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## CASENOTE

### VAGRANCY LAWS IN THE US AND IRISH SUPREME COURTS

**Genevieve Lennon<sup>1</sup>**

#### **Abstract:**

This case note discusses the treatment of two analogous vagrancy laws by the United States Supreme Court and the Supreme Court of Ireland. The note presents an overview of the relevant law, the facts of the cases and the main points of the judgments, which are striking in their similarity.

#### **Introduction**

This note compares the treatment of two analogous vagrancy laws by the Supreme Courts in Ireland and the USA: the legality of the 'sus' law considered by the Irish Supreme Court in *King v Attorney General* 1981<sup>2</sup>, and the legality of the Jacksonville Ordinance by the US Supreme Court in *Papachristou v City of Jacksonville* 1972.<sup>3</sup> Both Supreme Courts held the respective laws to be unconstitutional, taking a strikingly similar approach. While the two constitutions have some profound differences, the cases were decided on the basis of incompatibility with the rule of law, a concept common to both jurisdictions. This note will outline the relevant legislation and facts of the cases before analysing the judgments.

#### **1 'Sus' and the Jacksonville Vagrancy Ordinance Code**

The 'sus' law, contained in section 4 Vagrancy Act 1824, was retained in Ireland following independence. Section 4 of the Act was a mishmash of various types of offences including the traditional vagrancy offences, offences against the Poor Law, offences against public decency and morality, and the 'sus' offence. It included the offences of being armed with an offensive weapon, being found on enclosed premises for any unlawful purpose,<sup>4</sup> telling fortunes, sleeping rough and indecent exposure, in addition it criminalised all 'suspected persons' – the 'sus' offence – and those facing a second conviction for being 'idle and

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<sup>2</sup> *King v Attorney General* [1981] IR 233.

<sup>3</sup> *Papachristou v City of Jacksonville* 92 SCt 839 (1972).

<sup>4</sup> The unlawful purpose must be criminal, an act of immorality will not suffice, however, it is not necessary to prove intent to commit a crime at the time or place where the defendant was found (*Hayes v Stevenson* [1860] 3 LT 296; *Re Joy* [1853] 22 LT Jo 80).

disorderly', which included 'common prostitutes', those who failed to maintain their family when able to do so, beggars, unlicensed chapmen and pedlars.<sup>5</sup>

The 'sus' offence itself had three required elements. First, the person had to be a 'reputed thief' or 'suspected person'. The former required proof of a 'recent, relevant conviction of an offence of dishonesty' whereas the classification of persons as 'suspected' persons was based upon their antecedent behaviour, with or without convictions.<sup>6</sup> In common with 'reputed thieves', the convictions did not need to be known to the police officer at the time the power was exercised.<sup>7</sup> As explained in *Hartley v Ellnor* 1917, a 'person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past'.<sup>8</sup> In practice the exercise of the power often involved the 'suspected' person being observed acting in a suspicious manner twice, the second occasion constituting the offence. During the height of its notoriety in the 1970s, the 'suspicious behaviour' typically consisted of checking car doors or acting in a way that appeared preparatory to pick-pocketing or similar.<sup>9</sup>

The second requirement was that the suspicious behaviour occurred in or while 'frequenting' one of the places proscribed in the Act.<sup>10</sup> These were:

any river, canal, or navigable stream, dock or basin or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or any place adjacent to a street or highway.<sup>11</sup>

Finally, the 'suspected person' or 'reputed thief' had to intend to commit an arrestable offence.<sup>12</sup> Although mere suspicion of intent was insufficient it was not necessary to show the defendant was guilty of intending to commit any particular act(s). It simply needed to appear to the magistrate, from the circumstances and the person's known character, that he did so intend.<sup>13</sup>

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<sup>5</sup> Section 3, Vagrancy Act 1824. For a detailed commentary see: *Working Party on Vagrancy and Street Offences Working Paper* (HMSO, London 1975).

<sup>6</sup> Home Affairs Committee, *Race Relations and the "Sus" Law: 2<sup>nd</sup> Report* (HC 1979-80, 559) 47; *Ledwith v Roberts* [1937] KB 232, 245.

<sup>7</sup> *R v Clarke* [1950] 1 KB 523; *R v Fairbairn* [1949] 2 KB 690.

<sup>8</sup> *Hartley v Ellnor* [1917] 117 LT 304, 262.

<sup>9</sup> Clare Demuth, *'Sus': a report on the Vagrancy Act 1824* (Runnymede Trust 1978).

<sup>10</sup> 'Frequenting' means being in a place long enough for the purposes aimed at (*Clark v Taylor* (1948) 112 JP 439).

<sup>11</sup> Section 4, Vagrancy Act 1824.

<sup>12</sup> *R v Pavitt* (1911) 75 JP 432 and *Ledwith* [1937] KB 232.

<sup>13</sup> Section 15, Prevention of Crimes Act 1871.

*Papachristou* concerned the Jacksonville, Florida Vagrancy Ordinance Code which enabled the police to arrest without warrant any 'vagrant'. The relevant sections of the Code were:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants...<sup>14</sup>

This section of the Jacksonville Code is equivalent to section 4 Vagrancy Act 1824. Like section 4 it includes various different offences, including those comparable to offences against the Poor Law,<sup>15</sup> offences relating to prostitution and indecent exposure, gambling and vagrancy. As with 'sus', the Code criminalises what would ordinarily be non-criminal behaviour when it is carried out in a specific place and/or by particular classes of people. The 'reputed thief' offence is mirrored in the prohibition on 'common...thieves' while the 'suspected person' offence is diffused across several categories including 'habitual loafers' and 'disorderly persons'. Like 'sus', there is no requirement of specific intent to commit an unlawful act.<sup>16</sup>

## 2 The Facts

In *Papachristou* the defendants in the five conjoined appeals were charged with various counts of vagrancy, specifically 'prowling by auto',<sup>17</sup> 'loitering', being 'vagabonds' and being 'common thieves'.<sup>18</sup> The four defendants accused of 'prowling by auto' in the first appeal were driving from a restaurant to a nightclub when they allegedly stopped near a used-car lot which had been broken into repeatedly. In the second, the two defendants accused of being 'vagabonds' had been waiting for a lift from a friend. They initially waited in a store but left when asked to do so by the owners and then walked and up down the street at which point they were arrested. The two defendants accused of 'loitering' and being 'common thieves', in the third appeal, were arrested when they drove to the house of the girlfriend of one of the defendants where the police were already arresting people. The police ordered them to stop

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<sup>14</sup> *Papachristou* 92 SCt 839 (1972), fn 1.

<sup>15</sup> The reference to those living upon the earnings of their wives or minor children is mirrored in the reference in section 4 Vagrancy Act 1824 to those who leave their wives and children chargeable upon the parish.

<sup>16</sup> *Papachristou* 92 SCt 839 (1972).

<sup>17</sup> In *Hanks v. State* 195 So.2d 49, 51 (1967) the court construed 'wandering or strolling from place to place' as including travel by car, thus creating the offence of 'prowling by auto'.

<sup>18</sup> *Papachristou* 92 SCt 839 (1972) 841-2.

their car in the driveway and then arrested one as a common thief as he had a previous record and the other for loitering as he was standing in the driveway (as ordered!) In the fourth appeal, the defendant was charged with being a 'common thief' after driving home at a high speed, although no speeding charge was brought. The final appeal involved a defendant who was called over to a police car and searched, being a reputed thief and drugs pusher. He resisted the search, which ultimately resulted in two packets of heroin being found, and was charged with 'disorderly loitering', 'disorderly conduct' and a narcotics offence which was not pursued.

In *King* the plaintiff had been convicted of two offences: first, of being a suspected person loitering with intent to commit a felony; and, second, of having in his possession housebreaking implements with intention to commit a felony, both offences under section 4 Vagrancy Act 1824. He had been arrested in a 'public place' with a hammer, screwdriver and hacksaw.<sup>19</sup>

### 3 The Judgments

Both Supreme Courts held the respective vagrancy powers to be unconstitutional for vagueness and because the unfettered discretion they bestowed upon the police enabled the police to act in an arbitrary manner. These two grounds are interrelated – the ambiguity in the statute feeds into the broad police discretion. In relation to vagueness, there were two key issues. First, the terms of the statutes were themselves too ambiguous to form the basis of a criminal offence. In *King*, Kenny, J, noted the requirement that the law be accessible and 'expressed without ambiguity' before inquiring:

But what does "suspected person" mean? Suspected of what? What does "reputed thief" mean? Reputed by whom?...both governing phrases "suspected person" and "reputed thief" are so uncertain that they cannot form the foundation for a criminal offence.<sup>20</sup>

The term 'reputed thief' appears to be more precise than 'suspected persons' but the fact that the previous offences did not need to be known to the officer at the time of arrest undermines this apparent precision and objectivity. Both terms are highly subjective, a fact exacerbated by the fact that in most cases in the late twentieth century the case rested on the testimony of one or more police officers against that of the plaintiff.<sup>21</sup> Although this point was not discussed in *Papachristou*, it is clear that the terms 'vagabond' and 'common thief' are similarly subjective and ambiguous.

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<sup>19</sup> *King* [1981] IR 233, 236.

<sup>20</sup> *Ibid*, 263.

<sup>21</sup> Demuth, 'Sus': A Report.

The second issue was that the powers made criminal behaviour that would ordinarily be lawful. It is possible, of course, to make ordinarily lawful behaviour criminal when committed by a particular person, for example restrictions may be placed on convicted sex offenders restraining them from behaving in specified ways which would otherwise be lawful, however, in such a case the behaviour becomes criminal because, consequential to a criminal act, the person is subject to a specific order prohibiting defined behaviour.<sup>22</sup> These vagrancy powers lacked precision regarding the targeted class and the types of behaviour and, in addition, were not triggered by conviction for a criminal offence.<sup>23</sup>

In *Papachristou* the Jacksonville ordinance was held to be 'plainly unconstitutional' for 'vagueness' because it failed to give fair notice to persons that their conduct would be illegal.<sup>24</sup> Justice Douglas, giving the sole judgment, noted wryly that the prohibition on 'neglecting all lawful business and habitually spending their time frequenting...places where alcoholic beverages are sold or served' would include most members of golf and city clubs.<sup>25</sup> He also made a strong plea for the benefits of 'loafing' and 'wandering or strolling' without any lawful purpose or object, calling these activities 'part of the amenities of life...[which] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity', citing Walt Whitman, as evidence of such.<sup>26</sup> Similarly in *King*, Henchy, J, in a passage that should be read in full to appreciate the vehemence of his judgment, condemned the ingredients of the 'sus' offence and the method by which it was proved for being

so arbitrary, so vague, so difficult to rebut, [and] so related to rumour or ill-repute or past conduct...that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.<sup>27</sup>

He criticised the fact that 'sus' made ordinarily legal behaviour unlawful and 'indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality'.<sup>28</sup>

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<sup>22</sup> For example, sexual offences prevention orders under sections 104-113, Sexual Offences Act 2003.

<sup>23</sup> See further: Forrest Lacey, 'Vagrancy and other crime of personal condition,' *Harvard Law Review*, 66 (1952-53), pp.1203-1226.

<sup>24</sup> *Papachristou* 92 SCt 839 (1972), 843, 848.

<sup>25</sup> *Ibid*, 844.

<sup>26</sup> *Ibid*.

<sup>27</sup> *King* [1981] IR 233, 257.

<sup>28</sup> *Ibid*.

Both Supreme Courts criticised the unfettered discretion bestowed upon police officers. In *King*, Henchy, J stated that sus 'in its arbitrariness and its unjustifiable discrimination...fails to hold...all citizens to be equal before the law'.<sup>29</sup> In *Papachristou*, Justice Douglas noted that 'there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law'.<sup>30</sup> Both judgments also noted that the power could be used in a discriminatory manner against specific groups. In *King*, O'Higgins, CJ stated that he was 'repelled by the class-conscious and un-Christian philosophy which inspired such legislation'.<sup>31</sup> Justice Douglas, in *Papachristou*, stated that the power

provided a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" and could be used to force the 'poor people, nonconformists, dissenters, idlers' to 'comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts'.<sup>32</sup>

Excessive discretion within the powers also meant that they could be used to circumvent norms of criminal law. An issue in *King* was the fact that as antecedent behaviour formed part of the basis of the offence this infringed the presumption of innocence, which was held to be contrary to the concept of justice inherent in the Constitution.<sup>33</sup> The powers also enabled the police to avoid the normal requirement for arrest of reasonable suspicion or, in the US, probable cause, that an arrestable offence or felony is, has been or is about to be committed. As noted by Justice Douglas in *Papachristou*, '[a] vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest'.<sup>34</sup> It seems highly probable, for example, that the real grounds for arresting the defendant in *Papachristou* on charges of disorderly loitering, was for the narcotics offences. Similarly, the real grounds for arresting the defendant who drove home at high speed seem likely to be the driving offence rather than for being a 'common thief' as charged.

## Conclusion

These judgments struck at the heart of the two vagrancy offences. Both powers allowed unfettered discretion as they operated primarily as a means of social control and order maintenance. Without unfettered discretion, the powers could not achieve these objectives.

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<sup>29</sup> *King* [1981] IR 233, 257.

<sup>30</sup> *Ibid*, 847.

<sup>31</sup> *Ibid*, 249.

<sup>32</sup> *Papachristou* 92 SCt 839 (1972), 847.

<sup>33</sup> *King* [1981] IR 233, 248.

<sup>34</sup> *Papachristou* 92 SCt 839 (1972), 847.

This was explicitly acknowledged in *Papachristou* which cited with approval a dissenting judgment from an earlier vagrancy case where Justice Frankfurter had argued that 'definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offence.'<sup>35</sup>

These cases are of historical interest for anyone studying vagrancy and any associated laws and to students of constitutional law, with *Papachristou* being a leading case in relation to the 'void for vagueness' rule.<sup>36</sup> From a UK perspective, these cases are of particular interest as the courts must, since the Human Rights Act 1998, consider whether a power which infringes a Convention right is compatible with the rule of law, including the requirement of accessibility, which requires a similar approach to that taken in these cases. Given the rise of pre-emptive powers which are, by necessity, often vaguely drafted with considerable discretion bestowed upon the police, these cases may come to have renewed importance when anticipating the outcome of contemporary cases before the UK courts.

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<sup>35</sup> *Winters v New York* 333 US 507, 68 S.Ct 665, cited in *Papachristou* at 845. In relation to 'sus', albeit in the UK context, see: Demuth, 'Sus': A Report.

<sup>36</sup> See further Tammy Sun, 'Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine,' *Harvard Civil Rights Civil Liberties Law Review*, pp.149-194.