparison, there were 158,870 arrests for robbery in 1975. Id.

5. See p. 603 infra.
criminal laws, including loitering laws sufficiently narrow to survive the objections in *Papachristou*, do permit arrests for the first steps toward other crimes, these laws are constitutional only when they cover well-defined conduct. And the officer cannot make an arrest under these laws unless his certainty about the suspect's guilt has risen to the level of "probable cause." 

Because of these limitations, criminal laws enforced through arrest do not entirely satisfy the need for preventive measures. In *Terry v. Ohio,* the Supreme Court approved police intervention short of arrest when the need for intervention outweighs the invasion of personal liberty. This approval of intervention short of arrest suggests a constitutional method for preventing crime: under a narrowly written statute, designed to restrict personal liberty as little as possible, the police could order suspects to move on. In order to show the need for such a statute, this Note will first review the preventive measures now available to the police. It will then examine loitering and vagrancy laws to illustrate the constitutional limits on preventive action by the police and will argue that loitering and vagrancy laws sufficiently narrow to meet constitutional requirements are inadequate to prevent crime. It will propose instead a statute authorizing the police to give orders to move on. Drafted to remain within constitutional bounds and circumscribed by adequate remedies for abuses by the police, such a statute would offer a means to prevent street crime without creating arbitrary or ungovernable power.

I. Action by the Police to Prevent Crime

A police officer is charged with the duty not only to detect crime but also to prevent it from occurring. To carry out the duty of prevention, the officer must interrupt suspicious activity before it becomes completed crime. During the large amount of time that the urban police officer spends on street patrol, his knowledge of the area and of the people frequenting it will alert him to suspicious conduct that may represent the first stages of crime.

Consider two examples. A stranger follows a woman home and waits

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7. See p. 606 infra.
9. Id. at 21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).
10. See Adams v. Williams, 407 U.S. 143, 145 (1972) ("essence of good police work" may be to respond when crime about to occur).
11. Cf. T. Adams, Police Patrol 2 (1971) (patrol is "most important single function of the police department").
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outside on the sidewalk. After the police question the stranger, learn his name, and radio to the police station, they discover that this person was once convicted of indecent assault. Or suppose that several people gather at night in a nearly deserted parking lot where a number of muggings have recently taken place. The muggings have happened at this time of night and have been committed by groups of several people. When questioned by an officer, the people in the lot refuse to identify themselves or to explain what they are doing.

Traditionally, the police could have forestalled the threat of crime in such situations by making arrests for vagrancy or loitering. But this means of intervention is no longer available to them. After Papachristou and Terry, the police have four recognized constitutional methods of dealing with what they regard as incipient crime: the investigative stop, stop and frisk, arrest for inchoate crime, and arrest for completed crime. When the officer has “reasonable suspicion” of criminal activity, he can make an investigative stop for questioning.

The officer does not need to believe that a crime “probably” has occurred or is about to occur; he need only have an objective basis to suspect criminal conduct. In conducting the investigative stop, the officer may request identification and an explanation of the suspect’s conduct. If “specific and articulable facts” justify the suspicion that a person is armed and dangerous, the officer may also conduct a “frisk”—a limited external search for weapons. The Supreme Court first recognized this power to stop and frisk in Terry v. Ohio. By balancing the need for the police to act against the intrusion into personal liberty, the Court found the stop and frisk reasonable under the Fourth Amendment. The requirement of “specific and articulable facts” assured that the stop and frisk would be objectively justifiable and reviewable.

Arrest for either a completed or an inchoate crime must be based

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12. See note 1 supra.
13. See United States v. Brignoni-Ponce, 422 U.S. 873, 881, 884-85 (1975). Government agents had stopped a car to look for illegal aliens. The Court held the particular stop unlawful because the only ground for suspicion was the Mexican appearance of the occupants, but the Court would have allowed a stop based on “reasonable suspicion.” Id. at 884-86.
14. Id. at 884-85.
17. Id. In Terry an officer observed that two men had repeatedly walked in front of a store. Suspecting that the men were planning a robbery, the officer approached them and questioned them about their conduct. When he received incoherent replies, the officer frisked the suspects and discovered weapons. Id. at 5-7.
18. Id. at 21, 30.
19. Id. at 21.
upon a greater degree of certainty. Under the Fourth Amendment, only "probable cause" can justify an arrest or a search incident to arrest.\footnote{See Henry v. United States, 361 U.S. 98, 100-02 (1959). The Court in dictum recently reaffirmed this rule from Henry. Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975).} An officer has probable cause "if the facts and circumstances known to [him] warrant a prudent man in believing that the offense has been committed."\footnote{361 U.S. at 102.} This standard makes arrest unlawful unless the officer has substantial grounds to believe that a person has broken the law.\footnote{In Henry, for example, federal agents were investigating the theft of an interstate shipment of whiskey. The agents had heard rumors that a friend of the petitioner was involved in some sort of interstate shipment. When the agents saw the petitioner, who had never before been suspected of crime, stop his car in an alley and pick up some packages, the agents arrested him. The packages contained stolen radios. The Court found that the petitioner's activity consisted of "acts that were outwardly innocent." Id. at 103. Declaring that the agents lacked probable cause, the Court held the arrest unlawful and suppressed the evidence seized. See People v. Brown, 24 N.Y.2d 421, 424, 248 N.E.2d 867, 868-69, 301 N.Y.S.2d 18, 20 (1969) ("[T]he detected pattern [of activity] ... does not provide probable cause for arrest if the same sketchy pattern occurs just as frequently or even more frequently in innocent transactions.")}

By investigating suspicious conduct, the officer may gain probable cause to believe that the person suspected of planning a crime has in fact already committed one. The officer can then prevent further crime by arresting the suspect for the completed offense and by removing him from the area. Even if the officer has not found probable cause as to a completed offense, he may have grounds to arrest the suspect for an inchoate crime,\footnote{Crime is "inchoate" when the suspect has committed no completed offense, but may be punished for steps leading toward a crime.} such as criminal attempt or possession of burglar's tools. Since the laws on inchoate crimes reach only the advanced stages of preparation for other crimes,\footnote{A classic case in the law of attempt, for example, is People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927), in which the defendant, who intended to rob the messenger of a bank, rode in search of the messenger but failed to find him. The New York Court of Appeals held that his actions did not amount to criminal attempt.} however, they extend in only a limited way the authority of the police to remove suspicious persons from the area.

These methods alone—the investigative stop, stop and frisk, and arrest for inchoate or completed crime—do not sufficiently enable the policeman to discharge his duty to prevent crime. In the illustrations above, questioning and frisking of the suspects might not reveal enough information to ground probable cause. But because a reasonable suspicion that a crime was imminent would remain, the police would need to act despite the absence of probable cause. Arrests for loitering or vagrancy would once have allowed the police to intervene by removing suspicious persons from the area of anticipated crimes, but the un-
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constitutionality of loitering and vagrancy laws that served a general preventive purpose leaves the police without an effective means of intervention.

II. Papachristou and the Constitutional Limits on Laws Against Vagrancy and Loitering

Laws against vagrancy and loitering permitted arrest when the exercise of an officer’s other preventive powers did not dispel the suspicion that a crime was about to take place. An examination of why courts have invalidated many of these laws illustrates the constitutional limits on preventive action by the police, and a discussion of loitering and vagrancy laws sufficiently narrow to meet these limits demonstrates the need for an additional preventive measure.

A. Constitutional Limits

In Papachristou v. City of Jacksonville,\(^ {25} \) the Supreme Court held a municipal ordinance proscribing vagrancy and loitering to be vague and thus to constitute a denial of due process. In dictum the Court implied that the ordinance violated the standards for search and seizure of the Fourth Amendment as well,\(^ {26} \) and other courts have explicitly held such laws in violation of that amendment.\(^ {27} \) Loitering laws that force a suspect to explain his presence and conduct or to face arrest may also violate the Fifth Amendment right against self-incrimination.\(^ {28} \)

1. Due Process and the Doctrine of Vagueness\(^ {29} \)

Before states or the federal government can impose criminal penalties, due process requires a clear specification of the prohibited con-

26. Id. at 169.
29. In addition to the considerations to be discussed in this section—lack of fair notice and the possibility of arbitrary enforcement—the doctrine of vagueness has another element: the Supreme Court has been more willing to apply the doctrine when constitutionally protected conduct might fall within the statutory prohibition. Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 75 (1960). See, e.g., Cramp v. Board of Educ., 368 U.S. 278, 287 (1961) (state employees compelled to swear that they had not supported Communist Party; problems of vagueness “aggravated” because law inhibited free expression).
duct. In *Papachristou* the Supreme Court identified two defects that can make criminal laws void for vagueness. First, the laws may fail to provide "fair notice" of the forbidden conduct. Unless the legislature has drawn a clear line between permissible and impermissible conduct, fear of punishment may lead individuals to refrain from innocent activity. The Court has deemed it unfair to impose punishment for activity that members of the public could not have known to be forbidden and so did not avoid.

Second, the Court in *Papachristou* condemned laws that delegate excessively broad official discretion. When a law confers too much discretion on the officer, it encourages "arbitrary and erratic arrests and convictions" and allows police and prosecutors to attack conduct that the legislature did not intend to forbid. Especially vulnerable

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30. The Supreme Court may declare a civil statute void for vagueness as well. See A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925) (statute prohibiting "unjust or unreasonable" charges found vague). The doctrine has vitality, however, almost exclusively in the criminal field. See Note, *supra* note 29, at 69 n.16. Because even civil statutes may in theory be found vague, however, this Note will consider the doctrine of vagueness in relation to the proposal advanced at pp. 618-19 *infra*, which creates only a civil offense.

31. 405 U.S. at 162 ("This ordinance . . . 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' . . . .") (quoting United States v. Harris, 347 U.S. 612, 617 (1954)).

32. *See Baggett v. Bullitt*, 377 U.S. 360 (1964) (law commanding state civil servants to take oath). "The uncertain meanings of the oath require the oath-taker . . . to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Id.* at 372 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Justice Holmes expressed a similar idea in a civil tax case: "[T]he very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395-96 (1930). *See H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION* 94-95 (1968). The vagueness doctrine guarantees that "no more power [should] be given to call conduct into question as criminal, with all the destruction of human autonomy that this power necessarily imports, than is reasonably needed to deal with the conduct that the lawmakers seek to prevent." *Id.* This reluctance to direct personal conduct grows out of classical liberal beliefs: "[F]ree scope should be given to varieties of character, short of injury to others." *J.S. MILL, ON LIBERTY* 68 (Bobbs-Merrill ed. 1956).

33. Justice Holmes once wrote:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals . . . a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

34. "McBoyle concerned strict construction of a penal statute rather than vagueness, but such strict construction has been called "something of a junior version of the vagueness doctrine." H. PACKER, *supra* note 32, at 95. *See also* Connally v. General Constr. Co., 269 U.S. 385, 393 (1926) (necessity of standard so that persons can avoid prohibited acts).


are unpopular persons whom the police wish to harass but cannot arrest for any more precisely defined offense. The police can enforce most criminal laws selectively, but vague laws permit a different kind of arbitrary action: they define the prohibited conduct so loosely that the officer can decide for himself which acts violate the law.

Loitering and vagrancy laws were useful in the prevention of crime precisely because of their vagueness. The police officer could fit within the expansive terms of these laws much of the conduct that might signal the first stages of crime. Although vagrancy and loitering laws allowed the officer to interrupt suspicious conduct by making arrests, the laws failed to give adequate notice and insufficiently limited the officer's discretion.

2. The Fourth Amendment and Unreasonable Searches and Seizures

Vagrancy and loitering laws allowed the police to avoid the Fourth Amendment requirement of probable cause for arrest. When these laws prohibited "suspicious" activity, the officer needed only "probable cause" to believe that conduct was suspicious. Since the officer's "probable cause" consisted merely of his suspicion, he really had no probable cause at all. The Court in Papachristou found the require-


39. The ordinance in Papachristou identified as vagrants all "rogues and vagabonds, . . ., common night walkers, . . . persons wandering or strolling around from place to place without any lawful purpose or object, . . ., disorderly persons" and other misfits. 405 U.S. at 156 n.1. Traditional notions of "loitering" and "vagrancy" are expansive and unspecific. To loiter is "[t]o be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind." Black's Law Dictionary 1092 (4th ed. 1968). Vagrancy consists of "the act of going about from place to place by a person without visible means of support, who is idle, and who, though able to work for his or her maintenance, refuses to do so, but lives without labor or on the charity of others." Id. at 1718. A Seattle ordinance made it criminal for anyone "wandering or loitering abroad, or abroad under other suspicious circumstances at night . . . to fail to give a satisfactory account of himself upon the demand of any police officer." Seattle Code § 12.11.290 (cited in City of Seattle v. Drew, 70 Wash. 2d 405, 406, 423 P.2d 522, 523 (1967)).

40. See United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), aff'd on other grounds sub nom. Lefkowitz v. Newsome, 420 U.S. 283 (1975). In Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1975), the court wrote: "A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense."
ment of probable cause undermined even further because the suspicion centered not on past but on "[f]uture criminality." The use of arrest to interrupt suspicious conduct thus conflicts with the Fourth Amendment.

3. The Fifth Amendment and Self-Incrimination

Some loitering laws have authorized the police to demand that a suspect explain his presence and conduct. This demand presents the suspect with a dilemma: by not answering, he may suffer arrest and conviction for loitering; by complying with the demand, he may provide the police with evidence leading to his arrest and conviction for other offenses. These laws impose a criminal penalty for the suspect’s refusal to give information that might incriminate him. The ordinance challenged in Papachristou did not present this problem, and the Supreme Court has not ruled on the issue. But another court has condemned a loitering law permitting an officer to demand an explanation because of the burden placed on the right against self-incrimination under the Fifth Amendment.

The courts thus have found three basic constitutional limits on the power of the police to intervene against suspicious conduct. Due process requires fair notice of criminally prohibited conduct and demands adequate limitations on the discretion of the police. Under the Fourth Amendment, the police cannot make arrests without probable cause. And the Fifth Amendment restricts the power to compel disclosures from suspects upon pain of criminal sanctions.

B. More Precise and Limited Vagrancy and Loitering Laws

Loitering and vagrancy laws more precisely defined and limited than the ordinance in Papachristou continue to come before courts. In some instances these laws represent attempts to avoid the constitutional problems of broader vagrancy and loitering laws. These more

41. 405 U.S. at 169.
42. See notes 60 & 61 infra.
43. The right against self-incrimination "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966).
precise laws, however, either fail to satisfy the Constitution or are ineffective in preventing crime.\textsuperscript{46}

Some laws prohibit loitering that is supplemented either by other conduct or by additional intent. When statutes forbid loitering in combination with other conduct, such as carrying a concealed weapon, courts have upheld the laws against charges of vagueness. By specifying other conduct as an element of the offense, these statutes “give notice as to what constitutes the unlawful conduct.”\textsuperscript{47} Since the element of additional conduct clarifies what the legislature intended to forbid, such statutes also reduce the danger of arbitrary enforcement.

The Fourth Amendment, however, demands that the arresting officer have probable cause of both the “loitering” and the other conduct, since both elements are necessary to constitute the offense.\textsuperscript{48} When the officer suspects a criminal plan but is not warranted in believing that the suspect has committed the additional act,\textsuperscript{49} this type of statute does not advance his ability to prevent crime.\textsuperscript{50}

Other laws prohibit loitering committed with the “specific intent”\textsuperscript{51} to perform some other act, usually criminal in itself. The

\textsuperscript{46} These laws, discussed at pp. 611–16 \textit{infra}, would not enable the police to intervene in the examples hypothesized at pp. 604–05 \textit{supra}.

\textsuperscript{47} Yuen v. Municipal Court, 52 Cal. App. 3d 351, 358, 125 Cal. Rptr. 87, 92 (1975). The appellant in \textit{Yuen} had been convicted under an ordinance of San Francisco that defined an offense in terms reminiscent of the law in \textit{Papachristou}. The law, however, required an additional element for the offense: carrying a concealed weapon. According to the California Court of Appeals this element was “a sufficient additional requirement to give notice” of the forbidden conduct. \textit{Id.} See \textit{People v. Smith}, 393 N.Y.S.2d 239 (App. Term 1977) upholding N.Y. \textit{PENAL LAW} § 240.37 (West Supp. 1976), which requires loitering supplemented by additional conduct of beckoning to or stopping or interfering with passers-by; intent to solicit prostitution also required).

\textsuperscript{48} The court in \textit{Yuen} never discussed the details of the arrest. Unless courts delve into the facts of arrests and searches, the statute lets the police circumvent even the requirements of the stop and frisk. Under the principles regulating stops and frisks, the police officer may search the suspect only if he reasonably believes that the suspect is “armed and dangerous.” \textit{Terry v. Ohio}, 392 U.S. 1, 24 (1968). Unless an external search discloses an object that feels like a weapon, the officer may not reach into the suspect’s clothing. \textit{Id.} at 29–30. See \textit{Adams v. Williams}, 407 U.S. 143 (1972). Unless courts examine the facts surrounding arrests more closely than the court in \textit{Yuen} did, an arrest predicated on mere loitering might enable the police to conduct a full search of the suspect.

\textsuperscript{49} The statute in \textit{Yuen}, for example, would require probable cause to believe that the suspect was carrying a concealed weapon. \textit{See} pp. 605–06 \textit{supra} (discussing probable cause).

\textsuperscript{50} As a preventive measure, the statute in \textit{Yuen} adds nothing to the stop and frisk. The officer can frisk a suspect when he reasonably believes the suspect to be armed and dangerous. \textit{Terry v. Ohio}, 392 U.S. 1, 24 (1968). If the frisk uncovers a concealed weapon, the officer can make an arrest under a different statute that forbids the carrying of such weapons but does not require the element of loitering. \textit{E.g.}, CAL. \textit{PENAL CODE} § 12025 (West Supp. 1977). Unlike frisks, searches under the statute in \textit{Yuen} could be justified only by probable cause and not by reasonable suspicion.

\textsuperscript{51} “Specific intent” refers to a “special mental element which is required above and beyond any mental state required with respect to the \textit{actus reus} [unlawful act] of the
California Penal Code, for example, forbids loitering near a public toilet "for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act." The specific intent identified in this law is a plan to commit the crime of soliciting or performing a lewd act.

Although one court has declared such a law void for vagueness, prohibitions against loitering with intent to commit some other act have usually withstood constitutional challenge. These laws may avoid vagueness because they limit the officer's discretion and give notice to the individual. The officer can make an arrest only when the acts or words of the suspect establish probable cause concerning the necessary intent. And the individual has notice that he cannot plan crimes and take actions toward realizing his criminal purpose. Yet these laws promise little help in the prevention of crime. When the police officer only suspects the required intent, but lacks probable cause, he cannot constitutionally remove the suspect from the area by making an arrest.

Another approach is to forbid anyone to be in particular places, such as parks and schools, at particular times. Courts have sustained such crime. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 28, at 202 (1972). Just as burglary consists of breaking and entering the home of another person at night with the intent to commit some felony, see e.g., CONN. GEN. STAT. § 53a-102(a) (1977), so the loitering laws considered here define an offense of loitering with intent to commit some other crime.

52. CAL. PENAL CODE § 647(d) (West Supp. 1977). In People v. Ledenbach, 61 Cal. App. 3d (Supp.) 7, 132 Cal. Rptr. 43 (1976), the California Court of Appeal, without fully engaging the constitutional problems, sustained this statute against an argument that the provision was unconstitutionally vague. The court distinguished the ordinance in Papa-christou on the grounds that the ordinance reviewed by the United States Supreme Court made criminal "activities which by modern standards are normally innocent." Id. at 10, 132 Cal. Rptr. at 64. Quoting Papa-christou v. City of Jacksonville, 405 U.S. 156, 163 (1972), the California court interpreted the statute before it to require "linger[ing] for the purpose of committing a crime." Id. at 10, 132 Cal. Rptr. at 64. The court never answered the objection of inadequate notice. Even if the statute reaches only activities that are not innocent, individuals have a right to know what particular conduct falls within the statute.

53. See People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974) (en banc) (striking down law against loitering with intent to solicit deviate sexual intercourse). An Oregon court upheld an ordinance against loitering with intent to solicit prostitution only on the interpretation that the law required conduct in addition to loitering and not just additional intent. State ex rel. Juvenile Dep't v. D., 557 P.2d 687, 690 (Or. App. 1976).


55. Although these laws may not specify the particular acts that will reveal a criminal purpose, neither do laws on criminal attempt specify the particular acts in furtherance of a criminal scheme that are necessary to constitute an attempt.

56. Similar are prohibitions against loitering near a school; such laws, though specifying location, may not specify time. See, e.g., Anderson v. Shaver, 290 F. Supp. 920, 921 (D.N.M. 1968).
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laws. To avoid problems of vagueness, such a statute must create an absolute proscription. By forbidding all persons to be in a particular place at a particular time, the statute not only provides unambiguous notice of the conduct prohibited but also guards against arbitrary enforcement.

The police officer is primarily concerned with crime on streets and sidewalks. A law could not, however, absolutely prohibit people from being on streets and sidewalks. Yet if the prohibition established by the law is less than absolute, problems of vagueness arise. Individuals can be told not to "loiter" in a particular location at a specified time, but they will not understand what conduct constitutes loitering any more clearly under this kind of statute than under others not limited by time or location. Nor would such a law eliminate the danger of arbitrary enforcement, since it would leave unclear the conduct that the legislature intended to forbid.

A number of jurisdictions have enacted loitering laws based on a proposal in the Model Penal Code. The Code would forbid loitering under "circumstances that warrant alarm for the safety of persons or property in the vicinity." No suspect could be found liable under this kind of statute, for the law would not define what conduct the legislature intended to forbid.

57. See Peters v. Breier, 322 F. Supp. 1171 (E.D. Wis. 1971) (upholding ordinance that prohibited anyone from being in certain public park during specified hours). The court in Peters stressed that the ordinance applied only to a "small, localized area." Id. at 1172. More important, but unnoted by the court, was that the prohibition was absolute, so that it did not invite arbitrary enforcement or leave any doubt about what conduct was covered.

A similar method of escaping problems of notice, though not of arbitrary enforcement, is to require all persons entering certain areas to obtain permission from designated officials. See State v. Kimball, 54 Haw. 83, 87-90, 503 P.2d 176, 179-80 (1972) (permission of school officials to be on school grounds).

58. The terms of the statute should clearly set out what conduct violates the law. Only that conduct can justify an arrest.

59. The Supreme Court of Washington adopted this reasoning in State v. Martinez, 85 Wash. 2d 671, 538 P.2d 521 (1975). Martinez invalidated a statute that identified as a vagrant every "[p]erson, except a person enrolled as a student in or parents or guardians of such students or person employed by such school or institution, who without lawful purpose therefor wilfully loiters about the building or buildings of any public or private school . . . or the public premises adjacent thereto . . . ." Wash. Rev. Code Ann. § 9.87.010 (repealed 1975). The statute, ruled the court, did not afford fair notice of what conduct it forbade; it encouraged arbitrary arrests; and it embodied an improper classification (since teachers, exempted from the prohibition, might be as disruptive as anyone).


61. The Code provides:

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
the Code if he undertook to "identify himself and explain his presence and conduct" to the officer, provided that the explanation dispelled alarm or "was true, and if believed by the peace officer at the time, would have dispelled the alarm." Although the proposal in the Code would subject violators to civil penalties only, jurisdictions enacting laws based on the Code have imposed criminal sanctions.

Courts have reached conflicting conclusions about the constitutionality of criminal laws similar to the Code. Some courts have found that suspects cannot know what "circumstances . . . warrant alarm for the safety of persons or property" and that the laws, therefore, fail to give fair notice. In *State v. Ecker*, however, the Supreme Court of Florida suggested a saving construction of such a law. To make an

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 circumstance 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.

**MODEL PENAL CODE** § 250.6 (Proposed Official Draft, 1962). A "violation" under the Code is subject only to civil penalties. Id. at § 1.04(5).

62. Id. at § 250.6.

63. See note 60 supra (citing laws).


65. See note 61 supra (quoting Code).

66. New York, for instance, passed a statute that established a standard of "circumstances which justify suspicion that a person may be engaged or about to engage in crime." N.Y. PENAL LAW § 240.35(6) (McKinney 1967). Ruling on this statute, the Court of Appeals for New York found the standard "obscure" and held:

Assuredly, there are [sic] no commonly understood set of suspicious circumstances of which all citizens are aware and to which applicability of the statute is restricted. . . . [This language] merely indicates that a person may be held for loitering if suspicion of criminality happens to be created in the mind of the arresting officer.


Reviewing the same statute, the United States Court of Appeals for the Second Circuit noted that "[w]ith nothing more, the 'suspect' is hardly offered a bright line test for distinguishing the licit from the illicit." United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), aff'd on other grounds sub nom. Lefkowitz v. Newsome, 420 U.S. 283 (1975). Other courts, dealing with similar statutes, have voiced the same objections. See Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1975); City of Bellevue v. Miller, 85 Wash. 2d 539, 544-45, 556 P.2d 603, 607 (1975) (en banc).

67. 311 So. 2d 104 (Fla. 1975), cert. denied, 423 U.S. 1019 (1975).
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arrest, the court held, the police officer must be able to articulate "circumstances where peace and order are threatened or where the safety of persons or property is jeopardized." An officer able to meet that requirement would know "specific and articulable facts" justifying an inference that public safety was in danger—a standard similar to that approved in *Terry v. Ohio* for the stop and frisk. Reading the standard of "specific and articulable facts" into the statute, the Florida Supreme Court dismissed the argument that the law was vague.

The court's construction does not resolve the constitutional difficulties posed by the doctrine of vagueness. By requiring the police to base arrests on specific facts demonstrating a threat to public safety, a statute based on the Code may confine arbitrary enforcement. But the problem of fair notice remains. The standard of guilt is defined by the officer's state of knowledge, and individuals can know what is forbidden only if they can predict what conduct and what surrounding circumstances would alarm a trained and experienced officer.

Nor could a court escape from the failure of notice by adopting as a standard what would alarm a reasonable person. Such a standard would preclude the police officer from taking into account any surrounding circumstances known to him but not to the public, such as the pattern of crime in the area. A criminal law aimed at prevention of crime

68. *Id.* at 109.
69. *Id.* at 109 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).
70. *Id.*
71. If the Model Penal Code were enacted without change, the law would provide only for civil sanctions. Arguably, a civil statute escapes problems of vagueness altogether, since the Supreme Court has invoked the doctrine almost exclusively against criminal laws. *See* note 30 *supra*. This Note assumes that civil laws directed against suspicious behavior must meet the requirements of the vagueness doctrine: like criminal laws, civil statutes providing for arrest are likely to inhibit innocent conduct unless the prohibition is clear. The doctrine of vagueness protects against that inhibition. *See* p. 608 *supra* *cf.* City of Bellevue v. Miller, 85 Wash. 2d 539, 543 n.4, 536 P.2d 603, 606 n.4 (1975) (en banc) (even statute based on Code that created civil violation would be tested for vagueness). But even if a civil statute evaded the doctrine of vagueness, the proposal in the Model Penal Code would be objectionable for policy reasons. *See* note 103 *infra*.
72. The Supreme Court of the United States has ruled that in making investigative stops, the police officer can take into account the pattern of crime in the area. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (observations by officer that justify stop and frisk may be evaluated "in light of his experience"). A more likely method of rescue from the constitutional difficulties of the Model Penal Code lies in the provision that protects from prosecution any suspect able to "identify himself and explain his presence and conduct" to the officer. *See* note 61 *supra*. In People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 415 U.S. 931 (1973), the California Court of Appeal upheld a statute like the Model Penal Code on the construction that such a phrase in the statute required only identification. As the California court argued, the officer's request for identification gave the suspect notice of what activity was prohibited by law. *Id.* at 435, 108 Cal. Rptr. at 870-71.
cannot both provide notice to the suspect and give full play to the police officer's expert knowledge.

Criminal laws based on the Code may also violate rights against unreasonable search and seizure and self-incrimination. Although the Fourth Amendment requires probable cause for an arrest, a police officer acting under the Code could arrest a suspect whose only offense was to have acted suspiciously and to have failed to dispel the suspicion.73 And by putting a suspect to the choice of explaining his conduct or facing arrest, the Code may compel self-incrimination in violation of the Fifth Amendment.74

73. See United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), aff'd on other grounds sub nom. Lefkowitz v. Newsome, 420 U.S. 283 (1975). "Probable cause" to believe that an individual has acted suspiciously and has not dispelled the alarm amounts to a reasonable certainty that there is suspicion. But suspicion is a less rigorous standard than probable cause. See note 40 supra.

The American Law Institute itself acknowledged, in the commentary to the forerunner of § 250.6 of the Model Penal Code, that the Code might be altering the standard of probable cause to arrest. It observed that the provision "authorizes arrest of persons who have not given reasonable ground for believing that they are engaged in or have committed offenses. Alternatively, it can be regarded as a legislative determination that in 'suspicious' circumstances, failure to respond to police inquiries supplies reasonable ground." MODEL PENAL CODE § 250.12, Comment at 60 (Tent. Draft No. 13, 1961).

Unlike statutes against loitering with specific intent to commit a crime, see pp. 611-12 supra, the Code does not require the officer to have probable cause concerning the suspect's intent.

74. In Marchetti v. United States, 390 U.S. 39 (1968), the Court overturned the conviction of a gambler for failure to register for and pay the wagering tax. The Court reasoned that registration and payment would have entailed "'real and appreciable'" dangers of self-incrimination. Id. at 48-49 (quoting Regina v. Boyes, 121 Eng. Rep. 730, 738 (Q.B. 1861)). A law creates a "real and appreciable" danger of self-incrimination if it is directed at a "highly selective group inherently suspect of criminal activities" in an area of the law "permeated with criminal statutes." Albertson v. Subversive Activities Control Bd., 388 U.S. 70, 79 (1965).

It is not beyond dispute whether, under Marchetti and the cases like it, a criminal law based on the Model Penal Code violates the Fifth Amendment. In Marchetti and similar cases, the act of giving any information at all was substantial and perhaps conclusive proof of a crime. See, e.g., Leary v. United States, 395 U.S. 61 (1969) (Marijuana Tax Act); cf. Haynes v. United States, 390 U.S. 85, 96 (1968) (although possession of some weapons covered by registration act was legal, registration would, in vast majority of cases, establish possessory offense under state or federal law; Fifth Amendment privilege held valid defense to prosecution). Persons asked to explain their presence under the Model Penal Code, on the other hand, are less likely to incriminate themselves, and in any event the very act of answering the officer will not ordinarily provide substantial proof of a crime.

Criminal laws based on the Model Penal Code nonetheless impose great burdens on the right against self-incrimination. Since only those whose conduct gives warning of possible criminality would have to explain themselves, the laws are directed at a "highly selective group inherently suspect of criminal activities." The legislative purpose is not regulatory but criminal, since laws based on the Code aim squarely at the apprehension of criminals and potential criminals. The laws thus operate in an area "permeated with criminal statutes."
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III. Orders to Move On: A Proposal

Loitering laws sufficiently broad to cover the examples in Part I fail to satisfy the Fourth, Fifth, and Fourteenth Amendments, and the laws that do survive the constitutional tests fail to cover the examples. A statute authorizing orders to move on would supply a constitutional and effective alternative to loitering and vagrancy laws. Although the police already issue orders to move on, the power to give these orders rests upon uncertain legal authority. Some existing statutes could be read to authorize orders to move on as preventive measures against street crime, but courts have fully considered orders

accidents to report themselves to the police. But although the driver whose conduct has been criminal need supply only the information that he has been in a particular accident, the suspect under the Model Penal Code must give an account of his activities sufficiently complete to dispel suspicion. Failure to do so is an element of a criminal offense, since the jurisdictions adopting the provision from the Model Penal Code have chosen to enact it as a criminal law. See note 61 supra (Model Penal Code itself proposes civil sanction).

A forced explanation may also violate the Fourteenth Amendment for reasons of vagueness, since the power to demand an account might lend itself to arbitrary enforcement. At least initially, the police officer must decide whether the suspect's account is credible. The authority to make that decision may give the officer an arbitrary power to arrest. See Powell v. Stone, 507 F.2d 95, 96 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976); People v. Berck, 32 N.Y.2d 567, 571-72, 300 N.E.2d 411, 414, 347 N.Y.S.2d 33, 37-38 (1975). See 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) (requirement of "reasonable account" in vagrancy laws "operates simply as a charter of dictatorial power to the policeman"). The courts in Powell and Berck did not consider whether the standards from Terry erase this danger of arbitrary application. See p. 615 supra. But even if the defect of vagueness could have been corrected, the Fifth Amendment would have stood in the way of compelling more than identification.


Because these orders are largely unregulated, they are open to abuse. The police have, for example, used orders to move on to harass prostitutes whom the police had insufficient evidence to arrest for any crime. P. Chevigny, supra note 36, at 230.

78. The city of Jacksonville, Florida, has enacted an ordinance permitting orders to move on when a suspect has failed to produce written identification. See Jackson v. State, 319 So. 2d 617, 618 (Fla. Dist. Ct. App. 1975). If the suspect does not produce written identification, however, the officer need not limit himself to an order to move on. Even before giving such an order and seeing whether the suspect obeys, the officer can detain the suspect, take him to the police station, fingerprint him, photograph him, interrogate him, and consult other police departments about possible outstanding warrants for his arrest. Id. at 617-19.

The Supreme Court of New Jersey has upheld a statute allowing orders to move on.
to move on only in the context of demonstrations, major public disorders, or obstruction of public ways. The proposed statute would bring orders to move on into the open. It would explicitly grant authority to issue these orders and would provide an effective method for preventing crime. But it would limit that authority to satisfy the Constitution and would regulate the conduct of the police.

A. The Proposal

A statute should authorize a police officer to issue an order to move on when he knows specific and articulable facts warranting "alarm" that a suspect will imminently commit a crime. The statute should specify some necessary elements of alarm: it might, for example, re-

The court sustained a loitering law because there had to be a "refusal to obey a police order to move on before a charge under the ordinance [could] be prosecuted." Camarco v. City of Orange, 61 N.J. 463, 466-67, 295 A.2d 353, 354 (1972) (decided before Papachristou).

One commentator, see Comment, Louisiana Vagrancy Law—Constitutionally Unsound, 29 LA. L. REV. 361, 378-79 (1968), proposed a law under which an officer could not issue an order to move on without "probable cause to believe that the actor is about to commit a criminal act against persons or property." If this "probable cause" implies the same level of certainty as probable cause to arrest, see pp. 605-06 supra, an officer would not be able to act in instances like those hypothesized at pp. 604-05 supra.

The proposed comprehensive revision of federal criminal law, S. 1437, 95th Cong., 1st Sess. (1977), includes a section entitled "Failing to Obey a Public Safety Order," id. at § 1861, which authorizes orders to move on. But the orders can be given "in response to a fire, flood, riot, or other condition that creates a risk of serious injury to a person or serious damage to property." Id. at § 1861(a). If "other condition" is read in pari materia with "fire, flood, [and] riot," the provision does not reach street crime at all.

One law in New York, for example, by its terms could authorize orders to move on as preventive measures against crime. N.Y. PENAL LAW § 240.20(6) (McKinney 1967) (amending N.Y. PENAL LAW § 722(3) (Penal Code 1909)). The most extensive analysis of this statute, however, concerned the First Amendment. Feiner v. New York, 394 U.S. 111, 112 (1969). Because Feiner concerned free expression, however, its application to prevention of street crime is uncertain.

80. For a suggestion that the order to move on could replace vagrancy and loitering laws as a preventive measure against crime, see ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION § 3.3(iv), Comment at 108-13 (Approved Draft, 1973). Although it is not positively clear that orders to move on must rest on statutory authority, rather than the kind of common law authority supporting the stop and frisk, the Supreme Court has ruled that failure to obey the order of a police officer, however reasonable the order, cannot constitute disorderly conduct in the absence of a statutory provision about such disobedience. Gregory v. Chicago, 394 U.S. 111, 112 (1969). Because Gregory concerned free expression, however, its application to prevention of street crime is uncertain.

81. The standard of "alarm" comes from the Model Penal Code. See note 61 supra.
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quire that the suspect be found acting in a manner and waiting at a
time and place unusual for law-abiding persons. Other circumstances
that would contribute to a finding of alarm would be the suspect's
failure to identify himself or an attempt to conceal himself or any
object. Orders to move on would be authorized only when the officer
could anticipate a particular offense. The statute should prescribe that
the anticipated crime present a serious danger to persons or property.

The statute should provide suspects actually engaged in innocent
activity an opportunity to dispel alarm. When the officer is alarmed by
a suspect's conduct, he should have to ask the suspect for an explana-
tion of his presence and conduct. If this explanation is credible and
sufficient to dispel alarm, the officer should have no authority to give
an order to move on. If the suspect's explanation is incredible or does
not dispel alarm, the officer could proceed to order the suspect to
move on. Such an order would specify the area to be avoided and the
duration of the order. The statute should prescribe a maximum area
and duration in which the order could be valid.

If the suspect disobeys a lawful order to move on, the officer would
have authority to bring the suspect to the police station. This authority
would carry out the purpose of removing potential criminals from the
scenes of anticipated crimes. Detention at the station should accord-
ingly not exceed the time during which the order to move on would
be valid, and searches of detained suspects should not exceed what
would be necessary to find concealed weapons.

The statute should also contain remedies for illegal orders to move
on. Individuals ordered to move on in violation of the statute should
be able to collect liquidated damages, as specified by the statute, against
the municipality, county, or state.

B. Constitutional Validity of the Proposal

The proposed statute conforms to the constitutional limitations that
general laws against loitering and vagrancy could not meet. Unlike
many of the current laws, the statute would not fail for vagueness. Be-

82. See id. Although the Model Penal Code requires loitering "in a place, at a time, or
in a manner not usual for law-abiding individuals," id. (emphasis added), an unusual
hour by itself seems unlikely to support alarm.

83. Although this provision may appear unconstitutional when analogized to similar
provisions in loitering laws, see p. 616 supra, the Note argues that such a provision in
this context satisfies the Constitution. See pp. 625-26 infra.

84. An officer intent on harassment may find an illegal order quite as useful as a
legal one. The individual is likely to obey even an illegal order, and if he disobeys he can
vindicate his disobedience only after a possibly painful and costly trial. See note 77
supra (abuse of orders to move on).
cause the substantive offense is a refusal to obey a lawful order to move on rather than the creation of suspicion, the suspect receives fair notice from the officer's order itself. Until he disobeys the order, no sanction can be imposed on him. Arguably, the suspect unaware of the circumstances giving "alarm" still lacks notice, since he cannot know whether the order to move on is lawful. But in an analogous case, a person subjected to a lawful stop and frisk probably cannot refuse to submit to that intrusion, even if he does not know the basis for the officer's "reasonable suspicion." If a person resists either a stop and frisk or an order to move on, he does so at the risk that the intervention, based on facts outside his knowledge, may prove to have been lawful. In the case of an order to move on under the proposed statute, a person believing that the order is unlawful does not need to take that risk: he can instead obey the order and then file suit for liquidated damages.

Susceptibility to arbitrary enforcement, like inadequate notice, can make a law void for vagueness. The proposed statute would guard against arbitrary enforcement by setting strict limits on the officer's authority to give the order. Only in exigent circumstances, when the officer felt "alarm," could the order be issued. Because the standard of "alarm" imports an element of immediacy, the police officer would need articulable reasons why he thought a crime was imminent.

85. The California Court of Appeal has made a similar argument. In the statute before the court, the substantive offense was failure to give identification. See People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), cert. denied, 415 U.S. 951 (1974); note 72 supra (discussing case).

The Supreme Court of Florida may have been moving toward a similar argument in State v. Ecker, 311 So. 2d 104 (Fla. 1975), cert. denied, 423 U.S. 1019 (1975). The court read into a loitering law the provision that a suspect obeying the "orders of the law enforcement officer necessary to remove the threat to public safety" could not be convicted. Id. at 110. But this interpretation appeared in the section of the opinion dealing with arbitrary enforcement rather than with fair notice. And as one commentator has noted, the court did not describe what circumstances would justify such orders. See 4 FLA. ST. U.L. REV. 146, 158 (1976).

86. Suppose a person subjected to a stop and frisk mistakenly believes the intrusion to be illegal and so resists the officer. Evidently, no case has decided whether resistance could be excused by a mistaken belief that the stop and frisk violated the law, but two commentators have implied that it could not. Chevigny, The Right to Resist an Unlawful Arrest, 78 YALE L.J. 1128, 1142 (1969); LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 125 n.438 (1968). If, however, a court did find that suspects would lack adequate notice as to lawfulness of the orders, the proposed statute could be amended so that the officer would briefly recount to the suspect his reasons for alarm before he ordered the suspect to move on.

87. See pp. 621-22 infra.

88. It has been disputed whether the term "alarm" in the Model Penal Code establishes a specific standard. Comment, supra note 78, at 377-78. The term takes on meaning, however, when it is treated as a gradation of cause similar in kind to the "reasonable suspicion" of stop and frisk. A standard of "alarm," because of its connotation of
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An officer could not rely on a generalized apprehension of criminal activity but would have to be alarmed about the possibility of a particular crime. Adding another safeguard against harassment, the statute would prescribe that the anticipated crime present a serious danger to persons or property.

Effective remedies would assure that the officer observed these statutory limits. If the officer exceeded his statutory authority, a person whose statutory or constitutional rights had been violated could recover immediacy, is even stricter than "reasonable suspicion." See Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring) (intrusion by police more easily justified when situation demands immediate action).


90. Note the suggestion that Justice Harlan would have restricted the stop and frisk to certain serious crimes, especially crimes of violence, in LaFave, supra note 86, at 65. But see Adams v. Williams, 407 U.S. 143 (1972) (stop and frisk permitted in narcotics case after informant tells officer that suspect is carrying gun). Professor Amsterdam has remarked that a great danger in the power to stop and frisk is that the police will assert their authority to search for drugs. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 438 (1974).

Arguably, the proposed statute lends itself to a different type of harassment as well—harassment of persons exercising First Amendment rights. The police have sometimes used orders to move on in attempts to censor the expression of ideas or to hector groups exercising a right of assembly. See, e.g., Brown v. Louisiana, 383 U.S. 131 (1966); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Cox v. Louisiana, 379 U.S. 559 (1965). If this threat is real, a court might either look more favorably on arguments of vagueness, see note 29 supra, or invoke the doctrine of overbreadth.

Under the doctrine of overbreadth, even a defendant charged for conduct unprotected by the First Amendment can argue that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). A statute is overbroad if its terms would substantially cover protected speech, so that individuals might be inhibited in exercising First Amendment rights. 413 U.S. at 612-13. In Broadrick the Supreme Court announced a policy of caution toward the invocation of the overbreadth doctrine against "ordinary criminal laws." Id. at 613. For a court to invalidate a statute regulating conduct as well as speech, "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615.

Tested as if it were a criminal statute, the law proposed here is plainly intended to cover only conduct unrelated to demonstrations, speeches, and other expression. Because the officer must give each individual an opportunity to explain his presence and conduct and so dispel alarm, the police could not issue an order to move on to a large group. If the police sought to order a speaker to move on, he could explain his presence and conduct by saying that he was making a speech. Were the police to use the proposed statute in these unintended situations, courts could either construe the statute as inapplicable or rule the statute unconstitutional as applied. Under Broadrick, the statute could not be struck down merely because it might provide an excuse for some unconstitutional action by the police.
liquidated damages against the municipality, county, or state. The award of these damages would encourage police departments to regulate the conduct of officers so as to eliminate abuses.

In judging whether statutes are unconstitutionally vague, courts are inclined to invalidate laws whose enforcement arguably violates constitutional rights in addition to the guarantee of due process. The proposed statute, unlike loitering and vagrancy laws, does not violate rights under the Fourth and Fifth Amendments and thus is immune from the courts' most exacting scrutiny.

Because an order to move on imposes a restraint short of arrest, such an order does not require probable cause under the Fourth Amendment. A person subjected to an order to move on, however, is deprived of his freedom to go where he wishes, and he may have to abandon some legitimate activity he has planned. Although this restraint is less severe than arrest, it is a "seizure" of the person within the meaning of the Fourth Amendment. As a seizure short of arrest, provision for liquidated damages against the municipality, county, or state may surmount these difficulties. See Levin, An Alternative to the Exclusionary Rule for Fourth Amendment Violations, 58 Judicature 74, 76 (1974). When a person proved a violation of his rights under the Fourth Amendment or the proposed statute, he could recover the liquidated damages from the government without having to prove any actual damages. Liquidated damages would, therefore, circumvent the judgment-proof officer and avoid the problem of showing actual damages. Because the government rather than the officer would be liable, sympathy for the policeman would not bar recovery. And the statute itself would waive sovereign immunity.

91. If the police violate a person's Fourth Amendment rights, two methods of redress are available at present. At a trial for criminal charges, the court may suppress the evidence illegally seized. Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 224 U.S. 383, 398 (1914). If, however, a violation of the Fourth Amendment does not produce evidence that a prosecutor seeks to introduce at trial, the individual's only recourse is a suit for damages. See, e.g., Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396-97 (1971) (implied cause of action against United States for violation of Fourth Amendment by federal agents). Such suits almost always fail. If an officer is sued as an individual, he is likely to be judgment-proof; but even if the officer has money, jurors are usually sympathetic toward him and reluctant to award damages. Because it is so difficult to show the actual damages required to underlie an award for punitive damages, even an individual suing a government may not win a judgment sufficient to deter future violations. And suits against state or local governments may not overcome problems of sovereign immunity. Geller, Enforcing the Fourth Amendment, 1975 Wash. U.L.Q. 621, 691-95.

Providing for liquidated damages against the municipality, county, or state may surmount these difficulties. See Levin, An Alternative to the Exclusionary Rule for Fourth Amendment Violations, 58 Judicature 74, 76 (1974). When a person proved a violation of his rights under the Fourth Amendment or the proposed statute, he could recover the liquidated damages from the government without having to prove any actual damages. Liquidated damages would, therefore, circumvent the judgment-proof officer and avoid the problem of showing actual damages. Because the government rather than the officer would be liable, sympathy for the policeman would not bar recovery. And the statute itself would waive sovereign immunity.


93. See Note, supra note 29, at 75.

94. On the stop and frisk, a restraint requiring less than probable cause, see Terry v. Ohio, 392 U.S. 1, 26 (1968). But see Moore, Field Interrogation, 6 Harv. C.R.-C.L. Rev. 245, 270-71 (1969) (arguing that only probable cause can justify order to move on).

95. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of
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the order to move on must meet the standards of the Fourth Amend-
ment elaborated in Terry v. Ohio. The seizure must be reasonable; the
need for the seizure must outweigh the invasion of personal
liberty; that is, the intrusion must be justified both in its inception
and in its scope.

On one side of this balance is the need for the seizure. The interest
served by the order to move on is the prevention of imminent crime.
Under the proposed statute, an officer could not give such an order
unless the need for it was pressing: the officer must suspect that a
particular, serious crime is about to occur, and the standard of "alarm"
ensures that the need for action is immediate.

Against this need must be weighed the extent of intrusion. An order
to move on removes a person from the area of an anticipated crime and
so restricts his freedom of movement. Since the order to move on is a
restraint short of arrest, the extent of intrusion from the order may
be compared to the intrusions in other seizures less severe than arrest—

authority, has in some way restrained the liberty of the citizen may we conclude that a
'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.6 (1968). See United States v.
Brignoni-Ponce, 422 U.S. 873, 878 (1975).

96. 392 U.S. 1 (1968).

97. Id. at 20. Some have suggested that a different mode of constitutional analysis
would control statutes that restrain movement in the streets. Such statutes, the argument
urges, demand "strict scrutiny" because they burden a "fundamental interest" in free
movement; once a court has chosen that standard of review, any regulatory measure such
as the proposed statute is likely to fail. Professor Amsterdam has contended that the
government can restrict freedom of movement on the streets only for "overwhelming
considerations of social policy" that would "override this 'preferred' individual [liberty]
entitled to uniquely stringent judicial protection." Amsterdam, supra note 74, at 214. See

The cases do not establish, however, that freedom of movement on the streets is a
fundamental liberty, deserving the "uniquely stringent judicial protection" accorded, for
instance, to freedom of speech. The cases do establish as a fundamental liberty the
freedom to move across state and national borders, see Shapiro v. Thompson, 394 U.S.
618, 630-31 (1969); Zemel v. Rusk, 381 U.S. 1, 15 (1965); Edwards v. California, 314 U.S. 160,
173-74, 177 (1941), but the holdings do not discuss local movement.

Individuals in a federal republic have a critical interest in being able to travel
between the states. But to extend that fundamental interest to movement on the streets
would mean that the state could not even burden local traffic in the absence of a
compelling state interest. Amsterdam would recognize as compelling such an interest as
the maintenance of order in an emergency, the assertion of the police power during
"'flood, fire, or pestilence.'" See Amsterdam, supra note 74, at 214 (quoting Zemel v.
Rusk, 381 U.S. 1, 15-16 (1965)). Any regulations limiting the use of streets or sidewalks
would be tested by this elaborate constitutional apparatus. It would be a more moderate
accommodation of interests to adjudicate such regulations on grounds of reasonableness.
Although citizens do have a right to travel on their streets and sidewalks, courts should
not describe the limits of that right in the vocabulary of "fundamental liberties" and
"compelling interests."

98. "[T]here is no ready test for determining reasonableness other than by balancing
the need to search [or seize] against the invasion which the search [or seizure] entails." Terry
v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523,
536-37 (1967) (bracketed words added by Court)).


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the investigative stop and the stop and frisk. The cases concerning these restraints acknowledge that more compelling circumstances justify greater invasions of liberty. For sufficient cause, an officer may not only stop a suspect but frisk him. Some courts have gone farther and have allowed an officer to extend the investigative stop in exigent circumstances by transporting the suspect from the place where he is first detained. Like such transportation, the order to move on imposes a relatively long and severe restriction on the suspect's freedom of movement. And like transportation, the order to move on is justified by exigent circumstances: the proposal sanctions orders to move on only if there is "alarm." Justified by these exigent circumstances, the intrusion of an order to move on is reasonable. The proposal would grant only as much power as is necessary to dispel alarm that a suspect is about to commit a serious crime. It would permit only the removal of the suspect from the area.

Even if the suspect refuses to move on, the seizure is strictly limited

100. Id. at 27.
101. In United States v. Lee, 372 F. Supp. 591 (W.D. Pa.), aff'd mem., 505 F.2d 731 (3d Cir. 1974), cert. denied, 420 U.S. 933 (1975), the manager of a bank observed two men hiding behind a nearby building. Since it was payday at a Westinghouse plant near the bank, couriers would be bringing paychecks from the plant to the bank in order to cash them and then would return to the plant with the money. These couriers would pass by the place where the two men had hidden themselves. When the police chief came in answer to the manager's call, he was able to grab Lee, who was one of the men. Telling Lee that he wanted to talk to him, the officer put Lee in the back seat of the patrol car and began to chase Lee's companion. Lee was later convicted for violation of federal laws concerning firearms. Id. at 592-93. The court held:
The Chief was alone and confronted by two individuals whose conduct gave rise to a well-founded suspicion that they were contemplating a daylight robbery of either the bank or a courier; the obvious exigencies of this situation authorized the Chief by a show of authority and limited physical force to temporarily seize the defendant and restrain his freedom of movement by placing him in the back seat of the cruiser until the situation had stabilized and he could determine if a full custodial arrest and further detention were necessary. Id. at 593. Had the officer not discovered firearms, the restraint in this case might have occupied less time than the restraint from an order to move on. In one sense, however, the imposition on freedom of movement was even greater than from such an order: the officer forced Lee to go to a particular place—wherever the car was going. Here, as with an order to move on, the policeman did not suspect that any crime had yet taken place. Accord, In re Lynette G., 54 Cal. App. 3d 1087, 126 Cal. Rptr. 898 (1976) (transportation across half block for identification by injured victim); People v. Courtney, 11 Cal. App. 3d 1185, 90 Cal. Rptr. 370 (1970) (removal of suspect to police station for questioning when crowd gathered at scene of initial detention; no past crime suspected); State v. Watson, 165 Conn. 577, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960 (1974) (transportation to police station when crowd gathered at scene of initial detention); People v. Rivers, 42 Mich. App. 561, 292 N.W.2d 498 (1972) (suspects taken into building to verify explanation of presence; no past crime suspected); cf. People v. Harris, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975), cert. denied, 425 U.S. 934 (1976) (transportation for identification held unreasonable in particular case, but court explicitly refuses to hold investigative transportation always unreasonable). But see Robinson v. United States, 278 A.2d 458, 459 (D.C. 1971) (implying that transportation would not be permitted when original stop is for preventive purposes).
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to the need for removing the suspect from the area. The police can detain the suspect only for as long as the order to move on would have been valid, and the search incident to this detention cannot exceed what is necessary to find weapons. This detention does not attach the stigma of a criminal penalty. The intrusion would be "strictly tied to and justified by the circumstances requiring the police to act."
The proposal would also meet the strictures of the Fifth Amendment against compelled self-incrimination. Although a suspect's silence could contribute one element to the justification for an order to move on, the burden on rights under the Fifth Amendment is too indirect to invalidate the statute. In *Baxter v. Palmigiano*, the Supreme Court approved the drawing of an adverse inference from a person's silence, when that inference was only one of the grounds for imposing a burden other than a criminal penalty. Under the proposal, the

102. For the broad powers at common law to conduct a search incident to arrest, see *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that lawful custodial arrest for minor crimes conferred on arresting officer authority to make full search of suspect's person); *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (same). Although the proposal would limit the extent of a search incident to an arrest for disobeying an order to move on, the same result might possibly be reached through judicial construction. A court interpreting the proposed statute might, despite *Robinson* and *Gustafson*, limit the extent of a search incident to arrest, since the suspect arrested is subject only to civil penalties. *Cf. State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974) (despite *Robinson* state constitution limits warrantless search even of incarcerated person to scope necessary for discovery of weapons or of fruits or instrumentalities of particular crime). *See also Zehrung v. State*, 22 Crim. L. REP. (BNA) 2080 (Alaska Sept. 30, 1977) (state constitution forbids full search without warrant when person arrested will be permitted to post immediate bail); *People v. Maher*, 17 Cal. 3d 196, 198, 199, 550 P.2d 1044, 1046, 1047, 130 Cal. Rptr. 508, 510, 513-14 (1976) (en banc) (state constitution forbids full search incident to arrest for public drunkenness, if person arrested to be released immediately on bail). The proposal follows the American Law Institute, which has recommended a statutory limitation on searches incident to arrest for minor offenses, including civil violations. *All Model Code of Pre-Arraignment Procedure § 220.2 (1975).*

103. The Model Penal Code, too, would impose only civil sanctions. The statute proposed here, however, is preferable because its sanction is less intrusive. The suspect giving alarm under the Model Penal Code can be arrested. *See note 61 supra.* If a suspect creates alarm under the statute proposed in this Note, he is initially subject to an order to move on. Only if the suspect disobeys the order can he be detained.


106. Palmigiano, a prisoner, had refused to testify before a disciplinary board that was deciding whether to punish him for his alleged role in a disturbance inside the prison. Although the state had not yet preferred criminal charges, Palmigiano's conduct might well have exposed him to criminal liability. The disciplinary board warned Palmigiano that it would draw an adverse inference from his silence, but he still refused to testify. The Court upheld the adverse inference, noting that silence was not the only ground for the punishment imposed. The Court distinguished a line of cases on unconstitutional conditions by observing that in those cases the deprivations, such as denial of government contracts, had followed automatically on the assertion of rights under the
suspect's silence would reinforce alarm created by other circumstances and conduct and would be "given no more evidentiary value than was warranted." Unlike some laws that have been enacted against loitering, the proposed statute would not make silence an element of a criminal offense.

Conclusion

The proposed statute would provide an effective means for the prevention of crime. Reconsider the two examples in Part I. When an officer questioned the suspect waiting outside the home of a woman the suspect had been following, the officer discovered who the man was and, on the basis of that identification, found that he had previously been convicted of indecent assault. Although the officer could make no arrest, the proposal would permit an order to move on. If the officer returned later and saw the suspect still outside the woman's home, he could take the suspect to the police station. In the other example, the failure of the suspects in the parking lot to offer identification or to explain themselves would contribute to alarm. Also contributing to alarm would be the hour of night and the recurrence of robbery in that location. An order to move on would deny to these persons the location best suited to the criminal purposes that they may harbor.

While permitting the police to act in these instances, the proposed statute would not create in the police an arbitrary or excessive power. It would, indeed, regulate the conduct of the police by defining the limits of their authority and providing remedies for abuse of that authority. It would serve the interests both of preventing crime and of protecting individual liberty.

Fifth Amendment. Id. at 317-18. The idea that silence, if accompanied by other evidence, can contribute toward probable cause for arrest is analogous. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1, Comment (1975).


108. Baxter did not change the standards for judging the constitutionality of imposing criminal sanctions for silence: "No criminal proceedings are or were pending against Palmigiano. The state has not . . . sought to make evidentiary use of his silence at the disciplinary hearing in any criminal proceeding." 425 U.S. at 317. Laws based on the Model Penal Code, in contrast to the law proposed here, impose criminal penalties partly because of the suspect's silence. See note 60 supra (citing laws). The law proposed here would, in the event that the suspect is silent and that the circumstances give alarm, impose only an order to move on. Although the Court in Baxter did not elaborate a rationale for distinguishing criminal and civil sanctions, the Court may have considered criminal sanctions as more heavily burdening the Fifth Amendment.

Baxter left undecided whether testimony given under threat of an adverse inference from silence would be admissible at a later criminal trial. If such testimony were inadmissible, the suspect's explanation of his presence and conduct, given under threat of an order to move on, would also be inadmissible.