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Constitutional Law - Search and Seizure - Fourth Amendment Vagueness - Evidence Excluded When Obtained by Search Incident to Vagrancy Arrest under Statute Previously Held Void for Vagueness

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CONSTITUTIONAL LAW — SEARCH AND SEIZURE — FOURTH AMENDMENT VAGUENESS — EVIDENCE EXCLUDED WHEN OBTAINED BY SEARCH INCIDENT TO VAGRANCY ARREST UNDER STATUTE PREVIOUSLY HELD VOID FOR VAGUENESS.

Hall v. United States (D.C. Cir. 1971)

Appellant Hall was convicted in the United States District Court for the District of Columbia of certain narcotics violations[1] based largely upon evidence discovered in a search incident to his arrest under subsection (C) of the District of Columbia Narcotic Vagrancy Act.[2] Prior to trial, the appellant presented a motion to suppress the incriminating evidence based on a claim that his arrest had been made without probable cause and thus was in violation of the fourth amendment.[3] The trial court denied the motion to suppress and permitted the arresting officers to testify concerning their discovery of narcotics on the appellant's person. The Court of Appeals for the District of Columbia Circuit reversed, *holding* that probable cause for arrest could not be demonstrated simply by showing conduct ostensibly within the purview of subsection (C) because the Narcotic Vagrancy Act was too vague to provide a standard of probable cause for the guidance of arresting officers.[4] The evidence was therefore suppressed as the fruit of a search incident to an illegal arrest. *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1971).

The District of Columbia Narcotic Vagrancy Act is one of many vagrancy laws to come under constitutional attack from both courts[5]

1. The specific charges were importation, possession, and sale of narcotics in violation of 21 U.S.C. §§ 174, 4704(a) (1964) (repealed 1970). Both offenses are presently covered by 21 U.S.C. §§ 801 *et seq.* (1970).

2. D.C. CODE ANN. § 33-416a (1967) (held unconstitutional in part 1970). The arrest followed the third encounter between the appellant and the arresting officers. On each occasion the officers had seen the appellant, a known narcotics user, on the street in the company of at least one other known narcotics user. After responding to police inquiries, the appellant was warned that a narcotics vagrancy observation had been noted. The third encounter resulted in appellant's arrest under the Narcotic Vagrancy Act. *See* note 12 and accompanying text *infra.* In a search incident to that arrest, the officers found the drugs which became the basis of appellant's conviction. Hall v. United States, 459 F.2d 831 (D.C. Cir. 1971).

3. Appellant's written motion asserted the illegality of the search on the ground that he "was arrested without warrant and without probable cause . . . in violation of the protections of the 4th Amendment of the United States Constitution." 459 F.2d at 834 n.9.

Appellant questioned neither the scope of the search which followed his arrest nor the constitutionality of the statute under which the arrest was made. His only argument was that the arrest itself was illegal and therefore not supportive of an incidental search.

For a case in which the court considered the scope of a search made incident to an arrest under the Narcotic Vagrancy Act, *see* Worthy v. United States, 409 F.2d 1105 (D.C. Cir. 1968), in which the court suggested that any search more extensive than a self-protective check for weapons might be unreasonable where vagrancy is the only offense involved, reasoning that there can be no fruits or instrumentality of vagrancy. *Id.* at 1109-10. For a full discussion of *Worthy, see* 18 AM. U.L. REV. 588 (1969).

4. *See* notes 12-16 and accompanying text *infra.*

5. *See, e.g.,* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance held to be too vague); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967) (ordinances prohibiting "parading without a permit," "disorderly conduct," and

and commentators.[6] Vagrancy laws are preventive in nature[7] and are often used to gain custody of, or justify searches of, those suspected of more serious crimes for which probable cause to arrest is lacking.[8] Although the elements which constitute vagrancy vary widely from statute to statute, the typical provisions are broadly worded[9] and, therefore, lend themselves to flexible interpretation by law enforcement authorities.[10] Such broad wording has exposed many of these statutes to constitutional attack and several have been found to be too vague and, thus, violative of due process.[11]

Subsection (C),[12] the provision under which appellant Hall was arrested,[13] was declared unconstitutional (subsequent to Hall's conviction) by the Court of Appeals for the District of Columbia Circuit in *Ricks v. United States (Ricks II)*.[14] In *Ricks II*, a suspected prostitute and narcotics user was arrested under circumtances similar to those in *Hall*.[15] The statutory provision was held to lack a "degree of specificity that would enable citizens of ordinary intellect to distinguish wrong from right, or administrators or jurists to confidently make applications."[16] It was, therefore, declared void for vagueness as violative of due process.

In so holding, the court noted its similarity to a subsection of another District of Columbia statute found partially void for vagueness in

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"loitering" held to be too vague and overbroad); United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966) (vagrancy statute held to be too vague); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426 (1967) (statute violated due process and constituted an overreaching of the proper limitations of state police power).

6. *See, e.g.*, 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 (1967); Douglas, *Vagrancy and Arrests on Suspicion*, 70 YALE L.J. 1 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Comment, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962).

7. 18 AM. U.L. REV. 588, 589 (1969). *See* Lacey, *supra* note 6, at 1208.

8. Amsterdam, *supra* note 6, at 226–27; Douglas, *supra* note 6, at 9–10, 12–13; Lacey, *supra* note 6, at 1218–19. Such arrests and the resulting detention enable the police to run fingerprint checks, obtain possible identification by witnesses to other crimes of which the arrestee is suspected, and interrogate the arrestee. It is also relevant to note that it is easier to obtain a conviction for vagrancy than for many other crimes, and for that reason, vagrancy prosecutions often supplant prosecutions for crimes such as prostitution and related sex offenses. *Id.*

9. *See* Lacey, *supra* note 6, at 1208.

10. 18 AM. U.L. REV. 588, 589–90 (1969).

11. *See* note 5 *supra*.

12. D.C. CODE ANN. § 33-416a(b)(1)(C) (1967) which provides in pertinent part:

> (b) For the purpose of this section—
> (1) the term "vagrant" shall mean any person who is a narcotic drug user or who has been convicted of a narcotic offense in the District of Columbia or elsewhere and who—
> . . . .
> (C) wanders about in public places at late or unusual hours of the night, either alone or in the company of or association with a narcotic drug user or convicted narcotic law violator, and fails to give a good account of himself.

13. The subsection was not cited by the arresting officers at trial, but their testimony made it clear the arrest was in fact made pursuant to subsection (C). 459 F.2d at 835 n.13.

14. 414 F.2d 1111 (D.C. Cir. 1968).

15. *Id.* at 1111–12. *See* note 2 *supra*.

16. 414 F.2d at 1115.

Ricks v. District of Columbia (Ricks I).[17] In that case, the court held that a "good account" requirement identical to the one in subsection (C)[18] left too much discretion to the police because it effectively conditioned an individual's right to walk the street upon the officer's satisfaction with the person's explanation of his presence.[19] The *Ricks I* court also concluded that the terms "wander," "loiter," and without "visible means of support" were undefined and unlimited by the statute, thereby leaving the police and the courts to make an unassisted determination as to the terms' meanings and also giving "unfettered discretion — to administrative and judicial authorities alike — to regulate movement on the public streets."[20]

In both *Ricks* decisions, the court noted that the use of the statutes in question was to arrest, for investigatory and preventive purposes, those suspected of more serious crimes.[21] In *Ricks I,* the court recognized the need for effective measures to combat crime but rejected the concept that the mere statistical probability that a particular group will engage in criminal activity would serve as justification for punitive sanctions in the absence of proof of individual guilt.[22]

The issue of probable cause has seldom been considered at length in the context of a vagrancy arrest. However, this issue becomes relevant when considering the admissibility of evidence found in a search incident to such an arrest, as it is well settled that a search incident to an arrest made without probable cause is illegal, and the evidence obtained must be excluded from use at trial.[23]

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17. 414 F.2d 1097 (D.C. Cir. 1968). The three provisions involved in that case describe a vagrant to be:

> (1) [A]ny person known to be a pickpocket [or] thief . . . and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any . . . public place,
>
> . . . .
>
> (3) any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source,
>
> . . . .
>
> (8) any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

D.C. CODE ANN. §§ 22-3302(1), (3) & (8) (1967).

18. *See* note 12 *supra.*

19. 414 F.2d at 1105. The *Ricks I* court relied upon Shuttlesworth v. Birmingham, 382 U.S. 87 (1965), and could "discern no significant difference from a constitutional standpoint" between the statute before it and the one under consideration in *Shuttlesworth.* The *Shuttleworth* case involved a statute making it "unlawful for any person . . . to so stand, loiter, or walk upon any street or sidewalk . . . after having been requested by any police officer to move on." BIRMINGHAM, ALA., CODE § 1142 (1944). The Supreme Court held the statute invalid, saying it "does not provide for government by clearly defined laws, but rather for government by the moment to moment opinions of a policeman on his beat." 382 U.S. at 90, *citing* Cox v. Louisiana, 379 U.S. 536, 579 (1965) (Black, J., concurring and dissenting).

20. 414 F.2d at 1107.

21. *Id.* at 1109, 1116. *See* notes 7 & 8 and accompanying text *supra.*

22. 414 F.2d at 1110.

23. *See, e.g.,* Beck v. Ohio, 379 U.S. 89-97 (1964) (arrest and search incident thereto were invalid for lack of probable cause under the fourth and fourteenth

To determine the existence of probable cause for arrest, a court is normally required to decide whether the facts and circumstances within the knowledge of the arresting officer were sufficient in themselves to permit a reasonably cautious man to conclude that an offense had been or was being committed.[24] Primary consideration is usually given to the officer's factual knowledge at the time of the arrest,[25] with little, if any, consideration given to the technical aspects of the law under which the arrest is made. Thus, the same statutory broadness which has brought vagrancy statutes under attack on fifth amendment grounds has apparently been assumed to justify almost any arrest in terms of probable cause.

In *United States v. Margeson*,[26] one of the few cases to involve the admissibility of evidence uncovered in a search incident to a vagrancy arrest, the United States District Court for the Eastern District of Pennsylvania, after finding the statute involved to be void for vagueness, held that, in order for an arrest under a vagrancy statute to be valid, not only must the officers have had probable cause to believe the defendants were violating the statute, but also that the statute itself must be constitutional.[27] The court cited no cases in support of this proposition.[28] However, this same proposition has been urged by a dissenting justice in *Worthy v. United States*[29] and he cited *Margeson* as precedent.[30] In support of such a result, the *Worthy* dissent suggested that the reasons for holding a vagrancy statute unconstitutional for vagueness under fifth amendment due process are so closely related to fourth amendment search and seizure requirements that exclusion of the fruits of an arrest under a voided statute is certainly justified, if not required.[31]

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amendments); Henry v. United States, 361 U.S. 98, 102 (1959) (warrantless arrest supported an incident search only if made for probable cause); Johnson v. United States, 333 U.S. 10, 15 (1948) (a search incident to an arrest was valid only if the arrest itself was lawful).

24. Beck v. Ohio, 379 U.S. 89, 91 (1964); Draper v. United States, 358 U.S. 307, 313 (1959); Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Carrol v. United States, 267 U.S. 132, 162 (1925). The probable cause requirement for arrests originates in the fourth amendment which provides:

> The right of people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .

U.S. CONST. amend. IV. The ban on unreasonable seizures and on warrants issued without probable cause extends to seizures of persons — arrests. Giordenello v. United States, 357 U.S. 480, 485–86 (1958); McGrain v. Daugherty, 273 U.S. 135, 154–57 (1927).

25. *See, e.g.*, Beck v. Ohio, 379 U.S. 89 (1964).

26. 259 F. Supp. 256 (E.D. Pa. 1966).

27. *Id.* at 268.

28. *Id.*

29. 409 F.2d 1105, 1110–15 (D.C. Cir. 1968) (Wright, J., dissenting).

30. *Id.* at 1111–12.

31. Justice Wright pointed to such vagueness as giving police and prosecutors unfettered discretion to stop, question, search, and prosecute almost anyone, without warning delinquents who might wish to conform their behavior to the law. He further noted that arrests for vagrancy are often made simply as a pretext for a search (or interrogation) which it is hoped will turn up evidence of a crime which the police "merely suspect" the defendant has committed and for which the police cannot make a constitutionally valid arrest. Having characterized the defects in such statutes as closely related to fourth amendment policy, Justice Wright concluded that the fruits of arrests under such statutes should be excluded where

The approach employed in *Margeson* and in the dissenting opinion in *Worthy* is inconsistent with and unsupported by traditional probable cause analysis. Traditionally, it has been the fourth amendment, not the fifth, which has been utilized in connection with illegal arrests, and the analysis under that amendment usually considers the legality of an arrest based upon the facts within the knowledge of the officer at the time of the arrest.[32] If the relevant facts in consideration are those that are known to the officers at the time of arrest and if the standard is to be that of a man of reasonable caution rather than that of the legal technician, it seems incongruous to require police officers to predict that a presumptively valid statute will be found unconstitutional as violative of fifth amendment due process and to expect the officer to forego arresting a suspect for that reason.[33] The subsequent determination that the statute under which the arrest was made was too imprecise to authorize conviction would seem irrelevant to a consideration of the legality of the arrest; that is, to hold an arrest illegal because made under a statute subsequently voided under the fifth amendment is, at best, a proposition of doubtful validity.

Faced with a problem identical to the one presented in *Margeson,* the *Hall* court took a somewhat different approach. In the course of a discussion very much similar to the analysis in *Ricks I*[34] and *Ricks II,*[35] the court made a lengthy and critical examination of the nature and effect of the Narcotic Vagrancy Act. It was first noted that the statute had already been held void for vagueness under the fifth amendment in *Ricks II.*[36] The court also considered subsection (C), within the context of the fourth amendment, and described the subsection as defining a substantive offense in language so ambiguous as to precipitate arrests on mere conjecture.[37] The court further found the elements of subsection (C) so obscure that even officers acting in good faith could not determine

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the statutes are found unconstitutional. *Id.* If, as the Supreme Court stated in Sibron v. New York, 392 U.S. 41 (1968), Congress is not free, in fashioning a statute, to compromise or ignore the fourth amendment or to authorize police conduct which "trenches" upon rights guaranteed by that amendment, it should follow that the exclusionary rule may be applied to deter Congress from doing so.

32. *See* notes 24–27 and accompanying text *supra.*

33. It should be noted that a *fourth amendment* vagueness doctrine does not have the same effect. Such a proposition merely recognizes that certain statutes are so vague as to make it impossible for a policeman to have probable cause to arrest anyone for their suspected violation. To decide a statute is void for vagueness under the fourth amendment is to hold, firstly, that the judgment of the arresting officer was wrong and, secondly, that no officer could ever have probable cause to arrest under the voided statute because of its lack of comprehensible standards. The criteria under which such a holding would be made are ones with which the police are expected to deal every day. While, as the court noted, police officers, duty bound to execute faithfully the criminal laws, can hardly be expected to ignore the broad latitude of discretion such statutes confer (459 F.2d at 838), they can be expected to know and conform to the constitutional requirements relevant to arrest. This is all the fourth amendment vagueness doctrine requires.

34. 414 F.2d 1097 (1968).

35. 414 F.2d 1111 (1968).

36. 459 F.2d at 835.

37. *Id.* at 836.

probable cause for arrests in a manner consistent with fourth amendment principles because the only factor revealed by the statutory language "is the probability that the substantive status offense it prescribes will be deemed evidenced by conduct which does no more than arouse a suspicion of criminality."[38] In short, the statute was found to authorize arrest and conviction for merely "suspicious conduct."[39] Examination of police procedures revealed that the statute was in practice used as a substitute for arrests for more serious crimes of which the accused was suspected but for which the police had no probable cause.[40]

Having found that the statute authorized police conduct violating fourth amendment rights, the court held that conduct ostensibly within the scope of subsection (C) was not sufficient in itself to make out probable cause for arrest and that, therefore, appellant's motion to suppress the fruits of a search incident to such an arrest should have been granted.[41]

The court's analysis, while purportedly dealing with fourth amendment issues, was heavily flavored with language more appropriate to a discussion of fifth amendment due process.[42] The majority denied that the holding was based on fifth amendment grounds,[43] but at the same time failed clearly to delineate its purported fourth amendment basis. The language of the opinion suggested two possibilities.

The first possible basis rests upon frequently cited dicta — arrests cannot be made on mere suspicion of criminality[44] and fourth amendment probable cause requirements bar making merely suspicious conduct a substantive crime. Characterizing the statute as "purporting to authorize arrest and conviction . . . for merely suspicious conduct,"[45] the court found the resulting license to arrest on suspicion alone "plainly at war with the Fourth Amendment."[46] Moreover, the court declared that suspicious circumstances do not support an arrest unless "they ascend to the level of probable cause — within the Fourth Amendment meaning rather

38. *Id.* at 838.

39. *Id.* The court noted the similarity to an earlier statute which authorized the arrest and conviction of "suspicious persons" and which had been invalidated in Stoutenburgh v. Frazier, 16 App. D.C. 229 (Ct. App. 1900). 459 F.2d at 838.

40. 459 F.2d at 839. The court described police enforcement practices as diluting even the "relatively meaningless probable cause standard the Narcotic Vagrancy Act incorporates," and as "a flouting of the Reasonable Search and Seizure Clause as well." *Id.* Moreover, the court also took note of testimony summarized in the *Ricks* opinions to the effect that the observation was "sort of something you do instead of making an arrest" when there was a basis only to "suspect" one "of some form of crime." *Id.*

These procedures had their origin in a conference between the police and the office of the Corporation Counsel in 1954, two years before enactment of the Narcotic Vagrancy Act. Metropolitan Police Dep't, Memorandum Order No. 23, Ser. 1954 (Mar. 23, 1954).

41. 459 F.2d at 841.

42. *See* notes 16–22 and accompanying text *supra*.

43. 459 F.2d at 842.

44. Mallory v. United States, 354 U.S. 449, 454 (1956) (police may not arrest on mere suspicion but only on "probable cause").

45. 459 F.2d at 838.

46. *Id.*

than the statutory definition."[47] The implication would seem to be that probable cause has some viability independent of the statute under which an arrest is made and that a reasonable belief that the statute has been violated is not enough in itself to justify an arrest. It is arguable that the court indicated that the legislature may not make suspicious conduct a crime, and if such an analysis is proper, the dissent was correct in saying that such reasoning would be more comfortable within the due process clause.[48] If probable cause may be described as a reasonable belief that the arrestee is guilty of an offense,[49] such a principle can only have meaning if it is considered in conjunction with the statute describing the offense. Thus, fourth amendment requirements would be satisfied if the statute describes suspicious conduct as a crime in such a way as to allow the man of reasonable caution to form a reasonable belief that the arrestee's conduct violates the statute.

The second possibility suggested by the language of the majority is more plausible. By describing subsection (C) as so vague that "even officers engaged in its good faith effectuation cannot gauge justification for subsection (C) arrests consistently with Fourth Amendment principles,"[50] the court indicated that the statute failed to describe a crime in such a way as to allow the man of reasonable caution to form a reasonable belief that the statute was being violated.[51] In other words, the court deemed the statute too vague since it did not supply reasonable criteria by which a reasonable belief as to its violation could be formed or measured by an arresting officer. Such a theory is closely analogous to, but distinguishable from, the fifth amendment due process doctrine under which the statute was voided in *Ricks II*.[52] That doctrine required legislative specificity such that citizens of ordinary intelligence would be able to distinguish wrong from right and administrators or jurists would be able to apply confidently any such legislation.[53] On the other hand, the fourth amendment would require sufficient statutory specificity to enable a law enforcement official of reasonable caution to form a reasonable belief as to the type of conduct which would violate the statute.[54] Therefore, the fifth amendment would bar conviction on suspicion in lieu of proof of criminality,[55] while the fourth amendment would bar arrest on conjecture in lieu of probable cause.[56]

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47. *Id.* at 841.
48. *Id.* at 844 (MacKinnon, J., dissenting).
49. Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Carrol v. United States, 267 U.S. 132, 161 (1925).
50. 459 F.2d at 838.
51. *See* note 40 *supra.*
52. 414 F.2d 1111 (1968).
53. *See* notes 16–22 and accompanying text *supra.*
54. *See* text accompanying note 24 *supra.*
55. *See* notes 16–22 and accompanying text *supra.*
56. *See* Mallory v. United States, 354 U.S. 449, 454 (1956).

The dissent rejected the majority's distinction between the two theories as a ruse to effectuate a retroactive application of *Ricks II*.[57] A reluctance to rely on a retroactive application seems justified. As the dissenting justices demonstrated, the propriety of applying the *Ricks II* holding retroactively for the purpose of excluding evidence improperly obtained is doubtful in light of recent Supreme Court decisions on the subject of retrospective application of decisions expounding new constitutional rules.[58] However, the validity of the argument that the decision actually involved a retroactive application of *Ricks II* is questionable. Such an argument assumes, as the dissenters indicated, that the retroactive application of *Ricks II* would result in a determination that Hall's arrest under an unconstitutional statute was illegal, and therefore, the evidence found in a search incident to the arrest should have been suppressed as fruit of an illegal arrest.[59] This is, in fact, the same reasoning used in *Margeson,* although that case, unlike *Hall,* involved a statute not previously held invalid. The distinction is meaningless since any voiding of a statute applied to hold illegal an arrest made prior to that voiding is inconsistent with fourth amendment theory.[60] That amendment by its terms is directed at unreasonable searches and seizures.[61] Limited searches made incident to a legal arrest have been determined to be reasonable,[62] and the question of whether an arrest is reasonable and therefore legal[63] has been held to depend upon the circumstances at the time of the arrest.[64] Thus, it is clear that the voiding on fifth amendment grounds of the statute

57. 459 F.2d at 843–44 (MacKinnon, J., dissenting).

58. *See* Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965). In *Desist,* the criteria which guided the resolution of the question of whether a new consitutional rule should be given retrospective effect were said to encompass: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards, the most important of these being the purpose to be served by the new rule. 394 U.S. at 249. Assuming that a retroactive application of *Ricks II* would result in the suppression of the evidence found in *Hall* (*but see* notes 60–67 and accompanying text *infra*), the dissenters argued that such exclusion would not serve its normal purposes of deterring police conduct violative of constitutional limitations and of protecting judicial integrity. Justice Robb noted also that exclusion would have no effect on the truth-finding aspect of the appellant's trial, thus failing the test stated in Williams v. United States, 401 U.S. 646, 653 (1971). Thus, having decided that retroactive application of *Ricks II* would neither serve the normal deterrent purpose of exclusion nor substantially improve the truth finding function of the trial, the dissenting Justices agreed that any retroactive application of the *Ricks II* holding in *Hall* would be improper. 459 F.2d at 843–46 (dissenting opinions).

59. 459 F.2d at 844 (MacKinnon, J., dissenting). *But see* Johnson v. United States, 370 F.2d 489, 491 n.2 (D.C. Cir. 1966), in which it was indicated that even if a vagrancy statute is found to be unconstitutional, a search incident to an arrest under it might still be lawful so long as there was probable cause for arrest.

60 *See* notes 26–31 and accompanying text *supra.*

61. *See* notes 32–33 and accompanying text *supra.*

62. *See* note 24 *supra.*

63. *See* note 23 and accompanying text *supra.*

64. *See* notes 24 & 25 and accompanying text *supra.*

under which the arrest is made should not have any effect on the legality of arrest.[65] On the other hand, to declare a statute so vague as to offer neither the police, the legal technician, nor the man of ordinary caution any criteria by which to form even a reasonable belief as to the occurrence or non-occurrence of its violation is consistent with fourth amendment policy and involves no problem of retroactivity. As the majority noted, the appellant had earned his reversal as he was the first to "prevail on a claim that the Fourth Amendment deficiencies of subsection (C) nullify an arrest and search thereunder," this being a "fresh constitutional determination."[66]

What seems to have evolved is a fourth amendment vagueness doctrine under which arrests, not convictions, are found illegal when made pursuant to a statute lacking the requisite degree of specificity. However, it should be obvious that the degree of statutory vagueness sufficient to justify voiding a statute as violative of due process is much less than that which would be required to find an arrest under that statute illegal on fourth amendment grounds. That is, there is a quantitative difference between the belief a policeman is required to have in order to arrest and the belief required of a judge or jury to justify conviction. A statute too vague to allow an officer to form a reasonable belief in an arrestee's guilt is also obviously too vague to allow a judge or jury to form a belief beyond a reasonable doubt as to a defendant's guilt. Thus, declaring illegal an arrest under such a statute is, in effect, a finding that the statute itself is unconstitutionally vague. While this result may make the concept of fourth amendment vagueness appear somewhat redundant, it is submitted that these theories of vagueness can and should be distinguished. For example, as analysis of the *Margeson* rationale demonstrates,[67] a failure to attack vagueness in fourth amendment terms would leave a court with no logical approach to the problems involved in the instant case.

Thus, the fourth amendment doctrine suggested in the *Hall* opinion apparently solves these problems. While probably limited in applicability to situations similar to that presented in *Hall* — arrests made under statutes which would be or have been found void under the fifth amendment, the concept of fourth amendment vagueness does provide an alternative means by which fourth amendment rights can be protected in a manner logically consistent with traditional analysis. Such a result, in itself, seems sufficient to justify the acceptance of fourth amendment vagueness as a viable constitutional doctrine.

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65. *See* notes 32 & 33 and accompanying text *supra.*

66. 459 F.2d at 842.

67. *See* notes 32 & 33 and accompanying text *supra.*