71 N.Y.2d 376

[376]The PEOPLE of the State of New York, Appellant,

v.

Paul BRIGHT, Also Known as John Doe, Respondent.

The PEOPLE of the State of New York, Appellant,

v.

Alfred CLARK, Respondent.

Court of Appeals of New York.

Feb. 17, 1988.

Defendant was charged with criminal possession of stolen property. The Supreme Court, New York County, Rothwax, J., granted defendant's motion to suppress evidence seized when police officer arrested him on loitering charge, and State appealed. The Supreme Court, Appellate Division, 125 A.D.2d 1016, 509 N.Y.S.2d 444, affirmed in unpublished opinion. In second case, defendant was convicted on guilty plea in the Criminal Court, New York City, New York County, Adlerberg, J., of loitering, and he appealed. The Supreme Court, Appellate Term, 135 Misc.2d 22, 515 N.Y.S. 2d 382, reversed conviction, dismissed loitering charge, and remanded. Defendant appealed. Consolidating cases for purpose of appeal, the Court of Appeals, Titone, J., held that: (1) loitering statute which required suspect to give "satisfactory explanation of presence" in order to avoid arrest was unconstitutionally vague; (2) loitering statute unconstitutionally deprived suspect of Fifth Amendment right to remain silent; and (3) language in loitering statute, which limited place where arrest was authorized to "transportation facilities" did not save statute from vagueness challenge.

Affirmed.

1. Constitutional Law ⇐48(1)

Statute is presumed to be valid, and heavy burden of demonstrating that statute is unconstitutional rests on party seeking to invalidate statute.

2. Criminal Law ⇐13.1(1)

Legislature may not, consistent with vagueness doctrine, criminalize conduct which is inherently innocent merely because such conduct is sometimes attended by improper motives. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6.

3. Vagrancy ⇐1

Statute that merely prohibits loitering, without more, is unconstitutionally vague. U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6.

4. Vagrancy ⇐1

Loitering statute which required suspect to provide "satisfactory explanation of presence" in order to avoid arrest was unconstitutionally vague, where determination as to what constituted "satisfactory explanation" was left entirely up to arresting officer. McKinney's Penal Law § 240.35, subd. 7.; U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6.

5. Vagrancy ⇐1

Loitering statute which required suspect to provide "satisfactory explanation of presence" in order to avoid arrest unconstitutionally deprived suspect of right to remain silent. McKinney's Penal Law § 240.35, subd. 7; U.S.C.A. Const.Amend. 5.

6. Vagrancy ⇐1

Loitering statute which limited place where arrest was authorized to "transportation facilities" did not sufficiently inform ordinary citizens of what conduct was prohibited to survive vagueness challenge; "transportation facility," as used in loitering statute, was not place of restricted public access such as would give loiterer notice that he had no right to be there. McKinney's Penal Law § 240.35, subd. 7; U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6.

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[377]Michele Maxian and Caesar D. Cirigliano, New York City, for respondents.

Robert M. Morgenthau, Dist. Atty. (Barbara A. Sheehan and Norman Barclay, New York City, of counsel), for appellant.

[378]OPINION OF THE COURT

TITONE, Judge.

The issue presented on these two appeals is whether Penal Law § 240.35(7), which provides that "[a] person is guilty of loitering when he * * * [l]oiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence", is [379]constitutional. We hold that this statute is unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions because it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement and, finally, it requires that a citizen relinquish his constitutional right against compulsory self-incrimination in order to avoid arrest.

I.

People v Bright

On the evening of March 19, 1985, a New York City policeman observed defedant Bright displaying an open satchel to a passerby on the Long Island Railroad Concourse located in Pennsylvania Station. When Bright noticed that the officer was watching him, he quickly closed the satchel. The policeman approached Bright and the following conversation took place:

"Officer: What are you doing here?

"Defendant: Why are you bothering me.

"Officer: Got a ticket to take the train?

"Defendant: No.

"Officer: Are you going to take the train?

"Defendant: No."

Based solely on this exchange, the officer escorted Bright to the Long Island Railroad police office, where he asked Bright to produce identification. When Bright failed to produce any, the officer informed him that he was under arrest for loitering pursuant to Penal Law § 240.35(7). Bright was read his *Miranda* warnings and asked to empty his pockets. As Bright removed a piece of paper from his trouser pocket, two credit cards and four other identification cards fell to the floor, none of which belonged to him. Bright then told the officer that he had found the various cards and planned to sell them.

Defendant Bright was charged by indictment with two counts of criminal possession of stolen property in the second degree (Penal Law § 165.45[2]), and one count of criminal possession of stolen property in the third degree (Penal Law § 165.40). On his pretrial motion to suppress the physical [380]evidence, Bright argued that he was arrested without probable cause, and that his arrest was illegal, since the loitering statute pursuant to which he was arrested was unconstitutional. The Supreme Court, relying on its decision in *People v. Velazquez*, 77 Misc.2d 749, 354 N.Y.S.2d 975, held that the statute was unconstitutionally vague and granted the suppression motion on the theory that the arrest was violative of the defendant's constitutional rights. A unanimous Appellate Division affirmed, without opinion, 125 A.D.2d 1016, 509 N.Y.S.2d 444.

People v Clark

On the morning of April 24, 1985, defendant Clark was in the Port Authority Bus Terminal located in New York City when he was approached by a Port Authority police officer. Although the record is not entirely clear as to what occurred next, the officer arrested Clark for loitering in violation of Penal Law § 240.35(7) when he was unable to give a satisfactory explanation regarding his presence in the bus terminal. As an incident to that arrest, the officer searched Clark and found a cellophane envelope containing cocaine and a glass pipe with cocaine residue in the defendant's jacket pocket.

Clark was charged with loitering (Penal Law § 240.35[7]), and criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). At his arraignment before the Criminal Court of the City of New York, Clark moved to dismiss the loitering charge on the ground that Penal Law § 240.35(7) was unconstitutionally vague. His motion was denied, and he

was permitted to plead guilty to a violation of the loitering statute in satisfaction of both charges. On appeal before the Appellate Term, First Department, the court held that the statute was unconstitutionally vague and reversed the conviction, dismissed the loitering charge and remanded the case to the Criminal Court for further proceedings on the charge of criminal possession of a controlled substance, 135 Misc. 2d 22, 515 N.Y.S.2d 382.

In each of these two cases, a Judge of this court granted the People leave to appeal so that we could consider the constitutionality of Penal Law § 240.35(7). We have examined the People's arguments in support of the statute, but agree with the defendants that the statute is void for vagueness, and we now affirm in both cases.[1]

[381] II.

Penal Law § 240.35(7) is derived from two former enactments, Penal Law § 1990–a(2) (L.1939, ch. 391, as amended by L.1941, ch. 835, and L.1951, ch. 269) and Penal Law § 150(2) (L.1953, ch. 139). Under former Penal Law § 1990–a(2), a person was guilty of an offense if he loitered or was found sleeping "about any toilet, station or station platform of a subway or elevated railway or of a railroad" and was "unable to give satisfactory explanation of his presence".

The legislative history of Penal Law § 1990–a(2) indicates that the subways and railroad stations had become an attractive place for "fakers, perverts, pickpockets, loiterers, sleepers, flimflam men, etc., [who] infest[ed] these properties, night and day, necessitating constant policing by a large force of special officers and state railway officers" (Bill Jacket, L.1939, ch. 391, Senate Mem, at 4). Public officials and railroad authorities sought to prevent "peddlers and loiterers from harassing and annoying people on the railroad properties" (*id.*, Senate Mem, at 3). The Legislature, aware that the courts were refusing to convict people arrested in the train and subway stations of vagrancy or disorderly conduct, considered the bill necessary to protect the traveling public, especially because of the desire to "clean up" the subways and other railroad facilities in anticipation of the World's Fair held in New York City in 1939 (*id.*, Mayor's letter, at 10–11; Mem to Governor, at 14; *see also, People v. Bell*, 306 N.Y. 110, 113, 115 N.E. 2d 821 [danger to public "arises from the congregation of nondescript characters at such locations"]).

Former Penal Law § 150(2) made it an offense to loiter "about any toilet, area, station, station platform, waiting room or other appurtenance of an air or bus terminal" unless the loiterer was able "to give satisfactory explanation of his presence". This statute, like its counterpart, Penal Law § 1990–a(2), sought to provide "maximum passenger safety, comfort and convenience" by ridding these facilities of "many undesirable characters" who were loitering, soliciting business and begging in passenger terminals (Bill Jacket, L.1953, ch. 139, Mem in support, at 4–5).

In 1965, the Legislature enacted the statute at issue here, [382] Penal Law § 240.35(7), restating in more general terms former Penal Laws §§ 150 and 1990–a(2) (*see*, Hechtman, Practice Commentary, McKinney's Cons.Laws of N.Y., Book 39, Penal Law § 240.35[7], at 317). Under the statute, one is guilty of a violation if he "[l]oiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence" (Penal Law § 240.35[7]). A "transportation facility" is defined as "any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto" (Penal Law § 240.00[2]).

1. In affirming, we do not address the issue of whether evidence obtained pursuant to an arrest under an unconstitutional statute necessarily requires that such evidence be suppressed, since the People apparently did not raise the issue below and have not raised this question on appeal (*see, Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343).

III.

[1] An enactment of our Legislature is presumed to be valid and the heavy burden of demonstrating that a statute is unconstitutional rests with the one seeking to invalidate the statute (*Matter of Van Berkel v. Power*, 16 N.Y.2d 37, 40, 261 N.Y.S.2d 876, 209 N.E.2d 539; *Fenster v. Leary*, 20 N.Y.2d 309, 314, 282 N.Y.S.2d 739, 229 N.E.2d 426; *People v. Pagnotta*, 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 253 N.E.2d 202). In a challenge to the constitutionality of a penal law on the grounds of vagueness, it is well settled that a two-pronged analysis is required. First, the statute must provide sufficient notice of what conduct is prohibited; second, the statute must not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement (*see, Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903; *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110; *People v. Nelson*, 69 N.Y.2d 302, 307, 514 N.Y.S.2d 197, 506 N.E.2d 907; *People v. Smith*, 44 N.Y.2d 613, 618, 407 N.Y.S.2d 462, 378 N.E.2d 1032; *Matter of Sussman v. New York State Organized Crime Task Force*, 39 N.Y.2d 227, 234, 383 N.Y.S.2d 276, 347 N.E.2d 638; *People v. Heller*, 33 N.Y.2d 314, 328, 352 N.Y.S.2d 601, 307 N.E.2d 601; *People v. Berck*, 32 N.Y.2d 567, 569, 347 N.Y.S.2d 33, 300 N.E.2d 411; *People v. Pagnotta, supra*, at 337, 305 N.Y.S.2d 484, 253 N.E.2d 202).

[2] The rationale underlying the requirement that a penal statute provide adequate notice is the notion "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" (*United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989; *see also, Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584; *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888). Consistent with our concept of basic fairness, due process requires that a penal statute be sufficiently definite by its terms so as "to give a person of ordinary intelligence fair [383] notice that his contemplated conduct is forbidden by the statute" (*United States v. Harriss, supra*, at 617, 74 S.Ct. at 812; *see also, Colten v. Kentucky, supra*, at 110, 92 S.Ct. at 1957; *Jordan v. De George*, 341 U.S. 223, 230–232, 71 S.Ct. 703, 707–08, 95 L.Ed. 886; *Matter of Sussman v. New York State Organized Crime Task Force, supra*, at 234, 383 N.Y.S.2d 276, 347 N.E.2d 638; *People v. Berck, supra*, at 569, 347 N.Y.S.2d 33, 300 N.E.2d 411). For this reason, under our State and Federal Constitutions, the Legislature may not criminalize conduct that is inherently innocent merely because such conduct is "sometimes attended by improper motives," since to do so would not fairly inform the ordinary citizen that an otherwise innocent act is illegal (*People v. Bunis*, 9 N.Y.2d 1, 4, 210 N.Y.S.2d 505, 172 N.E.2d 273; *see, People v. Pagnotta*, 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 253 N.E.2d 202, *supra; People v. Diaz*, 4 N.Y.2d 469, 470–471, 176 N.Y.S.2d 313, 151 N.E.2d 871; *People v. Kuc*, 272 N.Y. 72, 75–76, 4 N.E.2d 939; *see also, Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 [" 'men of common intelligence' should not be forced to guess at the meaning of the criminal law"]; *Lanzetta v. New Jersey, supra*, at 453, 59 S.Ct. at 619).

The other prong of the test, which requires that a penal law not permit arbitrary or discriminatory enforcement is, perhaps, the more important aspect of the vagueness doctrine (*see, Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, *supra*). The Legislature must include in a penal statute "minimal guidelines to govern law enforcement" (*id.*, quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, *supra*). The absence of objective standards to guide those enforcing the laws permits the police to make arrests based upon their own personal, subjective idea of right and wrong. A vague statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation" (*Lewis v. City of New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 [Powell, J., concurring]), and

"furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'" (*Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, *supra*, quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98, 60 S.Ct. 736, 741–42, 84 L.Ed. 1093).

[3] The term "loiter" or "loitering" has a commonly accepted meaning that has evolved over the years, and connotes the act of remaining about or hanging around a place without any apparent purpose (*see, People v. Merolla*, 9 N.Y.2d 62, 66, 211 N.Y.S.2d 155, 172 N.E.2d 541, *cert. denied* 365 U.S. 872, 81 S.Ct. 906, 5 L.Ed.2d 861; *People v. Johnson*, 6 N.Y.2d 549, 552, 554, 190 N.Y.S.2d 694, 161 N.E.2d 9 [Fuld, J., dissenting]; *People v. Diaz*, 4 N.Y.2d 469, 470, 176 N.Y.S.2d 313, 151 N.E.2d 871, *supra; People v. Bell*, 306 N.Y. 110, 113, 116–117, 115 N.Y.S.2d 821, *supra; People v. Taggart*, 66 Misc.2d 344, 346–347, 320 N.Y.S.2d 671). However, a statute that merely prohibits loitering, without more, is unconstitutionally vague. Such a generalized law fails to distinguish between 1384 conduct calculated to cause harm and conduct that is essentially innocent, thereby failing to give adequate notice of what conduct is prohibited. Further, such a statute impermissibly places complete discretion in the hands of the police to determine whom they will arrest (*People v. Berck*, 32 N.Y.2d 567, 571, 347 N.Y.S.2d 33, 300 N.E. 2d 411, *supra; People v. Merolla, supra*, at 67, 211 N.Y.S.2d 155, 172 N.E.2d 541; *People v. Diaz, supra*, at 471, 176 N.Y.S.2d 313, 151 N.E.2d 871).

We have upheld loitering statutes only when they either prohibited loitering for a specific illegal purpose or loitering in a specific place of restricted public access (*see, People v. Berck, supra*, at 570, 347 N.Y.S.2d 33, 300 N.E.2d 411; *see also, People v. Smith*, 44 N.Y.2d 613, 407 N.Y.S.2d 462, 378 N.E.2d 613, *supra; People v. Pagnotta*, 25 N.Y.2d 333, 305 N.Y.S.2d 484, 253 N.E.2d 202, *supra; People v. Merolla, supra; People v. Johnson, supra*). Thus, statutes making it a crime to loiter for the purpose of using illegal drugs or for the purpose of engaging in prostitution have been upheld. Such laws provide the ordinary citizen with adequate notice of the exact conduct prohibited, and require the officer on-the-scene to objectively observe some definable impermissible act in order to find probable cause to arrest, thereby foreclosing the possibility that the law will be arbitrarily enforced (*see, People v. Smith, supra* [loitering for purpose of prostitution]; *People v. Pagnotta, supra* [loitering for purpose of using illegal drugs]). Similarly, we have held constitutional statutes prohibiting loitering in a specifically restricted place, such as a school or waterfront facility, since these locations were not open to the public, were places where illegal activity was notorious, and were normally frequented only by those who are affiliated with the activity being carried on there (*see, People v. Merolla, supra* [waterfront facility]; *People v. Johnson, supra* [loitering in schools]).

[4] The thrust of the People's argument on this appeal in support of the statute is twofold. First, the People argue that the "satisfactory explanation" provision in the statute is constitutionally permissible. Second, the People take the position that Penal Law § 240.35(7) falls within the category of statutes prohibiting loitering in specific places of restricted public access. To support these arguments, the People rely on *People v. Bell*, 306 N.Y. 110, 115 N.E.2d 821, *supra*, which upheld against constitutional challenge former Penal Law § 1990-a(2), a statute very similar to the one at issue here. In *Bell*, we held that a provision permitting the police to arrest a person for loitering unless he provides a "satisfactory explanation of his presence" is not a substantive element of the crime, but merely a procedural device to be followed by law enforcement 1385 officials in order to prevent the arrest of those who are innocent of any wrongdoing (*id.*, at 114–116, 115 N.E.2d 821). We further held that a subway station or railroad station was a place of restricted public access (*id.*, at 114, 115 N.E.2d 821). Nevertheless, we find the People's arguments unpersuasive and in direct opposition to precedents that have emerged since *Bell* was decided from

both this court and the United States Supreme Court.

Regardless of whether one characterizes the "satisfactory explanation" requirement as substantive or procedural, in *People v. Berck*, we concluded that a similar provision in a loitering statute that required a person to "identify himself" or "give a reasonably credible account of his conduct and purposes" was unconstitutional (*People v. Berck*, 32 N.Y.2d 567, 569, n. 1, 571–572, 347 N.Y.S.2d 33, 300 N.E.2d 411, *supra*). We held that under this provision, "enforcement of the law depends entirely upon whether the arresting officer is satisfied that a suspect has given" an acceptable account of his presence (*People v. Berck, supra*, at 571, 347 N.Y.S.2d 33, 300 N.E.2d 411). Similarly, in *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903, *supra*, the court invalidated a California loitering statute that required a person to provide identification and to account for his presence when requested by a peace officer. The court concluded that the statute contained "no standard for determining what a suspect has to do in order to satisfy the requirement" (*Kolender v. Lawson, supra*, at 358, 103 S.Ct. at 1858). Thus, the court held that the statute was unconstitutionally vague because it vested "virtually complete discretion in the hands of the police" without any legislative guidelines (*id.*). The statutory mandate at issue here that a suspect provide the officer with a "satisfactory explanation of his presence" is indistinguishable from these other "credible account" provisions. The determination as to what constitutes a "satisfactory explanation" is left entirely up to the policeman on the scene without any legislative guidance whatsoever, and renders the statute unconstitutional (*see also, People v. Schanbarger*, 24 N.Y.2d 288, 300 N.Y.S.2d 100, 248 N.E.2d 16).

[5] Requiring a person suspected of violating the loitering statute provide a "satisfactory explanation" to avoid arrest is also violative of a citizen's right not to answer questions posed by law enforcement officers. Although a police officer may have the right under appropriate circumstances to stop a person in a public place and make inquiry (*see, Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889), a citizen is under no obligation to provide any explanation regarding his conduct. He is permitted to remain silent under the Fifth Amendment to the Federal Constitution and article I, section 6 of the State Constitution (*People v. Schanbarger, supra*). However, under Penal Law § 240.35(7), he is faced with the choice of either foregoing his constitutional right to remain silent in the hope that his explanation will satisfy that particular law enforcement official, or invoking his constitutional right to remain silent and being arrested. As we held in *People v. Schanbarger, supra*, at 292, 300 N.Y.S.2d 100, 248 N.E.2d 16, the failure of a suspect to answer an inquiry of a policeman "cannot constitute a criminal act". Although "an officer may have a right to inquire into suspicious circumstances, a suspect's silence may not be used as a predicate for a separate offense such as loitering" (*People v. Berck*, 32 N.Y.2d 567, 574, 347 N.Y.S.2d 33, 300 N.E.2d 411, *supra; Kolender v. Lawson, supra*, at 362–365, 103 S.Ct. at 1860–62 [Brennan, J., concurring]). A provision such as this one effectively deprives the citizen of his constitutional right to remain silent, since his failure to speak will result in certain arrest under the statute (*cf., Davis v. Mississippi*, 394 U.S. 721, 727, n. 6, 89 S.Ct. 1394, 1397, n. 6, 22 L.Ed.2d 676; *Olmstead v. United States*, 277 U.S. 438, 476–478, 48 S.Ct. 564, 571–72, 72 L.Ed. 944 [Brandeis, J., dissenting]; *People v. Conyers*, 49 N.Y.2d 174, 424 N.Y.S.2d 402, 400 N.E.2d 342). It punishes a suspect for exercising his constitutional right to remain silent and impermissibly transforms the invocation of this right into a criminal act.

[6] Even if the statute did not contain the "satisfactory explanation" requirement, however, we would still be compelled to conclude that, as applied, the statute is unconstitutionally vague. Under the Penal Law, a "transportation facility" is defined in such a broad, all-encompassing manner so as to include some facilities that are more analogous to the public street than to a specific area of restricted public access

that gives notice of its prohibition against loitering. The statutory definition that embraces "all appurtenances thereto" is also too vague and wide ranging in the context of this case. At the time (*People v. Bell*, 306 N.Y. 110, 115 N.E.2d 821, *supra*) was decided, railroad stations offered few amenities, serving primarily as a place to purchase a ticket and wait for a train. Since that time, several of our transportation facilities have evolved into large, multipurpose complexes, replete with wide concourses along which numerous retail establishments of all kinds implicitly invite the public to enter, browse and shop.

The two facilities involved here, the Long Island Railroad Station and the Port Authority Bus Terminal, have numerous entrances and exits to the street, the New York City subway lines, as well as to buses, trains and house many other
1387 businesses that serve the general public. Thousands of commuters, shoppers and other people enter these terminals for a wide variety of reasons daily (*see, Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 85, 88–89; *People v. Velazquez*, 77 Misc.2d 749, 354 N.Y.S.2d 975, *supra*). As the Second Circuit has stated, the Port Authority Bus Terminal, "with its many adjuncts, becomes something of a small city" (*Wolin v. Port of N.Y. Auth., supra*, at 89). Similarly, Pennsylvania Station is also something of a small, indoor city. These facilities are not places of restricted public access like the school in *People v. Johnson (supra)* or the waterfront facility in *People v. Merolla (supra)*, which gave the loiterer notice that he had no right to be there, but, rather, large, public areas.[2]

Since both transportation facilities at issue here are, in reality, "public places," the statute, as applied, does not satisfy due process, since it fails to give unequivocal notice to the unwary that an activity as innocuous as mere loitering is prohibited (*see, People v. Berck*, 32 N.Y.2d 567, 569, 347 N.Y.S.2d 33, 300 N.E.2d 411, *supra*). Indeed, facilities such as Pennsylvania Station and Port Authority Bus Terminal are so public in nature, that they actually invite conduct that could be construed as loitering. Thus, in these two cases, the statute has the effect of prohibiting loitering in a public place and cannot withstand constitutional scrutiny (*see, People v. White*, 48 N.Y.2d 849, 424 N.Y.S.2d 429, 400 N.E.2d 368; *People v. Berck, supra; People v. Diaz*, 4 N.Y.2d 469, 176 N.Y.S.2d 313, 151 N.E.2d 871, *supra*).

Moreover, the statute is unconstitutionally vague, since it provides absolutely no legislative "guidelines governing the determination as to whether a person is engaged in suspicious loitering" in places of unrestricted public access (*People v. Berck, supra*, at 571, 347 N.Y.S.2d 33, 300 N.E.2d 411). In such large, urban transportation facilities, many people are engaged in activity that is seemingly aimless to the objective observer, such as waiting for a train, strolling about the concourse, or waiting for the rain to stop. Nevertheless, who will be stopped, questioned, and arrested under this statute is left "solely up to the discretion of the police officer" on the scene (*People v. Berck, supra*, at 571, 347 N.Y.S.2d 33, 300 N.E.2d 411).

Inasmuch as we have concluded that Penal Law § 240.35(7)
1388 is unconstitutional, we need not reach defendant Bright's claim that the police lacked probable cause to arrest him.

Accordingly, the orders appealed from in both cases should be affirmed.

WACHTLER, C.J., and SIMONS, KAYE, ALEXANDER, HANCOCK and BELLACOSA, JJ., concur.

In each case: Order affirmed.

2. Although we upheld the statute in *People v. Merolla*, 9 N.Y.2d 62, 211 N.Y.S.2d 155, 172 N.E.2d 541 on the ground that a waterfront facility was a sufficiently restricted area, we did note that the statutory requirement that one not loiter within 500 feet of a waterfront facility might be susceptible to unconstitutional application.