ARTICLES

CONSTITUTIONAL REFLECTIONS ON CALIFORNIA'S REQUEST FOR IDENTIFICATION LAW

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I. INTRODUCTION

Another phenomenal and seemingly incessant attack on arbitrary police intrusion and the extent to which the federal courts should intervene in state criminal proceedings is before this Supreme Court term. The context of the controversy surrounds California's "Request for Identification" law focussed upon in *William Kolender v. Edward Lawson* and is spawning calamitous trepidation for civil libertarians. Invoked by police in California and several other states, the law requires, under threat of criminal sanction, a person stopped to give reliable proof of identification in circumstances not amounting to probable cause for a belief that an offense has been committed.

II. FACTUAL SETTING AND PROCEEDINGS BELOW

A. *General*

During a twenty-two month period between March 1975 and January 1977, Edward Lawson, a black, thirty-six year old business consultant from San Francisco was stopped and detailed by police approximately fifteen times.[1] Several of these stops resulted in arrests with significant pretrial incarceration;[2] one resulted in a trial and conviction.[3] They were made while Lawson was walking or standing on public thoroughfares in predominantly white sections of the San Diego-Chula Vista area of Southern California.

In each instance, the stop was made pursuant to Section 647(e) of the California Penal Code which provides *inter alia*:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> . . .
>
> (e) who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man

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1. Kolender v. Lawson, 658 F.2d 1362, 1363 (9th Cir. 1981).
2. *Id.* at 1363.
3. *Id.*

that the public safety demands such identification.[4]

B. *The Statute*

The meaning and constitutionality of section 647(e), a California vagrancy law, have been considered by the California Court of Appeals.[5] Under the construction of that court, there are three elements which must be proven in order to establish a violation of section 647(e). Those elements are (1) loitering on the streets,[6] (2) refusal to give an identity and account (for one's presence on the street) upon request,[7] (3) under circumstances involving the public safety.[8] A finding of all three elements is necessary to establish a violation of the provision.

C. *The Defendant*

Edward Lawson's appearance is "unconventional." He is a tall, thin, black man who wears his hair braided shoulder length.[9] His attire typically consists of slacks, sneakers and a sports coat.

He asserts that he travels short distances by foot and longer distances by hitchhiking in order to make business and personal trips.[10]

Other than the approximately fifteen stops pursuant to section 647(e), Lawson has never been stopped or detained by police.

D. *Procedural Posture*

Generally, in response to the stops and detentions Lawson identified himself and was released.[11] However, on a few occasions he refused to identify himself and was arrested and incarcerated.[12] Finally, frustrated at the frequency of the stops, he filed a complaint in a United States District Court in California.[13] The plaintiff sought a declaration that section 647(e) was unconstitutionally vague and overbroad, and that its enforcement was in violation of his rights under the federal Constitution. He pleaded that the court enjoin its enforcement, forestalling all further detentions of his person

4. CAL. PENAL CODE § 647(e) (Deering 1971).

5. People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 415 U.S. 951 (1974). *See* Lawson v. Kolender, Appendix to Jurisdictional Statement, A-6 n.3, 658 F.2d 1362, 1364 n.3. [The Ninth Circuit reviewed the relevant federal and state law establishing that, in the absence of a California Supreme Court decision interpreting section 647(e), the opinion of the court of appeals in *Solomon* is properly considered the authoritative state court construction of section 647(e)].

6. People v. Weger, 251 Cal. App. 2d 584, 59 Cal. Rptr. 661 (1967), (The California Court of Appeals held that the words "loitering or wandering" as used in section 647(e) do no more than describe the person who may be asked by a peace officer to identify himself).

7. *Solomon*, 33 Cal. App. 3d at 438, 108 Cal. Rptr. 567 (1973) (duty to identify requires a genuine identification . . . one carrying reasonable assurance that the identification is authentic).

8. *Solomon*, 33 Cal. App. 3d at 435, 108 Cal. Rptr. 867 (1973) (circumstances involving public safety are those which fall within the standard articulated in Terry v. Ohio, 392 U.S. 1 (1968) . . . articulable suspicion less than probable cause to arrest.)

9. *Kolender*, 658 F.2d at 1363.

10. Brief for Appellee at 2, *Kolender*, 658 F.2d 1362, *cert. granted* (March 1982) (decision pending).

11. *Id.* at 3.

12. These findings of the district court were not published.

13. *Kolender*, 658 F.2d at 1363, 1364.

under it;[14] and, that he be awarded damages from the various officers who had arrested him.[15]

Lawson tried the case in *pro per*.[16] The evidence at trial disclosed several purported justifications by police for the stops. These were: (1) an officer's perception that Lawson might be engaged in some type of unlawful behavior, (2) that the particular stop was in the course of an investigation of recently reported criminal activity, and (3) that the officer's general belief was that Lawson appeared "suspicious".[17]

At the conclusion of the trial the district court initially entered findings of fact and conclusions of law. These sustained the constitutionality of section 647(e). However, in a subsequent memorandum opinion the same court vacated its earlier findings and held that section 647(e) was unconstitutionally overbroad. The basis of this conclusion was that a person who is stopped on less than probable cause cannot be criminally punished for failing to identify himself.[18]

The holding of the district court was affirmed by the court of appeals for the Ninth Circuit in an opinion filed on October 15, 1981.[19] The grounds for affirmation were that section 647(e) intrudes upon the fundamental right to be secure against unreasonable searches and seizures; and that 647(e) violates due process because it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement.[20]

The State of California filed a notice of appeal to the United States Supreme Court on November 10, 1981 and thereafter the Supreme Court noted probable jurisdiction under 28 U.S.C. § 1254(2).[21]

This past November 8, 1982 the case was argued before the United States Supreme Court. The Court was told by American Civil Liberty Union lawyers now representing Lawson that the state law causes forfeiture of privacy and mobility, and places an internal passport requirement on California residents.[22]

The essential questions presented, then, involves a review of the California state court's construction of section 647(e).

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14. *Kolender*, 658 F.2d at 1369, 1370.

15. Lawson also sought to recover damages for deprivation of his constitutional rights from the various officers who had arrested him. The district court held that damages were not recoverable because each defendant-officer had acted in good faith. (Appendix to Jurisdictional Statement, A-82 and A-83). The Ninth Circuit reversed this portion of the district court's ruling, holding that Lawson was entitled to have a jury determine the good faith of the defendants. Lawson v. Kolender, Appendix to Jurisdictional Statement, A-42 to A-44, 658 F.2d 1362, 1372 (9th Cir. 1981). Appellants do not contest this aspect of the court of appeals' decision.

16. BLACK'S LAW DICTIONARY 712 (5th ed. 1979). (*In propria persona*, in one's own proper person).

17. Brief for Appelle at 3-7, *Kolender*, 658 F.2d 1362 (on certiorari decision pending).

18. *Kolender*, 658 F.2d 1362.

19. *Id.* at 1362, 1363.

20. *Id.* at 1369.

21. 28 U.S.C. § 1254(2) which provides for review on appeal by a party relying on a state statute held by a federal court of appeals to be invalid as repugnant to the constitution.

22. Washington Afro-American, November 16, 1982, at 6, cols. 5-7.

III. HISTORY

A. *Vagrancy and the Void for Vagueness Doctrine*

At common law courts simply declined to enforce statutes deemed too uncertain for application.[23] The United States Courts soon adopted this approach and in the late nineteenth and early twentieth century these courts held many legislative enactments void under the concept of the separation of powers and the notion that the legislature, by enacting an ambiguous statute, could not constitutionally pass the lawmaking job on to the judiciary.[24] Still later the courts reversed several convictions under criminal proscriptions on the ground that the accused was denied his right to be informed "of the nature and cause of the accusation", as guaranteed by the sixth amendment to the United States Constitution.[25]

That historic environment aside, today it is the void for vagueness doctrine which scrutinizes and invalidates legislative enactments too uncertain for reasonable application and enforcement. Embedded upon the sacred principle that everyone is entitled to be informed as to what the state commands or forbids, the void for vagueness doctrine under the due process clauses of the fifth[26] and fourteenth amendments,[27] requires the legislature to set forth reasonable guidelines for law enforcement officials and triers of fact in order to preclude arbitrary and discriminatory enforcement.

The gist of this doctrine became manifest in the early 1970's when the Supreme Court began to focus on municipal vagrancy laws. In *Papachristou v. City of Jacksonville*,[28] the Court had before it the constitutionality of the Jacksonville, Florida vagrancy ordinance.[29] Declaring the ordinance unconstitutional, the court pointed out that a vague statute offends due process by failing to provide explicit standards for those who enforce them, thus al-

23. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923). Thus the Supreme Court, in early cases, overturned federal convictions under vague statutes without reference to any particular constitutional proscription. *See, e.g.*, United States v. Brewer, 139 U.S. 278 (1891).

24. James v. Bowman, 190 U.S. 127 (1918).

25. The sixth amendment to the federal Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . and to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. *See also* Yu Cong. Eng v. Trinidad, 271 U.S. 500 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

26. The fifth amendment to the Constitution of the United States provides, in pertinent part, that no person shall "be deprived of life, liberty, or property without due process of law." U.S. CONST. amend V.

27. The fourteenth amendment to the Constitution of the United States provides, in pertinent part, that no state "shall . . . deprive any person of life, liberty, or property without due process of law."

28. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

29. JACKSONVILLE ORDINANCE CODE § 26-57 provided at the time of these arrests and convictions as follows:

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

lowing discriminatory and arbitrary enforcement.[30] Similarly, the infamous convictions under the suspicious person ordinances,[31] and related facially vague ordinances proscribing as criminal "for three or more persons to assemble on any of the sidewalks and conduct themselves in a manner annoying to persons passing by,[32] were invalidated as void for vagueness. Simply stated, the court held the ordinances in question invalid in that they did not provide standards by which it could be determined what conduct constitutes a violation.

The effect of a vague law as reflected by the decisions of the Supreme Court then is threefold. It impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis.[33] Secondly, it invites arbitrary and discriminatory enforcement.[34] Thirdly, a vague law fails to give adequate notice of what conduct is proscribed, so much so that men and women of common intelligence must necessarily guess at its meaning.[35]

It is appropriate to mention that every somewhat uncertain statute is not necessarily unconstitutional. Where the legislative body and/or court has construed and appropriately limited the application of the law, the fair warning requirement is satisfied and the law would pass constitutional muster.[36] To this end, a statute is not unconstitutionally vague when the meaning of the words can be fairly ascertained by reference to judicial determinations, the common law, dictionaries and treatises, or even from words themselves if they possess a common and generally accepted meaning.

B. Terry *Stops, and the Articulable and Reasonable Suspicion Standard*

Terry v. Ohio,[37] and its progeny of cases construing the fourth[38] and fourteenth amendments to the United States Constitution have clearly recognized that under some circumstances an officer may detain a suspect briefly for questioning although he does not have probable cause to believe that the suspect is involved in criminal activity, as is required for a traditional arrest.[39] This detention, familiarly described as a *Terry* stop, requires

30. *Papachristou*, 405 U.S. at 165-71 (1972).

31. *See* Palmer v. City of Euclid, Ohio 402 U.S. 544 (1971) (suspicious person ordinance; e.g. Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without a visible or lawful business and who does not give satisfactory account of himself).

32. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971).

33. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

34. *Papachristou*, 405 U.S. 156, 165-71 (1972).

35. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

36. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("offensive, derisive or annoying" was made sufficiently specific by a state court ruling). Similarly, federal courts issue narrowing constructions to preclude acts of Congress from being invalidated on grounds of vagueness.

37. 392 U.S. 1 (1968).

38. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend IV.

39. *Terry*, 392 U.S. at 25-26.

the officer to have a reasonable suspicion, based upon objective facts, that criminal activity is afoot and, more importantly, that the individual stopped is involved in criminal activity.

In *Brown v. Texas*,[40] two police officers while cruising in what they described as a "high drug problem area", observed the defendant walking away from another man in an alley. Believing "suspicious circumstances", the defendant was stopped, despite the absence of any specific misconduct of which the officers could suspect him to be guilty. When the defendant refused to identify himself and explain what he was doing, the officers arrested him for violating a Texas statute requiring a person to give him name and address to an officer "who has lawfully stopped him and requested the information". A conviction was later reversed by a unanimous Supreme Court which held that the short detention was a "seizure" subject to the reasonableness mandate of the fourth amendment, and subject to an articulable suspicion (based upon objective facts) which simply was not present in the case.

It is clear that a seizure under *Terry* strikes a balance between an individual's reasonable expectation of privacy, and the need for effective law enforcement procedures. But to satisfy the fourth amendment mandate, even this limited intrusion must be justified upon the totality of the circumstances. Based upon the whole picture taken into account, the detaining officers must have a particularized and objective basis for suspicion of a particular person, and for action on that suspicion.[41]

IV. ARGUMENT

It appears that the State of California has advanced three arguments in defense of section 647(e). First the state reasons that the stop and request for identification is not a seizure under the fourth amendment instructions. They point out that unless the citizen contacted perceives his liberty as being constrained by physical restraint, threat of force, or assertion of authority, there is no seizure; on the contrary, the state asserts the procedure to be a permissible and reasonable police-citizen contact.[42] Next the state argues that even if this contact is construed to be a seizure within the teachings of the fourth amendment, the standard imposed upon the police is no less than that required for the more intrusive pat down search as mandated by *Terry v. Ohio*. Lastly the state posits that the language in section 647, subdivision (e) is clear and unequivocal so as to provide ample notice to the general public as to its requirements. Particularly instructive, according to the state, is the limiting application that the California appellate courts have placed upon the statute. Having delineated the circumstances upon which an officer may request identification under 647(e),[43] the courts, as maintained by the state, have immunized the statute from claims of unconstitutional vagueness.

40. Brown v. Texas, 443 U.S. 47 (1979).

41. *See* United States v. Cortez, 441 U.S. 411 (1981) wherein the Supreme Court upheld the conviction of the defendant based upon articulable facts by border patrol agents that a particular vehicle which was stopped contained illegal aliens.

42. *See* Brief for Appellee at 15, *Kolender*, 652 F.2d 1362 (9th Cir. 1981).

43. *See* People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 415 U.S. 951 (1974) where the Court discussed that before a California police officer may request identification of a person under 647(e) he must have articulable facts to support a reasonable belief that 1) the person is loitering or wandering for an evil purpose and 2) the officer believes the circum-

Appellee, on the other hand, urges the affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit.[44] Initially appellee argues that section 647(e) is repugnant to the fourth amendment guarantee against unreasonable search and seizures, specifically, by unreasonably and intrusively permitting police officers to arrest persons who either refuse or are unable to produce reliable identification under circumstances not amounting to probable cause to believe a crime has been or is being committed. Secondly, in support of the decision below, appellee denounces section 647(e) as unconstitutionally vague, contending both a failure of the statute to give persons of ordinary intelligence reasonable notice of its interdictions, and additionally permitting, *a fortiori*, a proliferation of the impetus for the arbitrary and discriminatory enforcement of the law.

A. *Extrapolating the Constitutional Mandate*

The limiting construction set forth in *People v. Solomon*,[45] notwithstanding, section 647(e) and its proscriptions, appear almost indistinguishable from the vagrancy statutes the Supreme Court nullified in *Papachristou v. City of Jacksonville*,[46] and *Palmer v. City of Euclid*.[47] Serious uncertainties emanate with reference to what conduct subjects one to criminal liability. Does the definition of "loitering or wandering upon the street or from place to place without apparent reason or business" (construed by *Solomon* to mean for evil purposes) also include angry, malevolent, or unpropitious people who are spiteful in thought but have no intention of criminal conduct? Does the duty to give reliable identification require one to carry and produce identification? Can one "account for his presence", without some kind of physical evidence of identification? These and numerous other inquiries protuberate the evils wrought by vague statutes. It is apparent that very little in the way of guidelines or standards exist to minimize unfettered police discretion in determining when to make a stop. In fact, the State (Cal.) apparently concedes that the request for identification would not be invoked during the day time in downtown Los Angeles.[48]

Beyond what has been said concerning the wandering and the duty to give identification aspects of the statute, is the requirement that the police have reason to believe the public safety demands the request. Imposing the *Terry* criteria as the *sine qua non* for police determination of public safety, the California Court in *Solomon*[49] retarded, but did not dislodge, arbitrariness. If the law would not have been invoked on Lawson in downtown Los Angeles in the afternoon, what is particularly unusual or suspicious for a black man to be walking in a predominantely white neighborhood late at

stances to be such that public safety demands that identification be asked in light of reasonable suspicion by the officer of criminal activity.

44. *Kolender*, 658 F.2d 1362 (9th Cir. 1981).

45. 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973).

46. *Papachristou*, 405 U.S. 156 (1972).

47. 402 U.S. 544 (1971).

48. It was reported that during the oral argument before the Supreme Court on November 8, 1982, A. Wells Peterson (California's Deputy Attorney General), arguing for the state conceded the law probably would not be invoked over a person found "at high noon in the downtown district Los Angeles". Washington Afro-American, Nov. 16, 1982 at 6.

49. *Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973).

night? In the absence of additional facts of "suspicion," one wonders if section 647(e) permits arrests for any inclusive, generalized conduct; perhaps, no more wrong than offensive to police notions. This kind of supposition has long been disapproved by Supreme Court precedent, and if sanctioned, would be a dangerous departure of the void for vagueness doctrine.

B. *Further Erosion of Fourth Amendment*?

The state argues in its brief that the stop and request for identification was not a seizure and therefore not subject to the fourth amendment protection. This kind of sophistry, of course, borders on a spirit of frivolity. Lawson was approached on numerous occasions by police while walking through predominately white middle class neighborhoods, and was required to produce reliable identification. He was not free to ignore the request, but on the contrary, was subject to arrest for failure to produce such identification. On several of the occasions when Lawson did not produce reliable identification he was in fact arrested under the auspices of the statute. Each time the officers detained Lawson, however brief, for the purpose of requiring him to identify himself, they were performing a seizure of his person subject to the requirements of the fourth amendment.

The situation here is almost a replica of the facts in *Brown v. Texas*,[50] where the police stopped and frisked the defendant in an alley in order to request, pursuant to a Texas law, that the defendant provide his name and address. Although the officer in *Brown* claimed defendant "looked suspicious", he was unable to point to any facts supporting the statement, and, when pressed, the officer acknowledged that he only stopped defendant to ascertain his identification. In the absence of articulable, objective facts, demonstrating suspicion, the Court in *Brown* held the detention arbitrary, unreasonable and unjustified.

Likewise, the Supreme Court, in *Delaware v. Prouse*[51] invalidated random checks for drivers' licenses and proper vehicle registration conducted on less than an articulable reasonable suspicion that the individual stopped was involved in criminal activity. From consideration of *Brown, Prouse* and their progeny emerges the inescapable conclusion that the accosting of an individual on the street and restraining (however brief) his freedom to walk away until reliable identification is produced is a seizure of that person within the purview of the fourth amendment. Just like in *Dunaway v. New York*,[52] it is of no moment what this intrusion is termed. It has all the trappings of a *Terry* stop, and constitutes a seizure in the historical context of the fourth amendment.

The state next argues that assuming the existence of a seizure, the mere request for identification is "*de minimus*" when restricted to circumstances justifying the greater intrusion of a *Terry* stop and frisk. The argument fundamentally misconceives the clear requisition of the statute. Even if the stop under *Terry* is constitutional, the individual still is arrested and ultimately punished on less than probable cause where reliable identification is not or

50. 443 U.S. 47 (1979).
51. 440 U.S. 648 (1979).
52. 442 U.S. 200 (1979).

cannot be produced. The production, or lack thereof, of reliable identification offers very little, if any, insight to resolving the suspicion and is similar to procedures disapproved by the Supreme Court in earlier decisions: "An officer may question the driver and passenger about their citizenship and immigration states, and he may ask them to explain suspicious circumstances, but any further detention or search must be based upon consent and/or probable cause."[53]

The paucity of sound logic and historical support for the state's position becomes even more profound when examined in the context of the balance between the administration of law enforcement and a citizen's expectation of privacy. The production of identification may or may not be deemed sufficient and reliable to the officer. Given *carte blanche* approval it can only be viewed as an abusive police practice. The substantial underpinnings for limiting arrest to circumstances of probable cause were concepts scrupulously endorsed by the framers and forefathers of the Constitution. The "articulable suspicion" for detaining Lawson under the circumstances of this case seems highly questionable and constitutionally defective. The subsequent arrests of Lawson for failure to produce reliable identification under direction of section 647(e) appears even more loathsome given the sanctity placed on privacy. A decision upholding 647(e) can only lead to innocent citizens being accosted, detained, searched and ultimately arrested at the whim of police officers who possess not the slightest suspicion of criminal activity.

V. CONCLUSION

The pressures on law enforcement officers charged with the prevention of criminal activity and the apprehension of criminals are immense, particularly in an era of criminal heinousness. As a buffer against inundation of those pressures, resolute loyalty to the guarantees of the Constitution is indispensable. The right to be lucidly and resplendently informed as to what the state commands or forbids; and to not be required at the peril of life, liberty or property to speculate as to the meaning of a penal statute, is a sacred one. Concomitantly, the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures is even more inestimable. The slightest transgressions of these fundamentals both exasperate police-citizen conflict and undermine the entire system of constitutional restraint on which the liberties of citizens rest.

53. U.S. v. Brignoni-Ponce, 422 U.S. 873 at 881-82 (1975).