LXO'D O'DONOGHUE, M.A. A reconsideration of the frequenting case.

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# A RECONSIDERATION OF THE FREQUENTING CASE

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I. INTRODUCTION: This article is intended as a general treatment of what is loosely termed the frequenting provision, canvassing and commenting on possible alternatives to the present state of the law. S.52 (1)(j) of the Police Offences Act 1927 enacts as follows :

> (1) Every person shall be deemed a Rogue and Vagabond within the meaning of this Act and be liable [to a fine not exceeding $400 or] to imprisonment for any term not exceeding 1 year -
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> (j) who being a suspected person or reputed thief, frequents any port or harbour, river, canal, navigable stream, dock or basin or any quay or wharf, or any other public place, or in any house building or other place adjacent to any such port or harbour, river, canal, navigable stream, dock or basin, or quay or wharf with a felonious intent.[1]

No attempt is made to delve with any depth into the general case law,[2] but an effort is made to highlight areas of uncertainty which have arisen. Hopefully, this will illustrate the broad and vague powers presently vested in the hands of the police; the anomalies which have emerged from such powers, and the oppressive potential for abuse which lurks in the hazy shadow cast by such powers.

Wide and vague police powers have long been censured as harbouring a temptation to arbitrary and discriminatory enforcement.[3] Nobody expresses this more clearly than the United Kingdom Royal Commission on Police Powers; "Where the laws are vague the danger of the police straining the evidence to achieve a conviction is greatest."[4]

The main thrust of this paper is to examine whether the frequenting provision as it stands is needed, and what viable alternatives are available if it is found not to be. This enquiry shall take place within the frame-work of the two models of the criminal process formulated by Herbert L. Packer in "The Limits of the Criminal Sanction."[5]

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1. The case law in England and Australia limits this offence to persons suspected of property crimes or crimes of dishonesty. However, since R v. Wilson [1962] NZLR 979 the New Zealand provision has been extended to cover suspected sex offenders as well.
2. For a general coverage of the case law see;
   (i) G.P. Curry "Vagrancy" Victoria University of Wellington LLM Thesis 1971 pp 52-4, 59, 61-62, 74, 116-121
   (ii) Pike "Is there a Defence to S.52 (1)(j)?" NZUL Rev. 1975 (6) pp 315-340.
3. Curry note 2 supra p. 37. Yeamans Constitutional Attacks on Vagrancy Laws 20 Stanford L.R. )1968) 782 pp 792-793. Budnitz Vagrancy Laws Invalid as too vague and as improper Exercise of Police Power (1968) 3 Har. Civ.Rights - Civ.Lib.Law Rev. 439 pp 441-442. Comments of Luxford S.M. in Fell v. Gauntlett (1949) 6 M.C.D. 48 at p.50.
4. Curry Note 2 supra p. 147 Royal Commission on Police Powers (UK 1929) cmnd 3297.
5. H.L. Packer "The Limits of the Criminal Sanction" Stanford Stanford UP 1968.

Note that these models are not intended to represent a complete or self-contained description of reality, or represent the ideal to the exclusion of the other. They are an attempt to abstract two seperate value systems that compete for priority in the operation of the criminal process. They afford a convenient way to talk about the operation of the criminal process, whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of the two values and a series of resolutions of the tensions between their competing claims.

On one side of the fence can be seen the Due Process Model, which champions the individual's right to freedom and liberty - the right to be left alone.

On the other side of the fence can be seen what has been labelled The Crime Control Model, which lays great stress on the contemporary need and usefulness of police powers such as S.52 (1) (j) as crime prevention devices. Crime prevention is seen as all-important - by protecting society from crime before it occurs, the community's liberty is maximised. The slight encroachment on an innocent person's freedom, which involves mere embarrassment or loss of dignity, is justifiable and should be sacrificed if society is to reap the long term benefits of crime prevention.

The next stage of the article entails a brief consideration of the role of the policy, in particular what sort of preventive role should they perform? How far can the police powers be pruned, if they are to remain effective agents of social control and able to carry out the police mandate.

The New Zealand police claim the frequenting provision is necessary, and their preventive role would be severely impaired if S.52 (1)(j)was wiped from the books. This claim will be examined to see if it is true in substance, and the question will be posed, whether the police do, in fact, need the frequenting provision.

To conclude, the proposed reforms and alternatives to S.52 (1)(j) shall be outlined and dealt with. Some other form of social control to that offered by the frequenting provision is called for - this paper concludes with a proposal which hopefully, best answers the criticisms levelled at the frequenting provision and also conforms to the criteria propounded by Packer as to what kinds of conduct the legislature should "prescribe" a criminal sanction for.

Two concepts which are at the core of this article require further explanation, to give some indication as to the manner in which the writer has interpreted them in the context of the article.

Firstly the term abuse. It is almost impossible to give a satisfactory definition of abuse - note however these instances which throw some light on what the writer regards as an abuse;

(i) Where the suspect has not done anything to show the intention to commit a particular offence - but S.52(1)(j) serves as a "short-cut" out of "mere convenience" to circumvent the more rigorous demands required for the law of attempts. Mere suspicion is the foundation of the charge.

(ii) When the frequenting charge is used to supplement the present laws of arrest - which convey no power to arrest on suspicion. The provision is employed in an underhand manner in practice as a "holding device", enabling the police to pursue further investigations into past or present offences.

(iii) The police may feel that the substantive charge against an accused might not hold up to the scrutiny of the court. - so "frequenting" is tagged on as an alternative charge. If the first charge does subsequently fail the police may rest easy that the second charge based on mere suspicion will probably be easier to "make stick". Where the police themselves feel strongly that a person who is guilty may be let off by the weakness of their own case then they may feel justified in convicting him at least for something. - frequenting fits the bill as something to charge him with.

(iv) The harrassment, either through arrest and taking into custody or via the threat of possible legal sanctions are also abuses of the criminal process. The freedom of the individual is restricted by the police action - and it is left to the police to define who is a potential offender or suspect.

As Thurman Arnold states; "...concealed practices have a bad odour."[6] Terence Arnold has this to say about such practices "This involves a manipulation and contempt for the law which is not desirable in a law enforcement agency."[7]

If anything at all can be gleaned from this review of abuses it is that there is no "legitimate" or proper use of S.52 (1)(j). One invariably ends up concluding that any action under S.52 (1)(j) is abusive, since a power to arrest on mere suspicion is in itself abusive of the lawmaking process. The use of S.52 (1)(j) is inconsistent with the general principles of criminal liability. One of the cornerstones of the criminal law is that the accused is innocent until proven guilty. The onus is on the prosecution to prove beyond reasonable doubt that the accused committed a particular offence, and in doing so had the requisite mens rea or guilty mind.[8]

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6. Thurman Arnold Symbols of Government (1938) p. 162
7. Terence Arnold Arrest, Victoria University of Wellington LLM Thesis 1972 p. 197
8. see Woolmington v. Director of Public Prosecutions [1935] A.C. 462

In the writer's opinon an arrest on the basis of what a suspect may do or is thought likely to do has no place in the criminal law. What a person is suspected of being likely to do and what he in fact does often probably would not coincide. It would not be an exaggeration to say that every person would have suppressed a temptation to commit a crime, be it large or small, at some stage of their life. Every person should have the right to be left alone and to have an opportunity to suppress an urge to commit a crime. And it does not matter one bit that the avenue by which this destination is reached is through second thoughts sparked by one's moral conscience, or simply being deterred by the risk of getting caught. In its simplest form the argument to this - if a person hasn't done anything, as a consequence nobody is harmed, therefore nobody should be punished.

Crime prevention is the second concept in need of elaboration. In its simplest form crime prevention is the stopping of crime before it occurs. Prevention is a goal which speaks to the future and can be effected by a variety of modes; Through the psychological deterrence of -

(a) perceiving the application of legal sanctions to offenders for past conduct committed, OR

(b) the threat or warning of the application of a legal sanction.

Secondly, there is direct physical restraint, where an offender is arrested subsequently incarcerated and thus incapacitated from committing further offences while in custody.

Another method, not directly related to this paper is the use of crime prevention devices such as locks or burglar alarms. An arrest on S.52 (1)(j), harassment or the threat of applying S.52 (1)(j) are regarded by the police as "legitimate" and essential crime preventive measures. These, however, as noted, constitute abuses, they do not get past the fundamental criticism that they are based on mere suspicion and are an unjustifiable interference with the individual's freedom.

## II. The Case Law - Uncertainty Reigns.

S.52 (1) (j) can be broken down into three elements:

1. suspected person or reputed thief
2. frequenting
3. with a felonious intent.

### A. Suspected person or reputed thief

(a) Evidence. To establish a person as a reputed thief or suspected person character evidence of a general nature is made admissible, and previous convictions are included as admissible evidence. This permits the prosecution to present evidence not usually admissible in criminal prosecutions.[9] Generally

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9. Curry note 2 supra pp 52-53 and cases cited therein.

character evidence is inadmissible to show that the accused is likely to have committed the offence charged, and previous convictions are usually not admitted if all they go to show is a predisposition to crime.[10] Evidence of other misconduct such as previous convictions is generally rejected because of the fear that it will be disproportionately prejudicial to the accused - with the result the court will not pay enough attention to the weight of the evidence connecting him with the present offence charged.[11] Plainly prejudice is unavoidable when the person is arraigned in the dock before the court. The accused may well be convicted on the present charge largely because of what it is proved he has done in the past.

(b) Nature of the reputation. The definition of a "reputed thief" has a very broad meaning. As McCarthy J. said in Waterman v. Police[1968] NZLR 689, "Persons may be reputed thieves although they have never been convicted. A reputation is established if several in the community believe a person to be a thief or if the police believe that." A suspected person by the same token does not have to be a person known to the police or one with a criminal record. According to Hutchinson J. in Illich Newson and Tonge [1958] NZLR 670 the question is one of reputation. The accused must clearly be a suspected person at the time of his arrest. It is prima facie evidence of that if he is a suspected person in the eyes of those who know him. The facts on which such persons formed their view need not be known to the arresting officer at the time of the arrest. In other words it is sufficient to render a person a "suspected person" if some other person suspects that he commits crimes when he gets the chance, and somehow the police get to know this.

(c) Nature of reputation amongst the Police. The required nature of the reputation among the police is plagued by uncertainty. In O'Connor v. Johnson (1903) 23 NZLR 183 Williams J. at p. 184 stated; "The evidence of a police officer as to whether a man is reputed to be a member of a criminal class, and if so, what branch of that class seems to me to be the best evidence of the man's reputation. General reputation can be established by the evidence of one witness." Contrast this however, with O'Connor v. Hammond (1902) 21 NZLR 573 and Waterman v. Police [1968] NZLR 689, which both speak of the police as a collective, the former referring to "their knowledge" while McCarthy J. referred at p.690 of the latter to the reputation existing in police circles. Curry is of the opinion that the belief of one policeman

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10. For a discussion of the admissibility of character evidence see;
Cross : Cross on Evidence 2nd NZ ed. 1971, pp 363-370
Adams : Criminal Law and Practice in New Zealand 1971, pp 973-976
11. see similar comments Criminal Law Revision Committee 11th Report, Evidence General 1972 p.9.

would suffice to establish a reputation of being a thief. The vague nature of the reputation amongst the police is bad enough - but the dangers inherent in allowing a single sentence from one police officer to establish a person's reputation is a position too easily abused.

(d) Reasonableness of Police belief. In Stevens v. Andrews (1909) 28 NZLR 773 Chapman J. considered that reputation amongst the police would suffice only; "...if it were shown that the repute was well-founded." Unfortunately well-founded was not further elaborated, so the possible safeguard was left hanging. In all probability, if a policeman's belief as to the reputation of the accused was in issue before the court, the court would insist on a reasonableness standard. One would suspect however, that in the run of the mill case, the policeman's evidence would be presumed to be "fair play" and as the best evidence of a person's reputation, otherwise the case would not be brought to court.

(e) Reputation must be antecedent. Case law has established the limitation that the reputation must be established by conduct antecedent to the conduct that was the immediate cause of arrest.[12] However, if a repute is challenged, previous convictions are admissible[13] even where they were unknown to the arresting officer[13] Chapman J. in Illich's case went even further and admitted general evidence of reputation not known to the arresting officer at the time of the arrest. This is clearly irreconcilable with the limitation noted previously. Reliance on evidence unknown to the arresting officer to establish repute means that an arrest for "frequenting" can be "validated" by subsequently discovered information.

(f) Found offending under S.60. Section 60 of the Police Offences Act 1927 confers the power of arrest in the police and stipulates that the accused must be "found offending". S.60 is an absolute arrest provosion and overrides S.315 (2)(b) of the Crimes Act 1961 by virtue of S.315 (3) of the same Act. What all this means then is that there is no defence to an action for false arrest, e.g. that the person arresting had reasonable and honest grounds to suspect that the arrested person was offending. Both Curry and Arnold concur that there is "no reasonable cause to believe" defence to a police officer if the accused wasn't in fact 'found offending'".[15] The anomaly which surfaces here is that a police officer could validate a false arrest (where the accused wasn't in fact found-offending) by using subsequently discovered information to establish that he was in fact "offending" when arrested.

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12. Curry note 2 supra p.62 see cases cited therein.
13. Curry note 2 supra p.61 see cases cited therein.
14. Curry note 2 supra p.61 see cases cited therein.
15. Curry note 2 supra pp. 190-192
    Arnold note 7 supra pp 75-77.

(g) Acts antecedent rule. Where a person has become suspected purely as a result of his actions, those acts must be antecedent and distinct from the act which caused him to be arrested and formed the basis of the charge.[16] There have not emerged from the case law concrete guidelines to determine what is a sufficient time lapse seperating the act giving rise to the suspicion and the act leading to arrest. It appears then to be a question of fact peculiar to the circumstances of each case - although this approach has produced some varying results to say the least.[17]

B. Frequenting

(a) In Goundry v. Police [1954] NZLR 692 North J. held that to frequent a place a person need be there only once. He approved Airton v. Scott 190 L.T. 393 and R. v. Child [1935] NZLR 28 which concluded that a person was frequenting as long as he remained in a place long enough to effect his purpose. The Privy Council did not agree, however, and in R. v. Nakhla [1975] 1 NZLR 393 [1976] A.C. 1. Lord Morris stated at p. 401; "So far as the principle on which cases turn can be crystallised in a single expression it seems difficult to improve on the words of Lord Hewart C.J. in Rawlings v. Smith[1938] 1 K.B. 675 at 686 where he said "Frequenting involved; the notion of something which to some degree, at any rate is continuous or repeated." This approach was recently adopted by the New Zealand Court of Appeal in Police v. Bazley [1976] 2 NZLR p.132 at p.158, adding that frequenting must depend on the circumstances of each particular case.

(b) Loitering. Since R. v. Child [1935] NZLR 186, "loitering" about a locality has been sufficient to constitute "frequenting". Here again uncertainty exists as to how long is required to constitute "frequenting" but as an example in Police v. Hartneady (1952) 7 M.C.D. 590, 25 minutes was held sufficient.

C. Felonius Intent and S.81

(a) S.81 of the Police Offences Act 1927 enables the police to impute an intent to commit a crime from both the circumstances of the case and the known character of the accused. S.81 provides "...in proving a criminal intent it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted, if from the circumstances of the case and from his known character ... it appears to such Justices or Court that his intent was to commit a crime."

The means of establishing known character are vague and prejudicial to the accused - as the case analysis reflects. It is in a sense a double injustice that the known character thus established, along with the circum-

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16. Curry note 2 supra p. 116 see cased cited therein
17. see Hartley v. Ellnor (1917) 117 L.T. 304 and compare it with the decision in Ex Parte King re Blackley (1938) S.R. N.S.W. 483.

stances of the case, then allows the prosecutor to infer an intention to commit a crime. Once S.81 comes into operation it seems a presumption of guilt is given a statutory blessing to go ahead. The crux of the matter would seem that all that is proved beyond reasonable doubt was that the police suspected the accused was likely to commit a crime. Who can ever be sure he would have?

(b) Another departure from standard practice is that under S.81 the police do not have to stipulate a particular crime, but can infer the intent to commit any crime. McCarthy P. in R. v. Wilson [1962] NZLR 979 at 985 however stated that there must be a relationship between the known character and the particular kind of crime which the accused is said to have the intention of committing, otherwise no valid inference as to the intent could be made at all.

(c) Wilson's case also established the proposition that it is not necessary that the crime intended should be in the place frequented.

Recapping then, the legal position with S.52 (1)(j) reflects that it is in an unhealthy state. General character is admissible to establish a person's known character, as are previous convictions if that reputation is challenged.

It is contended that the belief of one police officer is all that is required to establish a person's reputation as a thief or suspected person - and in the usual case the policeman's evidence would be treated as the best available and as a reasonable belief.

An arrest for frequenting can be validated by evidence unknown to the officer at the time of the arrest. Carried even further, a false arrest under S.[illegible] where a person in fact was not "found offending" could presumably be validated by subsequent evidence which established that the accused was in fact offending.

Under S.81, from the circumstances of the case and from the known character as can be proved, the police can impute an intent to commit a crime. The courts can convict on the suspicions of the police, which is totally inconsistent with standard criminal principles.

III.A. Crime Control Versus Due Process

The individual's right to liberty and freedom and the competing demands of crime prevention in a modern society are often difficult to reconcile.[18] The Statutes Revision Commission on the Police Offences Act stated the issue confronting them; "In any democracy, however, the position of the Police in relation to the citizen is always a difficult and delicate one. On the one hand, unlimited and arbitrary powers vested in the police, even for worthy ends are rightly detested as the antithesis of a free society. On the other hand the Police are clearly entitled to those powers that are

necessary to carry out the task that the community has given them - to prevent and detect crime and bring offenders to justice. The problem is just where the balance should lie.[19]

Packer suggests that there exists between the two competing values, of Crime Control and Due Process, a basic consensus on the major ground rules of the criminal process. It is agreed that the security and privacy of the individual may not be invaded at will, and that there are limits to the powers of the government to investigate and apprehend persons suspected of committing crimes. Also the notion embraced by such terms as the "adversary system" or "procedural due process" assumes that the alleged criminal is not merely an object to be acted upon, but an independent entity in the process, who may, if he so desires, force the operators of the process to demonstrate to an independent authority (judge and jury) that he is guilty of the charges against him. The Crime Control Model begrudgingly acknowledges the adversary system, while it is to the heart of the Due Process Model.[20] The question of just where the demarcation line is to be drawn depends, in the end on what value system one prefers. Packer's Models shall serve to reflect the underlying presupposition of the competing values and act as a backdrop to the discussion keyed to S.52 (1)(j). For our purpose a condensed version of Packer's original formulation has been produced selecting those factors which best aid the discussion.[21] As the reader will see both Models have a widely different interpretation of what constitutes "legitimate" or proper police practice.

B. The Underlying Values of the Models

(a) Crime Control. This value system asserts that the repression of criminal conduct is the most important function of the criminal process and one which society cannot do without, as it is the positive guarantor of social freedom.

If the police are perceived as failing to effectively control crime, as a result a disregard for legal control is facilitated so that the citizen then becomes the victim of all sorts of invasions of his person and property - in short his liberty and security are severely reduced.

The major stress of the Crime Control Model is on efficiency and speeding-up the criminal process so that it isn't cluttered up with ceremonious rituals in the courtroom. Great emphasis is placed on the assumption that

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18. Note. Use of vagrancy-type laws for Arrest and Detention of Suspicious Persons. 59 Yale Law Review p. 135
19. Statutes Revision Committee Report on the Police Offences Act 1927 (1972) p.7.
20. H. Packer The Limits of the Criminal Sanction Stanford University Press (1968) pp. 156-7
21. For the original outline see H. Packer note 20 supra pp. 156-190.

[illegible] of the criminal law.

police evidence is the most reliable indicator of probable guilt. It is the police who are trained and experts at fact-finding, as it is their job, and they can make a much better job of recreating the course of events than the courts. Informal operations are preferred to formal - the stationhouse preferred to the court. The basic premise of this approach is that those people who are probably innocent will be "screened-out" early on in the process, because the police are better placed to determine probable innocence and in theory the innocent should have nothing to fear and be able to dispel suspicions surrounding them.

However, those not screened-out and about whom a determination has been made that there is enough evidence of guilt to permit holding them for further action must face a presumption of guilt - that is , in all probability they are guilty. Once the accused falls into this category he is shunted through the examining stages of the process rather mechanically. Taken to its logical extreme; "...the prosecutor must look at the criminal law not as something to be enforced because it governs society but as an arsenal of weapons with which to incacerate certain dangerous individuals who are bothering society".[22] Therefore, once it has been determined that a person is probably guilty, he is proceeded against as a dangerous individual who should be punished before he bothers society. Here, it is left very much to the police to define who is a "dangerous individual" or potential offender.

(b) Due Process. This model champions the concept of primacy of the individual, and stresses the need for limitation of the State's official power. The stigma and loss of liberty attached to the arresting and conviction of an accused is the heaviest form of deprivation that a government can inflict on the individual. The coercive power of the State must be subjected to controls - to curb the threat of tyranny and abuse of such powers.

The Due Process model rejects the claim of the Crime Control Model that the informal fact-finding ability of the police results in more reliable evidence. This Model substitutes it with a formal, adjudicative, adversary, fact-finding process in which the factual case against the accused is publicly heard by an impartial tribunal, and is evaluated only after the accused has had an opportunity to discredit the case against him.

At the heart of the Due Process Model is the presumption of Innocence. A person is not to be held guilty of a crime merely on the showing that in all probability, based upon reliable evidence, he did actually what he is said to have done. The accused, under this value system is presumed innocent until he has been proven guilty beyond all reasonable doubt to be guilty of the

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22. Thurman Arnold note 6 supra p. 153. It should be noted that this quote is used in rather a different context. Arnold uses it referring to the objects and aims of the criminal law.

of the offence charged.

The final strand of thought in the Due Process Model is a mood of scepticism about the morality and utility of the criminal sanction. The criminal laws reliance on punishment as an educational and deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for indivualised and humane rehabilitation of offenders is inhuman and wasteful.[23]

This model doubts the propiety of a large proportion of the uses of the criminal sanction, as representing an unwise invocation of so extreme a sanction. This leads to pressure to limit the kinds of conduct the criminal sanction applies to and also the discretion to exercise such power.

(c) The Models in Operation - Practical Implications

Crime Control: Normally the first stage of the process as it affects the suspect is the act of taking him into custody where the police think that a crime has been committed, and that they have identified the person who committed it. Sometimes, however, the police will want to detain a person even though he is not suspected of having committed any specific offence. They may do this where they think a person is a generally suspicious character who on investigation will likely turn out to have done something criminal, or because they think that police intervention by harassing him in this way might prevent the commission of an offence and induce him to stop engaging in some undesirable activity of which he is suspected. In short, the power of the police to arrest people for the purpose of investigation and prevention is one that must exist if the police are to do their job properly.

The police should be entitled to arrest a person when they have probable cause to think he has committed a particular offence. However, arrest should not be permissible only in that situation. The slight invasion of personal freedom and privacy involved in stopping a person on the street to ask him questions or even taking him to the stationhouse for a period of questioning and other investigation is necessary in a wide variety of situations. For example;[24]

(a) People who are known to the police as previous offenders should be subject to arrest at any time for the limited purpose of determining whether they have been engaging in criminal activities - especially when it is known that a crime of the sort they have committed has taken place and that it was physically possible for them to have committed it.

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23. see P. Bator. Finality in Criminal Law and Federal Habeas Corpus for State Prisoners. 76 Harv. L. Rev. 441, 442 (1963).

24. H. Packer note 20 supra pp. 176-179.

(b) Anyone who behaves in a suspicious manner, suggesting that he may be "up to no good" should be subject to arrest for investigation. It may turn out that he has committed an offence, but more importantly the very act of stopping him for questioning, either on the street or in the stationhouse, may prevent the commission of a crime.

(c) Those who make a living out of criminal activity should be made to realise that the police know what they are up to and they will get caught sooner or later. Therefore by harassing them, periodically checking their activity, whether or not this involves an arrest or formal charge, will bring this attitude home to them.

(d) The police have no reason to abuse this power of arrest and hold innocent people. Any who are "caught in the web of suspicion" will dispel the suspicion and be screened-out of the process.

There are generally speaking, two kinds of devices for giving the police adequate scope in making arrests for investigation. The first is what might be called the direct method : explicitly providing broad powers to stop and question persons, irrespective of whether they are reasonably suspected of having committed a particular crime. The second is the indirect method : framing broad enough definitions of criminal conduct to give the police the power to arrest on the orthodox probable cause basis, a wide variety of people who are engaged in suspicious conduct. Vagrancy laws and disorderly conduct laws are examples. The New Zealand police do not have a direct power to arrest for investigation on suspicion.[25] However S.52 (1)(j) is viewed by the police as a legitimate crime prevention device, to deal with suspicious persons and does enable arrest on suspicion.

Due Process:

(a) It is a basic right of free men not to be subject to physical restraint except for"probable cause", for example that a crime has probably been committed and that he is the person who probably committed it. Any less stringent standard opens the door to the probability of grave abuse.

(b) Society must be prepared to pay a price for a community that fosters personal privacy and champions the dignity and freedom of the

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25. In Blundell v. Attorney-General [1968] NZLR 341 The New Zealand Court of Appeal was emphatic the police have no power to hold for questioning nor to hold while enquiries are being made.

individual. That price inevitably involves some sacrifice in the efficiency of crime control - an appeal to efficiency is never sufficient to justify an encroachment on the area of human freedom.

The Due Process Model rejects, out of hand, wide and vague powers like S.52 (1)(j), as they do enable arrest on a standard less stringent than probable cause. An accused is arrested on what the police suspect he is likely to do - in short mere suspicion. S.81 enables the police to infer the intent to commit a crime from the circumstances of the case and his known character as proved. As we have seen this is inconsistent with standard criminal principles - and for that reason the Due Process Model would call for its repeal.

Such broad powers under S.52 (1)(j) increases the likelihood of abuse and arbitrary enforcement, as well as encouraging improper police practices such as holding devices to deal with suspicious persons.

When the law is vague and uncertain the citizen is not sufficiently warned of what constitutes criminal conduct. In the United States vagrancy-type statutes have increasingly come under constitutional attack for just such reasons - they fail to give notice of the prohibited conduct and invited arbitrary enforcement.[26] Such powers must be sacrificed for they allow the individual's freedom to be invaded without any other cause than suspicion.

The Due Process Model also rejects the proposition that the innocent law-abiding citizen has nothing to fear, and will be able to clear any suspicions he may have aroused, when questioned by the police. In theory one would expect an innocent person would willingly be able to answer"what he's about" and clear any suspicions. Any person has the right to silence when questioned by the police. The right to silence is the concrete and visible assertion of the fundamental principle that the prosecution must prove their case and that no obligation lies upon the accused to prove his innocence.[27] However, reality paints a different picture; many suspects, flustered and in a stress situation under police scrutiny could well "put their foot in it" answering enquiries. Their sloppy explanation may well get them arrested for frequenting. To go to the other end of the spectrum, the person who insists on his right to silence runs the risk of having an adverse inference drawn against him, both by the police on the spot who may arrest him for frequenting thinking he is covering up something, or even the court when recreating the course of events later. The irony therefore emerges that if you try and clear yourself and make a mess of it, or insist on your rights, it is still possible to be arrested on S.52 (1)(j).

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26. see Curry note 2 supra. p. 46 the cases cited therein and "Orders to move on and the prevention of Crime" in Vol. 87 Yale Law Journal 1978 p.603 for more recent cases.
27. W. Miller Silence and Confessions-What are they Worth 1973 Crim L.R. 343-355 p.34

IV A. Civil Liberties Speaks Out

S.52 (1)(j) offends many of the traditional standards of criminal procedure: and the presumption of innocence and the shunning of preventive arrest to name but a few, appear to fall by the wayside. There seems little semblance of natural justice in a provision which allows arrest on suspicion that a person was about to commit a crime. This then explains the amount of objection in principle and criticism which has been levelled at the provision in the submissions made to the Statutes Revision Committee.[28] Numerous overseas commentators have fired disapproval at similar vagrancy-type laws, and it is endeavoured to outline those elements which came in for the greatest amount of "flak", to provide useful fuel for thought. Before working through the criticisms it is important to note that each policeman has a discretion to invoke such a provision - it is left very much up to the individual policeman to decide what action to take. As Goldstein suggests "Far from merely applying legal maxims in a ministerial manner, police employ discretion in invoking the law. Thus, they in fact, draw the outer perimeter of law enforcement, a power that is not officially assigned to them".[29] Bittner chips in; "...any policeman worth his salt ought to be able to arrest almost anyone on formally defensible grounds with relatively little effort. Naturally this condition creates favourable conditions for the expression of personal prejudice..."[30] While another commentator proposes that; "For the rough approximation of community values that emerges from the legislative process there is substituted the personal and often idio-syncratic values of the law enforcer.[31]

(a) Guilt by Reputation. As we have seen from the analysis of the case law S.52(1)(j) enables the police to arrest a person where there is no more than a mere suspicion that he is about to commit a crime. The police task is made that much easier by S.81 which allows them to impute a felonious intent from the circumstances of the case and from the known character of the accused. This character could probably be established by a simple statement from one police officer that he is of the opinion the suspect is a reputed thief, and if such repute is challenged previous convictions are admissible to back up his claim, (including those unknown to him at the time of arrest). Clearly the odds are stacked against the accused - hardly a "fair game". Douglas comments that when "suspicion is the foundation of the conviction, the

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28. see generally submissions to the Statutes Revision Committee on the Police Offences Act 1927 (1972)
29. Goldstein. Police Discretion Not to Invoke the Criminal Process; Low Visibility Decisions in the Administration of Justice (69) Yale L.J. (1960) pp. 543-544
30. Egon Bittner. The functions of the Police in Modern Society.1970 p. 108.
31. H. Packer note 20 supra p. 290.

presumption of innocence is thrown out the window."[32] While the author of a note in the Yale Law Journal is prepared to go even further; "In fact, if not in theory, they burden the defendants with a presumption of criminality."[33] You will no doubt note the familiar ring of one of the aims of the Crime Control Model in the last quote.

(b) Circumvents the law of attempts. The principal doctrinal device that the traditional criminal law has relied on for dealing with preparatory conduct, and therefore for introducing some measure of preventive detention into the criminal law are the so-called inchoate crimes: attempt, conspiracy and incitement. The law of attempts[34] is explicitly addressed to the problem of conduct that has not reached the ultimately apprehended harm. However, an attempt differs substantially from S.52 (1)(j), and is at best an uneasy compromise between due process and crime control demands.

Firstly there are only attempts to commit particular crimes. Secondly, an attempt requires a high order of proof that the actor really was engaged in conduct that would have led to an offence but for some mischange (e.g. getting caught) rather than in activity which looked suspicious, but was in fact innocent and harmless. This assurance is given in two ways : first by insisting on a showing that the actor had a purpose to bring about the forbidden result[35]; second by requiring proof that his conduct brought him a substantial distance on the road to achieving his objective. The bench has been roused to criticism of improper police practice in employing vagrancy laws. In Dean (1924) 18 Crim. App. R.133 at p. 134 Lord Hewart C.J. delivering the judgment of the English Court of Appeal stated, after the accused had been convicted of loitering with intent; "It looks very much as if it was thought there was not enough evidence to charge the appellant with attempted housebreaking and this other method was adopted." He continued to condemn the use of the loitering with intent provision to uphold a conviction where the evidence was insufficient to uphold a charge to attempt to commit a crime. The police readily admit to using S.52(1)(j) as an alternative charge.[36]

Talbot J. in the case of Caldwell (1927) 20 Crim.App.R. p.60 commented; "The Vagrancy Act of 1824 is not intended as a convenient method of supplying a hiatus in the evidence of a felony." Similar censures have

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32. Douglas Vagrancy and Arrest on Suspicion 70 Yale L.J. (1960) 1, p.11.
33. Note note 18 supra p.1352
34. see S.72 of the Crimes Act 1961.
35. Note that actual intent is required even though the principal crime can be committed recklessly - see R. v. Mohan [1975] 2 All E.R. 193.
36. Curry note 2 supra pp 135-136.

have been voiced in the New Zealand Courtroom.[37]

Where the attempt charge fails because of a lack of evidence the police can indirectly "nail" the suspect for something at least, be it nothing more than they suspected he was about to commit a crime - S.52 (1)(j) provides such an alternative charge. This circumvention of the stricter requirements of attempt should not be condoned - as Douglas suggests it encourages inefficiency and lax police practices.[38]

(c) A supplement to the Limits of the Law of Arrest. Packer reveals that one of the covert functions of the criminal sanction is exemplified by the use of vagrancy and disorderly conduct laws to provide the police with powers that they do not possess under the law of arrest.[39] Caleb Foote has this to say; "one cannot escape the conclusion that the administration of vagrancy-type laws serves as an escape hatch to avoid the rigidity imposed by real or imagined defects in the criminal law and procedure To the extent that such rigidity presents a real or imagined problem and that the need for a safety valve is not merely the product of inefficiency on the part of police or prosecutors such a problem should not be dealt with by indirection. If it is necessary to ease the prosecutions burden of proof or to legalise arrests for mere suspicion, then the grave policy and constitutional problems posed by such suggestions should be faced. If present restrictions on the laws of attempts or arrest place too onerous a burden upon the police because of the nature of modern crime, then such propositions should be discussed and resolved on their merits.[40] Curry remarks that the police often feel the need to detain and investigate without actually arresting on a major charge. The broad and vague vagrancy provisions can be pressed into service to achieve the same end result as would express powers of arrest on suspicion. He adopts much the same tack as that expressed by Foote, if the police need such powers they should be expressed clearly and openly, not shrouded in the width and vagueness of the vagrancy laws.[41]

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37. per Luxford S.M. in Fell v. Gauntlett (1949) 6 M.C.D. 48.
Shorland J. in Devon v. Police [1961] NZLR 261
Cooke J. in Police v. Bazley [1976] 3 NZLR 152 at p. 159
Mahon J. in Police v. Thomas [1974] NZLR 558 at p. 561
38. Douglas note 31 supra p.11.
39. H. Packer note 20 supra pp. 293-294.
40. Caleb Foote Vagrancy-type Law and its Administration 104 Univer. Pa.L.R. (1956) 603, pp. 649-650.
41. Curry note 2 supra pp. 130-132.

(d) Preventive Detention. Considerable tension exists between the goal of prevention and the idea that the criminal law is limited to past identifiable conduct.[42] As a general rule our law does not countenance the arrest of a person whom the police suspect of being likely to commit an offence if no attempt to commit it has been made.

Preventive detention then sanctions arrest, not on what a suspect has actually done, but on what it is suspected he will do in the future. Packer hints that perhaps the bulk of arrests on suspicion do not have a motive with even a degree of pseudo-legality; "Rather such arrests reflect the view that these people may engage in bad conduct in the future and that, if they are harassed in advance, both their opportunity and their incentive to engage in criminal conduct may be reduced.[43] Preventive detention can be accomplished under the guise of punishment for crimes committed, if the definition of the crime is sufficiently vague and elastic. This is very much the case under S.52 (1)(j) - by establishing a person's crime the suspect is punished largely for what he may have done in the past and is therefore considered likely to do now. No person should be subjected to arrest until he has translated his intention into some concrete preparatory act which constitutes an attempt to commit a particular offence. If one rejects arrest on suspicion then attempts is as far as one can go to effect a resolution between the claims of civil liberties and crime prevention.

(e) Abuses Exposed Overseas. There is a profusion of material which illustrates that vagrancy-type statues are often abused. While crime prevention is claimed to be the primary objective of the vagrancy laws - as Duffy postulates this label is somewhat confusing in reality, as vagrancy statutes are used to investigate past or present offences in a great many cases. Foote comments that while such statutes "make punishable acts petty in terms of social dangerousness."[44], their chief importance lies in their quantitative impact and administrative usefulness.[45] They bestow the police with a residual discretionary power to control suspicious people, and; "facilitate the apprehension, investigation or harassment of suspected criminals. When suspects can be arrested for nothing else it is often possible to "go and vag them."[46]

Packer suggests "the prototype of the outright violation is the arrest for "investigation" or "on suspicion." The ideal of the law of arrest is that no person may be deprived of his freedom, even momentarily, unless

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42. Packer note 20 supra p.97.
43. Packer note 20 supra p.98.
44. Duffy Stop and Frisk 53 Cornell L.R. (1968) 899, 412.
45. C. Foote note 40 supra pp 613-614
46. C. Foote note 40 supra p.614

there is probable cause that he has committed a crime. But that ideal is flouted in practice hundreds of times every day. People who arouse the suspicions of the police that they may be up to no good are taken into custody sometimes for only a few minutes, sometimes for days, or even weeks - out of a variety of preventive motives.[47] He points out that if a crime is defined in a sufficiently vague and elastic manner, people can be arrested ostensibly because they are "vagrants", but in fact because they are likely to commit offences unless restrained.[48] In his section on covert functions of criminal sanctions Packer lists as one example harassment. Here the police tactic is often aimed not at prosecution and conviction but at "making life difficult" for the suspected person so that he will either stop what he is doing or go do it someplace else.[49]

The most frequent abuse dug up is the use of vagrancy statutes as holding devices - to enable the police to conduct further investigations into past or present crimes, or to look into more serious investigations, where nothing can be specifically "pinned-on" the suspect.[50] Not surprisingly vagrancy statutes have been stamped as the "catch-all" of the criminal law"[51] or as an "all-purpose control device."[52] A former chief inspector of the City of London said this of the corresponding English provision; "this is a much abused provision, and one of tyrannical scope which gives the lie to the British boast that the citizen cannot be held in custody on mere suspicion - he can be imprisoned for 3 months* on the mere suspicion that he was in the street to steal...It has also given rise to many injustices and many convictions falling far short of the standards required in other criminal cases. It is the provision ...which should be the first to be repealed in any adequate revision of the criminal law."[53]

The Statutes Revision Committee relied on their opinion when weighing up their recommendation on S.52(1)(y) that the criticisms of it were almost without exception of a general nature and that they received almost no concrete evidence of any clear and specific instances of abuse.[54] The police in their submissions emphasise the same theme - despite criticisms of an academic nature there are none on the grounds of actual abuse of the provisions by the Police.[55] What then does all this really mean - are

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47. Packer note 20 supra p.98
48. Packer note 20 supra p.98
49. Packer note 20 supra pp 293-4
50. C. Foote note 40 supra pp 613-617
    E. Bittner note 30 supra pp 109,111
    Williams note 37 supra p.661
    Budnitz note 3 supra p.441-442
    Campbell and Whitmore Freedom in Australia p.20
    Chevigny Police Power (1969) p.232
    Vol. 89 Yale Law J. note 26 supra p.603
    T. Arnold note 7 supra P.172
51. C. Foote note 40 supra p.614
52. E. Bittner note 30 supra p.108
53. C.H. Rolph Law Reform Nov.(1963)p.24
54. Report of Statutes Revision Committe note (19) supra p.7.
55. Submissions of the Police Dept. to the Statutes Revision Committee p.16

* 12 months in New Zealand.

there really no abuses of S.52(1)(j)? It would be unrealistic to give a positive answer to the question posed. The police naturally aren't going to openly admit to abuses committed within the force, so in the end it may mean nothing more than the New Zealand police are more efficient at concealing abuses than their overseas counterparts. Other possibilities which can't be dismissed are that a person may be unaware of an abuse (that the police have overstepped their power), or may be just too plain scared to do anything about it for fear of reprisals by the police. Do we then accept the propsition that such abuses are the actions of a minority - the black sheep of the flock. The trend which emerges from points forementioned and in view of the pressure the police exerted to retain the provision substantially as it stands, tends to point in another direction. The police regard S.52 (1)(j) as a residual means of dealing with suspicious persons and as a legitimate crime prevention device. The provision is organisationally necessary and administratively useful to them. At the end of the day the answer seems to be that abuses are more widespread than originally **suspected** and not the problem of a few black sheep.

B. Crime Controls' Right of Reply.

What case can be made out for the retention of S.52(1)(j)? The special aim of the vagrancy statutes is widely recognised as crime prevention.[56] Taking the Crime Control Model to its logical extreme the argument goes something like this; the police are the one's best placed to know whether a person is likely to commit an offence so why not step in and act before something really does happen. Crime prevention has been elaborated on earlier in the article, but points which relate more specifically to vagrancy provisions similar to S.52 (1)(j) shall be included at this stage.

Crime prevention is based on the assumption that prevention is better than cure. It is better to "nip in the bud" a potential offender who has by acting suspiciously shown that he is likely to commit a crime. Duffy extracts two limbs to preventive powers. Firstly, they can serve as a method to stop people getting into trouble, from "travelling the road to ruin". Secondly, they can be used where the person's behaviour has indicated he is likely to commit a crime if given the chance.[57]

Proponents of crime prevention go to great lengths to stress the importance of the role of the police in crime prevention. They assert that for the proper performance of this function the police need the authority to forcibly detain individuals who they suspect are likely to commit crime.[58]

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56. Curry note 2 supra p.35 see authorities cited therein. Vol. 87 Yale Law Journal 1978 note 26 supra cases cited therein.
57. Duffy note 44. supra p. 912.
58. Duffy note 44 supra p. 912 C. Foote note 40 supra p. 614 Luxford Police Law in New Zealand 3rd ed (1967) p. 847 Perkins The Vagrancy Concept Hastings L.J. (1956)

Foote states that "Administratively vagrancy-type statutes are regarded as essential criminal preventatives".[59] Another commentator emphasises the need for the police to have the authority to temporarily detain and investigate without arrest or charge, and that the use of supicious persons statutes to effect this purpose merely reflects the importance of this authority to effective law enforcement.[60]

The case made out for the retention of provisions such as S.52(1)(j) is based on the argument that if such powers are impaired "the security of the citizen would be grieviously weakened"[61] and that the police performance of their crime prevention duty would be stultified."[62] Luxford, having admitted they are a departure from well-established principles is of the view that "experience has shown that a vagrancy code is indispensable in any country desirous of preserving peace and good order among its citizens."[63] In view of the attacks on vagrancy statutes in the United States with the result that some have been declared unconstitutional by the courts it would seem that a vagrancy code is no longer "indispensable" - one could query whether in fact it ever has been. Luxford's view does not hold much weight. While some judges criticise the abuse of vagrancy statutes, the bench also has judges who have come out in support of the frequenting provision.[64]

The dilemma is to decide whether the socially desirable ends of crime prevention justify the means of S.52(1)(j).

V (a) Consideration of the Role of the Police. It has become necessary to look into the role of the Police and to examine how in fact they carry out their mandate, what sort of preventive role should they perform and how far can their powers be limited if they are to remain effective agents of social control?

A common assumption by the public at large is that the police role is confined primarily to law endorcement, crime control - the prevention of serious crime and the apprehension and prosecution of criminals, and keeping the peace. Commentators are only now moving away from this characterisation of the police role, and beginning to capture the actualities of what the police task involves on a typical tour of duty.[65]

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59. C. Foote note 40 supra p.614
60. Note note 18 supra p.1358
61. Perkins note 58 supra p.252-3
62. see the comments of Mahon J. in R.V. Otten [1977] 2 NZLR 44 at p.45
63. Luxford note 58 supra p. 847
64. Luxford S.M. on Fell v. Gauntlett note 3 supra p.50
    also Mahon J. in R. v. Otten note 62 supra p.45
65. E. Bittner note 30 supra pp. 2-3,29,40,43-44
    E. Bittner Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police
    In H. Jacob "The Potential for the Reform of Criminal Justice" 17,pp.22-23,30
    Gold stein Police Formulations: A Proposal for Improving Police Performance 65 Mich L.R. (1967) 1123, pp.1124-1125.

In reality only a small percentage of time the average policeman spends on duty directly relates to handling serious offences.[66] Bottomley states that most contacts which the police have with the public relate to entirely "neutral services." In an emergency of almost any type - of human relations of health, of nature, the police are amongst the first to be called in, and they are expected to do something about it.[67] Bittner continues along that line commenting that the police are called upon to cater with an immense array of activities that have nothing to do with law enforcement, but are primarily oriented to easing some social strain or to deal with some human problem, where people feel inadequate to cope themselves. This includes such tasks as; assisting the aged and the mentally ill; locating missing persons, providing emergency medical services, mediating disputes between husbands and wives, landlords and tenants, or shopkeepers and customers, caring for neglected children, investigating accidents, giving directions, to getting a drunk off the street before he hurts himself.[68]

Bittner then goes on to examine what it is about the police role that sets them apart from others in society, and enables them to deal "informally" with the many problems that come their way.

The central thread to the explanation Bittner advances is that underlying all their actions is the knowledge that the police mandate confers on them a unique capacity to use force as a last resort; "the authorisation and obligation to use force ... is the exclusive monopoly of the police. No other official in any branch of civil government has this right of duty," so that, "On the basis of practical considerations neither the government nor the citizenry could presumably do without it."[69] The police then deal with all the problems and exigencies in which force may have to be used to meet them. Bittner also concludes that arrest is only one of the resources available to the police to handle any given situation, and one that is rarely invoked by the average policeman at that; "In the typical case the formal charge justifies the arrest a patrolman makes but is not the reason for it. The actual reason is located in the domain of the need to handle the situation and invoking the law is merely a device whereby this is

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66. According to the International Association of Police Chiefs the percentage of police effort devoted to traditional criminal law matters does not exceed ten per cent. See Niedhoffer, Behind the Shield: The Police in Urban Society, N.Y. Anchor Books 1969 p.75
E. Cumming, I. Cumming and L. Edell Policeman as Philosopher Guide and Friend Social Problems 12 (1965) pp. 276-286
M. Banton The Policeman in the Community, N.Y. Basic Books 1964
67. A.K. Bottomley Decisions in the Penal Process 1973 p.45
68. E. Bittner note 30 supra p.43-44
see also H. Goldstein note 65 supra p.1124-1125
69. E. Bittner note 30 supra p.34

sometimes accomplished."[70] Goldstein agrees and chimes in with this observation; "However, for everytime that a police officer arrests a person he also disposes of scores of incidents by employing a lesser form of authority such as ordering people to move on..."[71]

What this indicates then is that in the vast majority of cases informal policing such as warnings are sufficient to deal with poblems. The warnings are obeyed because those involved know that underlying them is the threat that the police may ultimately fall back on legitimised force and arrest if they aren't. Shearing adds a further component exclusive to the police role which may account further for their ability to handle situations informally. Besides access to legitimised physical force, he postulates that the police also have a special access to law enforcement as a means of maintaining order. While this isn't always necessarily used, the public very much perceive the policeman as a problem-solver, who-has-a-special-access-to-law-enforcement.[72] Therefore what puts the "punch" behind a police warning or threat is the public's respect for the fact that ultimately the police can have recourse to the law on their side, and as a last resort invoke physical force to effect an arrest.[73]

Other distinguishing features of the police role is that they are in effect the only agents of social control available 24 hours around the clock.[74] The police role is for the most part reactive - in response to citizen requests and complaints, where they are summoned and expected to do something about whatever prompted the call.[75]

The police therefore view S.52(1)(j) as providing a last resort to arrest a suspicious person for frequenting, where either a warning is felt inappropriate to handle the situation, or they believe the warning will be flouted. They would argue of course that if S.52(1)(j) was repealed the legal threat behind such warnings would be removed, and as a consequence the warnings would be ignored. The writer however neither shares this fear nor accepts it as a valid proposition. The police practice of issuing warnings and the power to do so are based on uncertain legal authority.[76] It is

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70. E. Bittner note 65 supra p.27 A theory of the Police
71. H. Goldstein note 65 supra p.1125-1126
72. C.D. Shearing Reconsidering the Police Role: A challenge to the Challenge of a popular conception
Canadian Journal of Criminology and Correction. 331 pp. 338-339
73. C.D. Shearing note 72 supra p.342
74. E. Bittner A Theory of the Police note 65 supra p.3]
C.D. Shearing note 72 supra p. 343
75. C.D. Shearing "Dial a Cop" A Study of Police Mobilisation in R. Akers and E. Sagarin, Crime Prevention and Social Control p.77
E. Bittner A Theory of the Police note 65 supra app. 30-31
A. Bottomley note 67 supra p.95
76. Goldstein note 65 supra p.1142
Vol. 87 Yale Law Journal note 26 supra p.618

clear that they do have power to advise someone to move on if they are obstructing the footpath, but that is a very limited power indeed. It is the writer's contention that the average person in the street is hardly likely to know that if he doesn't obey a warning the police may arrest him for frequenting. The answer lies more in the arguments proposed by Bittner and Shearing earlier. The public have traditionally respected the police and their authority, and obey their warnings because of the knowledge that underlying those warnings is the threat that they may be arrested for something, if they don't obey. The inherent authority of the Police is more the reason than an awareness of S.52 (1)(j)'s existence, and it is suggested this will continue to be the case. S.52 (1)(j) is not the only offence which the police may arrest on. The Police, if they feel an arrest is necessary as a last resort, one would suspect could arrest on some other offence. As Bittner mentiones; "For instance, the suspension of the vagrancy statutes need not in any way affect the rate of persons who were earlier arrested under these provisions. They are simply charged with some other offence.[77] Harking back to a theme already hammered home is the proposition that any policeman worth his salt ought to be able to arrest almost anyone on formally defensible grounds with relatively little effort.

(b) An acceptable crime prevention role. The thrust of this section is to illustrate that S.52(1)(j) is an abuse of all that the criminal law stands for. It is unnecessary in practice and one provision we could well do without. The same ends can be achieved by "informal" means so it can safely be repealed. The police claims that their crime prevention role will be severely impaired are unfounded. In ninety-nine percent of the cases the mere presence of the police or a warning to the person acting suspiciously that the police are "keeping an eye on him" and have him under surveillance would suffice to frighten off the would-be offender from committing a crime.

This in the writer's view, is the only acceptable crime prevention role for dealing with suspicious persons, if the suspect fails to do some act which will satisfy the law of attempts to commit a particular crime. An arrest on suspicion alone permits an arbitrary interference with an individual's freedom - a state of affairs which should not exist in any criminal code.

## VI. The Police case for Retention of S.52(1)(j)

Having culled from the overseas literature a relative perspective of abuses which occur in other countries it is necessary to look at how the police actually use S.52(L)(j) in New Zealand. In doing so we shall examine the Police submissions to the Statutes Revision Committee, which opted in favour of retaining the provision substantially in its present form.

77. E. Bittner note 30 supra p.109

Curry concluded; "In terms of police powers the vagrancy laws are an enigma. They confer draconian power, but on the whole appear to be sensibly administered in New Zealand."[78] Curry based his conclusions on information he received from interviews with the police. One is largely restricted to that source when attempting such an enquiry - but along with the note of acution previously sounded it is the writer's opinion that the police information should be taken with a grain of salt. The impression the writer gains from the police pressure to retain the provision is that it is felt to be organisationally necessary to their crime prevention role to deal with suspicious persons - and that abuses of the provision are accordingly more widespread than at first thought. It is difficult to envisage a sensible use of a provision which is based on suspicion, and therefore Curry's conclusion does not tie in with the writer's impression, that it is used improperly.

The police submitted that the frequenting provision makes a valuable contribution to the protection of the public. The provisions fills the gap where an attempt or conspiracy cannot be proved, but the known character of the suspect makes his intentions in the circumstances obvious. One must query whether it is possible to determine whether a suspect's intentions are absolutely obvious - would it not be more true to say that only his likely intentions are obvious. The law of attempts is not easy to satisfy and prosecutions often can't be brought because the subject has not gone beyond preparation for the offence which is too remote to constitute an attempt.[79]

The police contend that without the provision they would be severely hampered in dealing with child molesters and other sexual offenders. Police often observe known sex offenders endeavouring to entice children to a secluded place. The police reasoning is that they can't allow the child to be enticed away and must interfere before an offence is actually committed. They stress that because of the suspects' history his intentions are patently clear.

These provisions are also widely used against burglars, car converters, and thieves. When a criminal is observed preparing for the commission of one of these offences, it may happen that his actions do not constitute an attempt. However, a thief or car converter who peers into numerous cars or a burglar who is observed going to the doors of several houses and when the householder opens the door asks the directions to a non-existent address makes his intent clear. To back up these claims they gave illustrations of the practical application of S.52(I)(j).[80]

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78. Curry note 2 supra p.142.
79. see generally Police Submissions to the Statutes Revision Committee on the Police Offences Act 1927 (1972) pp 15-17
80. Police Submissions note 79 supra pp 15-16

(i) A, a convicted sex offender, was seen to try and entice a 10 year old boy into his car. The boy refused. A was later interviewed and charged with frequenting.

(ii) B, a known sex offender, followed or walked with a youth for a distance of 3/4 mile. B talked to the youth about sex, his girlfriends and at one stage asked him to spend the night at his flat. B was convicted of frequenting.

(iii) C, a convicted thief, was seen in the early hours of the morning walking along a city street and looking into motor cars. C was furtive in his actions and looked into eight different cars and was seen to try the doors of three of them. He was arrested and convicted of frequenting.

(iv) D, a convicted thief, was observed crawling along the aisles and behind seats in a picture while a screening was in progress. He was convicted of frequenting.

From an interview with the police[81] one is able to gauge the current practice of the police in using S.52(1)(j). The provision has been used roughly eight times in the last 12 months in the Wellington region(1976-1977 period). It is used mainly against sexual offenders, against transvestites soliciting near public conveniences. In most cases if a person is seen to be going "a bit off the rails" the police would administer a stern warning to the suspect and advise him to stay out of trouble in the future. However, if the suspect is a persistent offender, then the stiffer preventive measure of arrest will be used.

The police also pointed out in their submissions that substantial sentences as a preventive measure are not often imposed and the sentence of preventative detention for offenders other than repeated sexual offenders has been abolished. Periodic detention sentences are often imposed where the offender is only in custody for the weekends. Bearing this in mind, the provisions of S.52 (1)(j) combined with S.81 are a small concession for the legislature to make in providing some protection to the public from sexual offenders as well as dishonest offenders.

The conclusion to be drawn from the police[82] arguments is plainly, that an arrest under S.52(L)(j) is rare. The mere presence of the police and the issue of warnings - in short "informal" means achieve the same degree of crime prevention. The added advantage with these methods is that they don't offend the value of civil liberties. It is time to strike S.52(1)(j) from the statute books - it is a blemish on the criminal law, and an unnecessary one at that.

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81. A Detective - Inspector of the C.I.B., Wellington

82. Police Submissions note 79 supra p.17.

VII. Conclusion.

Set out below are salient factors to be considered when approaching a discussion of the limits of the criminal sanction. The criminal sanction inflicting as it does a unique combination of stigma and loss of liberty should be resorted to only sparingly in a society that regards itself free and open. It should be reserved for what really matters in terms of social dangerousness. While a criminal sanction may successfully prevent and reduce the conduct in question, the moral and practical costs must be reckoned in terms of such values as liberty and freedom.[83]

The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is however, a negative aspect and one which pursued with single-minded zeal may end up creating an environment in which all are safe but none is free"..."the ultimate goal of law in a free society which is to liberate rather than restrain."[84]

"The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor, used indiscriminately and coercively it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved, in favour of guaranty and against threat."[85]

Packer formulates a number of criteria which this writer regards as being essential preliminary considerations in the reform of the law.

Packer argues that conduct should only be rendered criminal if:-

(1) The conduct is prominent in most people's view of socially threatening behaviour, and is not condoned by any significant segment of the society.

(2) subjecting it to the criminal sanction is not inconsistent with the goals of punishment.

(3) suppressing it will not inhibit socially desirable conduct.

(4) it may be dealt with through even-handled and non-discriminatory enforcement.

(5) controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.

(6) there are no reasonable alternatives to the criminal sanction for dealing with it.[86]

Let's work through the relevant criteria and apply them to S.52(1)(j). It is inconsistent with the goals of punishment to arrest and punish on

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83. H. Packer note 20 supra p.250
84. H. Packer note 20 supra pp 65-66
85. H. Packer note 20 supra p.396
86. H. Packer note 20 supra p.296

suspicion - not for what somebody has done but what it is suspected he is likely to do. In suppressing suspicious conduct by arrest one cannot escape the danger that the innocent may be caught in the web of police suspicions. When this is so,socially desirable conduct may well be inhibited. A person may be taking a perfectly innocent stroll late at night, arouse police suspicions and end up fronting-up on a frequenting charge, if he is unable to satisfactorily explain his actions. It is very much left in the hands of the police to define if somebody "is up to something" - as is the discretion to invoke an arrest under S.52(1)(j) as a method of dealing with a situation. With the broad and vague interpretation given S.52(1)(j) the opportunity for arbitrary and discriminatory enforcement is heightened. The chance is there for a policeman to take out his prejudices and even the score with a person who has annoyed him - the frequenting provision provides him with a convenient means of"something to charge him with." The uncertainty which prevails in the case law to date does not make good law - vague and inconsistent decisions constitute a qualitative strain on the process. Finally and most importantly, there is a reasonable alternative to an arrest for frequenting. This alternative is consistent with the established principles of the criminal law, the values of civil liberties and doesn't severely impair the police preventive role, or deprive society of that element of crime prevention considered socially desirable. One is talking of course of the informal handling of suspicious persons - by the mere presence of the police or by the issuing of warnings to suspects to deter them from committing a crime.

The Statutes Revision Committee took a pragmatic view when considering their recommendations on S.52 (1)(j). While conceding that the objections in principle had some weight, they were heavily swayed by the police evidence of the value of the provision as a preventive power against known offenders for behaviour falling short of a criminal attempt. They, therefore, compromised and adopted a middle of the road course - to meet some of these objections, while retaining, for the police, the use of preventive powers.[87] The Committee recommended that it should be an offence to be found in a public place committing suspicious acts, i.e., acts which a reasonable person would believe to be preparation for a crime. The notion of "repute of a thief" would disappear and the section would focus not on "felonious intent" but on the person's actual conduct. Previous convictions would be admissible in evidence to assist in proving the suspicious nature of the acts.

The writer rejects this piecemeal reform. Firstly, the reform proposal does little to answer the fundamental criticisms raised earlier in the article. The power invested in the police is still broad and open to abuse. The proposal permits arrest on mere suspicion, so that the danger of

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87. see p.31 of The Statutes Revision Committee Report (1972)

unwarrantable interference with an individual's freedom is not eliminated. Allowing previous convictions to assist in proving the suspicious nature of acts is prejudicial to the suspect, and contravenes one of the basic rules of the law of evidence.

Two other alternative proposals to that recommended by the Statutes Revision Committee, which attempt to bypass the use of arrest and to substitute instead periods of temporary detention for dealing with suspicious persons, also fall under the chop of the writer's axe.

The first is a formulation for an express detention statute, in other words, a statutory holding device.[88] The police would have the power to detain a person whom they suspected of likely criminal intent. Detention would not constitute an arrest or be recorded as such, therefore the element of stigma would be avoided. If insufficient grounds are unearthed for a specific charge, the suspect should then be released without further formalities.

The second is set out in the Yale Law Journal, and is labelled the "move-along" proposal.[89] This statute would expressly authorise a police officer to use an order to move on. The officer would be required to have "reasonable cause to suspect" that a person was about to commit an offence - if the suspect gives a credible explanation which shows he is engaged in innocent activity the officer has no authority to move that person on. The order would specify the area to be avoided and the duration the order remains valid. If a suspect disobeys a lawful order to move on the officer would then have the authority to bring the suspect to the police station. The purpose is to remove potential offenders from the scene of anticipated crimes. The suspect is detained at the station only as long as the order would have been valid in duration. An individual ordered to move on in violation of the criteria built in to the statute could bring an action against the officer for the harrassment.

In theory the substantive offence is a refusal to obey a lawful order to move on, rather than an arrest on suspicion. The suspect receives fair notice from the officers order itself - until he disobeys that order he cannot be detained.

While admittedly both proposals are a less severe intervention on the freedom of a citizen and in all probability would be of shorter duration than an arrest on S.52(1)(j) the fundamental objection remains; they are an intrusion on the freedom of the individual on no more grounds than suspicion. Under the latter proposal, even if the suspect isn't detained and does obey the order to move on his freedom of movement and choice of where he can go are restricted. He may well have to abandon some legitimate activity he had intended.

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88. Note note 18 supra 1358-1364

89. Vol. 87 Yale Law Journal note 26 supra pp 603-626

Notwithstanding the intended safeguards against arbitrary enforcement one would expect such proposals would still be viewed by the police as legitimate crime prevention devices, open to widespread abuse and used to harass suspects.

There is little doubt in the writer's mind, that the police themselves would not be over-enthusiastic about either of the two proposals. They are impractical and unsuited to a country like New Zealand with its relatively small cities by world standards. They are unnecessary to the extent that suspicious conduct is not really that widespread here, as perhaps the States. One would forecast that the police would find them cumbersome and unworkable, overtechnical, too time-consuming and beyond the scope of their present resource allocation capabilities.

What other means of social control are available then to arrive at that element of crime prevention which is socially desirable; while at the same time avoiding , or minimising the formidable battery of objections we have been considering. If there are none we should not reject out of hand the alternative of doing nothing.

In the writer's opinion there is one, however. The recurring theme of this article has been that the police, by informal means of social control, e.g. by deterring would be offenders by their physical presence of by issuing warnings to a suspect that the police know "what they are up to" achieve the same ends as an arrest under S.52(1)(j).

The latter method, as we have seen, offends many of the traditional principles of the criminal law and is an unwarranted interference with the freedom of the individual. It is a method which is rarely used and is therefore questionable whether necessary. It should be scourged from the statute books.

The former, however, is to my mind a proper and fair means of crime prevention, which pays due reverence to the time-honoured principle that a person cannot be arrested unless there is probable cause that a crime has been committed and he was the one who committed it. More importantly the freedom of the individual is left intact - even the suspect is free, to choose whether to refrain from committing a crime or to go ahead and run the risk of being caught red-handed. Therein lies the answer.