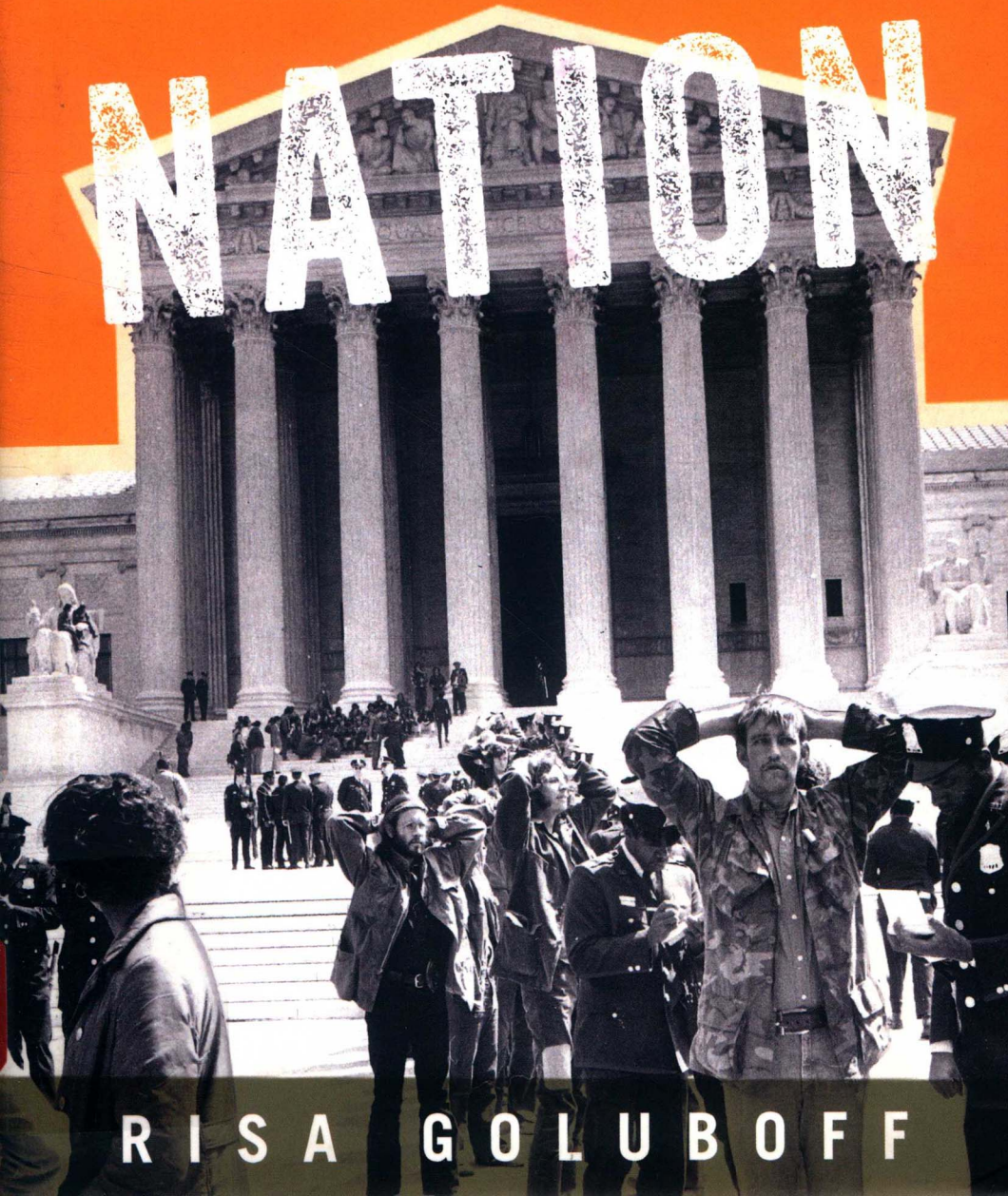
POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s

VAGRANT NATION



RISA GOLUBOFF

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Cover Image: Police arrest a Vietnam War protestor on the steps of the Supreme Court in April 1971.

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Introduction

In 1949 Los Angeles, a police officer arrested Isidore Edelman as he spoke from a park bench in Pershing Square. Twenty years later, an officer in Jacksonville, Florida, arrested Margaret "Lorraine" Papachristou when she was out for a night on the town.

Edelman and Papachristou had very little in common. Edelman was a middle-aged, Russian-born, communist-inclined soapbox orator. Papachristou was blond, statuesque, twenty-three, and a Jacksonville native. The circumstances of their arrests were different, too. It was Edelman's strident and offensive speeches that caught the attention of the police—his politics were just too inflammatory for the early Cold War . For Papachristou, it was her choice of companions—she and her equally blonde friend had been out with two African American men in a southern city not quite transformed by the civil rights era.[1]

What Edelman and Papachristou shared despite their differences was the crime for which they were arrested: vagrancy. California law made a vagrant of everyone from wanderers and prostitutes to the willfully unemployed and the lewd. Edelman's earlier arrests off the soapbox had made him "dissolute" and therefore a vagrant under the law. Papachristou was arrested under a Jacksonville ordinance that criminalized some twenty different types of vagrants, including "rogues and vagabonds, or dissolute persons who go about begging, . . . persons who use juggling or unlawful games or plays, common drunkards, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons." Such a law, noted a judge in 1970, sounded like "a casting advertisement in an Elizabethan newspaper for the street scene in a drama of that era." To the police, the listed categories did not even exhaust the law's possibilities. They noted that Papachristou and her companions were vagrants for an improvised and far more modern reason: "prowling by auto."[2]

As the evocative language of these laws suggests, the crime of vagrancy had long historical roots. William Blackstone, the doyen of eighteenth-century English legal commentators, noted that "idleness" was "a high offense against the

public oeconomy" not only in England but in China and ancient Athens as well. Modern American lawyers liked to highlight vagrancy laws' obsolescence by tracing the laws to the medieval English Statutes of Labourers of the fourteenth century. Their more direct roots, scholars would have scolded them, hailed (merely) from the sixteenth century. Together with sumptuary laws that told the English who could wear what—making one's rank instantly apparent—and "poor laws" that supervised and supported the needy, vagrancy laws were built for hierarchy and social order. Despite much-touted myths of American upward and outward mobility, the laws proliferated along with English colonists on this side of the Atlantic too.[3]

Indeed, when Edelman was arrested in 1949, vagrancy was a crime in every state and the District of Columbia. It was the basis for hundreds of thousands of arrests every year, not including arrests for related crimes like loitering and being a suspicious person. With a few exceptions, and despite the many varieties of vagrancy laws, scattered challenges to the laws' constitutionality prior to the 1950s failed. A prominent 1946 treatise captured prevailing sentiment when it concluded that vagrancy laws' legality "cannot be doubted." Four hundred years on the books were decisive evidence of their legitimacy.[4]

Two features of vagrancy laws made them especially attractive. First, the laws' breadth and ambiguity gave the police virtually unlimited discretion. It was the officer on the beat who determined in the first instance—and often, as it turned out, the last—what it meant to loiter, to lack a lawful purpose, to be dissolute or suspicious. Because it was almost always possible to justify a vagrancy arrest, the laws provided what one critic called "an escape hatch" from the Fourth Amendment's protections against arrest without probable cause. As one Supreme Court justice would write in 1965, vagrancy-related laws made it legal to stand on a street corner "only at the whim of any police officer."[5]

Second, vagrancy laws made it a crime to be a certain type of person—anyone who fit the description of one of those colorful Elizabethan characters. Where most American laws required people to *do* something criminal before they could be arrested, vagrancy laws emphatically did not. "The purpose of vagrancy laws is to subject persons, whose habits of life are such as to make them objectionable members of society, to police regulations promotive of the safety or good order of the community in which they are found," a popular 1955 legal treatise observed. The goal was "to prevent crimes which may likely flow from a vagrant's mode of life, by cutting out at the roots breeding places of many crimes offensive to the personal well-being of many citizens. . . . Such preventive purpose wholly fails if a law enforcement officer must wait until a crime is committed."[6]

Armed with this roving license to arrest, officials employed vagrancy laws for a breath-taking array of purposes: to force the local poor to work or suffer

for their support; to keep out poor or suspicious strangers; to suppress differences that might be dangerous; to stop crimes before they were committed; to keep racial minorities, political troublemakers, and nonconforming rebels at bay. As these uses suggest, vagrancy laws were linked to a conception of postwar American society—as they had been linked to a conception of sixteenth-century English society—in which everyone had a proper place. The vagrancy law was often the go-to response against anyone who threatened, as many described it during vagrancy laws' heyday, to move "out of place" socially, culturally, politically, racially, sexually, economically, or spatially. Over time, states and localities deployed and retooled vagrancy laws for use against almost any—real or perceived, old or new—threat to public order and safety.[7]

The officer on the beat in the 1950s and 1960s saw such threats everywhere, in the "queer," the "Commie," the "uppity" black man, the "scruffy" young white one. It was his job to see these threats, to determine who was "legitimate" and who not. He was trained to see difference as dangerous, to see the unusual as criminal. That was what not only his superiors but also the upstanding taxpayers wanted, expected him to do. When he walked the streets questioning and arresting the scum, the flamboyant, the detritus, and the apostate, he brought vagrancy laws with him, and he did his job.[8]

Between Edelman's arrest and Papachristou's twenty years later, literally millions of people shared their vagrancy fates. Some of those arrested comported with the usual image of the vagrant. Sam Thompson, for example, was an underemployed handyman and alcoholic arrested some fifty-five times in Louisville, Kentucky, in the 1950s. But many, like Edelman and Papachristou, are more suprising. The police arrested for loitering the Reverend Fred Shuttlesworth, co-founder with Martin Luther King Jr. of the Southern Christian Leadership Conference, when he spoke briefly with colleagues on a Birmingham street corner during a 1962 department store boycott. It was vagrancy the police used when they could not get Tulane law student Stephen Wainwright to cooperate with a murder investigation in New Orleans' French Quarter in 1964. It was vagrancy as well that justified the 1966 arrest of Martin Hirshhorn, a young cross-dressing hair stylist arrested in his hotel room in Manhattan wearing only a half-slip and brassiere. Police turned to vagrancy in 1967 when they arrested Joy Kelley in the "crash pad" she had rented for herself and her hippie friends in Charlotte, North Carolina. And they used it again when they mistook Dorothy Ann Kirkwood for a prostitute when she was on her way to meet her boyfriend on Memphis's famous Beale Street in 1968.[9]

These and other vagrancy suspects were white and black, male and female, straight and gay, urban and rural, southern, northern, western, and midwestern. They had money or needed it, defied authority or tried to comply with it. They were arrested on public streets and in their own homes; as locals or strangers; for

political protests or seeming like a murderer; for their race, their sexuality, their poverty, or their lifestyle.

Vagrancy laws were thus not only a fact of the legal landscape in the middle of the twentieth century. They were also a fact of life for countless Americans. Working-class immigrant families warned their maturing children not to leave home without money that could inoculate them from vagrancy arrests. Early "homophile" organizations educated their gay and lesbian members about "lewd vagrancy" arrests and how to avoid them—"wear at least three items of clothing of your own sex" was a common refrain. Black newspapers warned their readers that vagrancy arrests were a likely consequence of any racially presumptuous behavior. Civil rights organizations tried to head off seemingly inevitable vagrancy arrests of workers heading south by providing "vagrancy forms" that attested to the workers' standing as "reputable member[s] of the community."[10]

The vagrancy law regime, then, regulated so much more than what is generally considered "vagrancy." Vagrancy laws were as versatile as they were common and legally valid. They represented an approach to policing, a vision of society, and, for many, an inescapable vulnerability.

That was all about to change. The case that followed Edelman's 1949 arrest marked a new era in the history of vagrancy laws. Though Edelman himself did not emerge victorious, his case both signaled and set in motion a process of rapid and fundamental legal transformation. Laws on the books for four centuries were now, suddenly, on the constitutional defensive. Over the next twenty years, alleged vagrants and their lawyers, social reformers, activists, the media, state legislators, state and lower federal courts, and, somewhat belatedly, the Supreme Court condemned vagrancy laws and their uses. Even the laws' fiercest defenders—the police who relied on them—substantially narrowed their justifications for the laws' legitimacy. In a trio of cases in 1971 and 1972, including Papachristou's own, the Court announced that vagrancy, loitering, and suspicious persons laws were unconstitutional.[11]

This book shows how that change happened. It asks how a category of laws that had been ubiquitous and presumptively legitimate for centuries lost its constitutional validity over the course of just twenty years.

The answer to that question can be found in the major upheavals that convulsed American legal, social, intellectual, cultural, and political life between the 1950s and the 1970s. Those who had long lacked social and political power began to organize, march, and protest; stand fast before fire hoses and riot gear; hire lawyers and bring appeals. In doing so, they projected a new image of American society in which vagrancy policing was anathema. To them, the cop on the street—with the vagrancy law tucked away in his pocket—was the "pig," the "Man," the "Establishment." The language of equality and nonconformity

became a mantra, the image of the respected and fulfilled individual, the Holy Grail.

Telling the history of vagrancy laws' demise thus means telling a legal history of the 1960s writ large. As may already be apparent, the age-old crime of vagrancy became a flashpoint in virtually every great cultural controversy of the time. From sexual freedom to civil rights, from poverty to the politics of criminal justice, from the Beats to the hippies, from communism to the Vietnam War, the great issues of the day all collided with the category of the vagrant. Vagrancy, police power, and the Constitution met on streets and parade grounds, skid rows and lunch counters, at polite sit-ins, militant protests, and outright riots. Wherever the sixties happened, vagrancy law was there.

Indeed, legal challenges to vagrancy laws were made both necessary and possible by other changes in American law and society between the mid-1950s and the early 1970s. Because vagrancy laws had been a key way of keeping people in place, they presented obstacles to the other goals (of racial equality, sexual freedom, political protest) of their usual targets. Local officials and low-level judges armed with discretion-licensing vagrancy laws could, and did, thwart those goals just as Jim Crow, the draft board, and the welfare agency did. Though the vagrancy law challenge claimed only a limited immunity from arrest on sight, that immunity was crucial to all kinds of other ambitions. Because any right would be hard to vindicate if a person could not walk down the street without being arrested for who he or she was, alleged vagrants began to insist on their right to make their own place in the world, the faultiness of the whole idea of place, or both.

These claims went to the heart of the pressing questions of the era. When was difference dangerous? How could law enforcers identify such danger? To what extent and under what parameters could the law safely embrace the challenge to the status quo, especially at a moment of deep anxiety about crime, violence, and disorder? The undoing of vagrancy laws long used to neutralize any threat was thus an integral part of the making of the 1960s because it had to be.

The profound upheavals of the period made the dramatic change in vagrancy laws' fortunes not only necessary but also possible. Many of vagrancy laws' targets were now organized, assertive, and—this is key—represented by lawyers. Given that vagrancy cases promised neither glory nor money, people arrested for vagrancy had had little luck finding legal counsel even a generation earlier. During the 1960s, however, some of the best educated, most pedigreed lawyers actively sought out vagrancy clients. Louis Lusky, first in his class at Columbia Law School, former Supreme Court law clerk, and later an eminent scholar at his alma mater, pursued Sam Thompson's case all the way to the Supreme Court. Anthony Amsterdam, first in *his* class at the University of Pennsylvania Law School, former Supreme Court clerk, and eminent scholar at *his* alma mater

(as well as at Stanford and New York University law schools), helped shepherd Fred Shuttlesworth's case to the same court and many other cases through the state and lower federal courts. As these and other lawyers joined the growing staffs of the American Civil Liberties Union (ACLU) or the NAACP Legal Defense Fund (LDF), or brand new legal aid and public defender offices, they knew they were not their fathers' lawyers. They saw themselves as part of a self-conscious social and professional network very different from the Wall Street firms for which they had been trained.[12]

To these lawyers, cases that had always been dismissed as involving the most trivial of charges suddenly seemed full of possibility. Conceived for a very different time and place, vagrancy laws no longer served their original purposes. Whether one took as the lodestar an expanding welfare state that deemed the poor worthy of support or a free-wheeling market economy that deemed them an unavoidable reality, criminalizing poverty was simply incongruous. So too was criminalizing difference, as the premises underlying vagrancy laws' many other functions also came under attack. Reform movements were claiming, and courts were increasingly offering, constitutional protection for new people and new rights—the rights of racial minorities and the poor, or rights to free speech, nonconformity, and privacy. Legal professionals questioned the fundamental basis of the criminal law, asking whether it should—as vagrancy laws did—regulate either public or private morality. The Warren Court's bevy of emerging rules for the police and the courts were dubbed nothing less than a "criminal procedure revolution."

These changes of the 1960s made the largely hidden, centuries-old practices of vagrancy law governance visible and visibly problematic. Law enforcement officers did what they had always done with vagrancy laws. But as new groups linked their own claims against the laws to those of other groups, a full picture of the vagrancy law regime began to materialize. Each new arrest revealed deep tensions between vagrancy laws and developing, if contested, tenets of criminal law and procedure and emerging, if contested, ideas of constitutional rights to freedom and equality.

Prior to the 1960s, the Constitution had endorsed, or at least tolerated, vagrancy laws—capacious grants of discretion to arrest people on sight. After that time, it did not. Though the Supreme Court did not vindicate every claim of every vagrancy law challenger, its rejection of vagrancy laws marked a fundamentally new constitutional orientation toward people out of place. The history of vagrancy laws' fall from constitutional grace is thus a history not only of how a legal regime lost its legitimacy, how the rules of policing shifted, or how "the sixties" came to be. It is also a story of how the meaning of the Constitution itself changed.

Telling that story requires leaving behind preconceptions about how constitutional change happens. A conventional approach would likely place Supreme Court Justice William O. Douglas at the center. The story would begin with Douglas telling (possibly apocryphal) tales of a youth spent riding the rails and bedding down with hoboes. It would detail Douglas's abiding condemnation of vagrancy laws and his ultimate success authoring their invalidation in *Papachristou v. Jacksonville*. The story would close with Douglas's death and *Papachristou* as the opinion he wanted read at his funeral. The lesson would be simple: Douglas was a man with a vision and the power to make it happen.

That story is not this book. Constitutional change does not begin and end at the Supreme Court, with the decisions or biographies of the justices. It does not even begin with some heroic lawyer or organization identifying an obvious constitutional issue and crafting a strategy to address it. The story told here bears little resemblance, for example, to the usual history of the NAACP "on the road" to *Brown v. Board of Education*.[13]

Against what has become the standard model of the organized, straight-ahead legal campaign, the vagrancy law challenge may seem at first glance like no model of constitutional change at all. To be sure, organizations like the ACLU and the NAACP LDF were repeat players and organizational hubs for information and publicity. But the lawyers and clients who propelled the challenge were not their minions, dispatched from New York or Washington, DC. Nor did vagrancy law challengers have any unified theory of attack for some time.

The many, often barely visible, uses of vagrancy laws made a full picture of the regime long difficult to discern. It was only through a process of discovery and publicity, borrowing and adapting, that litigants, lawyers, and judges could even begin to map out the extensive terrain of vagrancy laws' reign. At first, it was not clear that vagrancy laws themselves would be the target. Law enforcers—the beat officers, police brass, prosecutors, and local judges who exercised vagrancy law discretion—seemed at least equally responsible for the injuries to person, dignity, and future prospects that the regime inflicted. That lawyers and clients settled on constitutional challenges to vagrancy laws resulted more from convergence than coordination.

But one can hardly dismiss a free-wheeling constitutional challenge that produced some two hundred fifty published cases over a twenty-year period. Improvisational, cumulative, and only loosely networked, the challenge was irrepressible because vagrancy law represented a legal obstacle so pervasive and so intrusive that every social movement of the era ran smack into it and tried to push it over. The vagrancy law challenge offers a model of constitutional change that very much began "from below" but did not remain there. It moved from the lived experiences of people like Edelman and Papachristou into the formal processes of "the law." Cases kept coming not in one place or as a result of one group

or one set of lawyers. They kept coming because the laws were critical to the maintenance of an increasingly contested order and hierarchy in American society.

The vagrancy law challenge thus produces a new image of legal and constitutional change. One might liken the litigation strategies with which we have become familiar to the 1950s high school prom—organized, fixed, and known, even if contingent in many of its particulars. By contrast, one might think of the vagrancy law challenge as a groovy 1960s "happening"—no one really planned it; the guest list was unwritten; the entertainment self-created; the location, duration, and content relatively spontaneous and open. Vagrancy cases shared certain constraints and opportunities, characteristics and approaches, but each case grew out of its own social world and took on its own shape.

Constructing and relating this diffuse and improvised history requires its own kind of orchestrated improvisation. The chapters highlight different areas of social life—from skid rows to hippie communes to gay bars—and different areas of legal doctrine—from free speech to criminal law and procedure to civil rights. Some chapters begin with the Supreme Court, others with lawyers, and still others with "vagrants" themselves. Some focus tightly on the vagrancy law challenge itself, while others extend to the developments that made that challenge possible or appealing. Some explore the lost world of vagrancy policing, while others assess the legal doctrines deployed to destroy it. Like vagrancy laws themselves, this story travels the entire country, from rural Louisiana to big city California. It takes account of vagrancy law defendants and their lawyers, social movement organizations, legislators and other politicians, lower court judges, legal scholars, and the media as well as the police officers, prosecutors, and other local officials responsible for vagrancy enforcement. Whatever person, place, or moment serves as the starting point, the story moves not only forward in time as the challenge gains adherents and momentum but also up and down the legal process, from litigant to lawyer to judge and back again.

This book thus shows the real work of legal and constitutional change. It shows how vagrancy laws' fall was both shockingly quick—twenty years is a metaphorical blink of an eye given a four-hundred-year-old regime—and slowly elaborated. It is difficult for a regular person to decide to fight a law. It takes knowledge and consciousness, financial resources and human ones. Even once a person has decided to fight and gotten a lawyer, it is hard to get a case to court in a posture, and with the right kinds of facts, that allows a court to answer a legal question crafted so as to produce the effect lawyers and clients desire. There are the obstructionist police officers who drop cases whose outcomes they fear and the well-meaning prosecutors who do so when they think the police were out of line; the reluctant judges who don't want to go out on a limb and the Supreme Court justices who often have their eyes on larger stakes or some other case that term. The process by which judges, and especially Supreme Court justices like

William O. Douglas, came to see vagrancy laws as a problem is an important part of the story. But so are the many arrests that never became convictions, the cases courts never saw, those they never decided, and even those in which they utterly failed to deal with what often seemed an intractable problem. History is full of such false starts and meandering paths, of successes and failures, of conflict seen and not seen, of ideas on the table and those that fall off of it. This is that kind of history, the messy kind, the human kind. It tries to understand how change happens in a complex world, and what it means when it does.

Reconstructing vagrancy laws' downfall as a legal history of the 1960s is a hard story to contain. First, there is the problem of defining the subject. Vagrancy laws were not a clearly delineated category. They were derivative, sprawling, and overlapping. Sometimes they included loitering or being a suspicious person. Sometimes those crimes were separate. Sometimes they included drunkenness or prostitution, but just as often those too were separate. Some states considered vagrancy to be a more serious charge than disorderly conduct or breach of the peace. Some less. Moreover, it was not that vagrancy laws served as the sole law enforcement tool against any particular threat. For the political dissident, vagrancy shared law enforcement space with sedition; for the gay man, it was sodomy; and for the street protestor, breach of the peace or disorderly conduct. As a result, what follows necessarily includes not only vagrancy laws themselves but also the various legal, and extralegal, constellations of which they were a part. It includes the laws and the criminal justice apparatus that enforced them. It details arrests and the brutality that sometimes accompanied them. The shifting scope of inquiry is determined by the particular social world from which the case emerged as well as from the regulatory landscape, the practices of police departments and officers, the acts of suspects, the strategies of lawyers, and the framings of judges.[14]

Still, the focus of this story always remains vagrancy laws and their challengers. This is a story about the use and abuse of law, rather than the use and abuse of force. Moreover, in keeping the focus on vagrancy-related laws, rather than their close relations, it follows the lead of many at the time who viewed vagrancy, loitering, and often suspicious persons laws as different in kind from most other laws. One prominent lawyer singled them out as "the paradigmatic harassment statutes." A Supreme Court justice put vagrancy laws "in a class by themselves."[15]

Second, there is the problem of when to begin the story of vagrancy laws' decline. Because people have always chafed under the laws' strictures, the story could begin as far back as defiance to the 1349 Statutes of Labourers or the various Tudor vagabonds acts, or with early efforts to evade and defy vagrancy enforcement on these shores. Or it might begin in the Depression Era of the 1930s, when poverty took on new meaning in the United States, and the

Supreme Court decided a handful of cases that began to undermine some of the basic assumptions buttressing vagrancy laws. These cases would become staples in the vagrancy law challenge a few decades later, but when they were decided, they were scattershot and disconnected. For the most part, vagrancy laws survived not only the Depression but the war that followed. The developments of the 1930s are thus better understood as resources for, and precursors to, the vagrancy law challenge of the 1960s than the beginning of the story itself.[16]

Third, it is difficult to maintain focus on vagrancy laws against the vast sweep of the 1960s. As shown here, that era will be both familiar and unfamiliar. As history does not usually proceed in neatly bounded decades, this book covers a rather "long 1960s." It begins in the early 1950s, when Edelman challenged his arrest, the civil rights movement entered a new phase, the Beats arrived on the cultural scene, the first gay and lesbian organizations emerged, and lawyers began to recognize vagrancy law as a constitutional problem. It ends in the early 1970s, with *Papachristou v. Jacksonville* crystallizing the claims of the prior twenty years.

Within that period, there is no one-to-one correlation between the events that dominate conventional histories of the era and the events that become visible through the vagrancy law lens. Though international developments come into view, the campaign's focus on changing the U.S. Constitution makes this a national, rather than global, story. Within that national frame, some movements of the long 1960s did not significantly partake of the vagrancy law challenge, and some left less of an imprint on the law books than those emphasized here. Because the vagrancy harassment of African Americans was so critical to the growing consensus against vagrancy laws, for example, they are the racial minority most visible here. Moreover, though women enter the story to fight vagrancy laws that interfered with their sexual autonomy, there is little sustained discussion of Second Wave feminist vagrancy law challenges. That absence is due partially to the fact that the protests of the women's movement postdated the heyday of the vagrancy law regime. In part, however, vagrancy laws had long applied differently to women, and during the long 1960s, the state often preferred other legal methods of regulating women. The rise of conservatism at the very moment left and liberal social movements were staking their claims also appears here only obliquely. Conservative activists are not present as vagrancy challengers because they did not, so far as the historical record reveals, tend to get arrested for vagrancy. Where the ideas and institutions undergirding the rise of conservatism informed the views of vagrancy laws' defenders, however, they are frequently, if implicitly, in evidence. Whether on the left or the right, not every iconic person, place, or incident of the 1960s can be found in these pages. The history of the vagrancy law challenge thus produces *a*, not *the*, legal history of the sixties.[17]

Finally, containing the story of vagrancy laws' aftermath is even more challenging than containing the story of its demise. For the story—like the institutional incentives for the police to engage in social control—- continues today and, no doubt, tomorrow. It is not just that the present repeatedly butts into the past, as aspects of the vagrancy law regime call to mind current problems of police power, social control, and constitutional interpretation. It is also that the story does not end in 1971 and 1972, when the Supreme Court struck down vagrancy, loitering, and suspicious persons laws.

The Court's declaration that vagrancy laws as they were written were incompatible with the Constitution was important. It suggested that the Constitution might embody some fundamental ideas that had come out of the social, political, cultural, and legal battles of the previous decades. But it was not everything. For one, the Court invalidated vagrancy laws only after it had created other methods of authorizing police discretion. It hoped that methods like stop and frisk would be more congruent with contemporary ideas about criminal justice and constitutional rights. For another, the justices who ultimately disposed of vagrancy laws stopped short of a wholesale validation of the individual rights claims that the vagrancy law challenge inspired.

Most fundamentally, the end of the vagrancy law story is unruly because there can be no definitive ending. The Court is not the only or the final arbiter of the legitimacy of any law. The moment when the Supreme Court and the Constitution (belatedly) joined the fray is as good a moment to pause as any. That vagrancy laws—long considered among the most trivial of violations—had constitutional dimensions suggested that nothing was now too small for constitutional consideration. What is more, the Constitution had taken the side of vagrancy laws' challengers. We should not mistake, however, a moment of punctuation for resolution. The Supreme Court's interventions fundamentally transformed, rather than ended, the war between order and disorder, control and freedom. The battles that would follow, battles that would remain profoundly contested and fundamentally constitutive of the fabric of American law and society, would be shaped indelibly by the one set in motion with Isidore Edelman's arrest in the fall of 1949.

1

From the Soapbox to the Courthouse

As he did most days, on September 22, 1949, Isidore Edelman left his apartment in the Happy Valley neighborhood of Los Angeles and trekked five miles downtown. His destination was Pershing Square. His plan was to spend the day talking.

Even among the many characters the park had on frequent display, this soapbox orator stood out. Perhaps it was his presence. Though he was a small, balding, middle-aged man, Edelman's eyes were wide awake, and his smile had more than a little mischief in it. Perhaps it was his perseverance. Day in and day out, parkgoers could count on Edelman for education, provocation, and entertainment.

Most likely, though, Edelman's fame was due to what he said there in the park at the beginning of the Cold War. Edelman had come to the United States from Russia in 1910, when he was eleven years old. During the early New Deal, he worked for the federal theater project of the Works Progress Administration (WPA). Later, he described himself as a "freelance pamphleteer." Edelman joined the Communist Party in 1936, but he was expelled in 1947 because, in his words, "I criticized its leadership for waging relentless war against right and left deviationists in its ranks." That said, Edelman acknowledged that he remained "Communist in his thinking."[1]

For a year and a half, Edelman had taken his place in the square without incident. For a year and a half, he had preached his personal brand of left politics to warm, or at worst indifferent, reception. Then trouble began. Whether those who caused that trouble did so because they deemed Edelman a buffoon, an irritant, or a threat, they were not alone in worrying that views like Edelman's could destroy the nation's moral fabric and political security. Edelman's radical notions put many Americans in mind of Soviet power and the Soviets' recent explosion of their first atomic bomb. Who knew what fanatics like Edelman might do? In fact, a year after Edelman's arrest, Julius and Ethel Rosenberg would be arrested, and eventually executed, for spying for the Soviets.