California Penal Code Section 647(e): A Constitutional Analysis of the Law of Vagrancy

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Two police officers patrolling an area with a high incidence of drug traffic saw two men walking in opposite directions in an alley. The officers stopped one of the men because the situation "looked suspicious" and because they had never seen him in that area. The man angrily asserted that the officers had no right to stop him and refused to identify himself. He was arrested and subsequently convicted of violating a Texas statute requiring individuals who have been lawfully stopped by a police officer to provide the officer with their name and address upon request.1 The conviction ultimately was reversed by the United States Supreme Court.2

The above scenario occurred in Texas; yet it might have taken place in California. The stated facts are sufficient to sustain a misdemeanor conviction of disorderly conduct under section 647(e) of the California Penal Code.3 The offense set forth in section 647(e), also referred to as the stop and identify statute, involves three elements: (1) loitering or wandering without apparent reason or business;4 (2) refusing to identify oneself when requested to do so by a

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1. Tex. Penal Code Ann. tit. 8, § 38.02(a) (Vernon 1974) states: "[A] person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."
3. Cal. Penal Code § 647(e) (West 1970). The statute provides: "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 that the public safety demands such identification." Id.
4. "Loitering" has been held to connote lingering for the purpose of committing a crime when an opportunity is presented. It excludes the notion of waiting for a lawful pur-
police officer; and (3) surrounding circumstances that indicate to a reasonable person that the public safety demands such identification.

The breadth of the proscription of conduct in section 647(e) raises serious constitutional questions under the fourteenth amendment due process clause and the fifth amendment privilege against self-incrimination. The California courts last addressed these questions in *People v. Solomon*, in which the court of appeal upheld section 647(e) as constitutional. Since that time, however, stop and identify statutes in other jurisdictions have been invalidated under the same constitutional provisions that section 647(e) was found to satisfy by the *Solomon* court. This relatively recent series of decisions raises serious doubts as to the rationale and result in *Solomon* and merits a reevaluation of the application of constitutional principles to section 647(e) by California courts.

This Note challenges the continuing viability of section 647(e) under current constitutional standards. The Note first examines the rationale and holding of the *Solomon* court. Second, it surveys developments in other jurisdictions which raise questions regarding the soundness of the *Solomon* opinion. Finally, this Note evaluates the language of section 647(e) under constitutional standards and concludes that the development of constitutional requirements in decisions subsequent to *Solomon* render section

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5. Although the language of the statute requires not only that one identify oneself, but also that one account for one's presence, *People v. Solomon*, 33 Cal. App. 3d 429, 437-38, 108 Cal. Rptr. 867, 872-73 (1973), construed the statute to require only identification. See note 36 & accompanying text infra.


7. See notes 76-118 & accompanying text infra.

8. See notes 119-29 & accompanying text infra.


10. *Id.* at 439, 108 Cal. Rptr. at 873.


12. See notes 16-36 & accompanying text infra.

13. See notes 37-74 & accompanying text infra.
647(e) both unconstitutionally vague\textsuperscript{14} and violative of the privilege against self-incrimination.\textsuperscript{15}

**People v. Solomon**

The California court of appeal first upheld the constitutionality of Penal Code section 647(e) in *People v. Weger*.\textsuperscript{16} The court in *Weger* relied on an extensive discussion of the commonly accepted meaning of the statutory terms "loiter" and "wander," the reasonable person's understanding of the phrase "identify himself or to account for his presence," and the degree of discretion that the statute vested in an enforcing officer in finding that the statute was not void for vagueness.\textsuperscript{17} The statute also was found not to violate the right against self-incrimination, because silence "is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one."\textsuperscript{18}

Six years after the decision in *Weger*, Arnold Solomon was arrested and charged in municipal court with violating the provisions of section 647(e). The trial court sustained Solomon's demurrer and dismissed the cause. The appellate department of the superior court reversed the trial court's determination and certified the cause to the court of appeal. The court of appeal ordered the case transferred to it so that it could reconsider the constitutionality of section 647(e) in light of United States Supreme Court decisions rendered subsequent to *Weger*.\textsuperscript{19} Upon reconsideration, the court again held that the statute was not void for vagueness,\textsuperscript{20} but construed the statute more narrowly than it had in *Weger* in order to protect the privilege against self-incrimination adequately.\textsuperscript{21}

\textsuperscript{14} See notes 76-118 & accompanying text infra.
\textsuperscript{15} See notes 119-29 & accompanying text infra.
\textsuperscript{17} Id. at 589-99, 59 Cal. Rptr. at 664-72.
\textsuperscript{18} Id. at 601, 59 Cal. Rptr. at 673 (quoting People v. Wilson, 238 Cal. App. 2d 447, 455, 48 Cal. Rptr. 55, 61 (1965)).
\textsuperscript{20} 33 Cal. App. 3d at 435-36, 438-39, 108 Cal. Rptr. at 870-71, 873.
\textsuperscript{21} Id. at 436-38, 108 Cal. Rptr. at 871-73. See Note, Recent Cases: People v. Solomon, 14 Santa Clara Law. 139 (1973).
Vagueness

In holding that section 647(e) was not unconstitutionally vague, the court in Solomon made three determinations. First, the court held that the statute did not lend itself to arbitrary and capricious enforcement because it becomes operative only when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands identification."22 The court further noted that the relevant circumstances must be within the knowledge of the police officer, and that the reasonableness of the belief in the threat to public safety is subject to review by an independent trier of fact.23

Second, the court held that section 647(e) did not violate the fourth amendment24 prohibition against unreasonable searches and seizures.25 The court compared the statutory requirement that the surrounding circumstances be such as to indicate that the public safety demands identification with the standard set forth in Terry v. Ohio.26 In Terry the Supreme Court approved a limited pat-down search for weapons27 when a police officer possesses "articulable suspicion less than probable cause."28 Because Terry upheld the more substantial intrusion upon the person incidental to a temporary detention for purposes of a frisk, the court in Solomon found that temporary detention followed by a request for identification also was justifiable and not violative of the fourteenth amendment.29

Finally, the court noted that before any violation of the statute could occur, a request for identification must be made. Therefore, the court reasoned, the person requested to identify himself or herself was furnished fair and adequate notice as to what conduct was prohibited by the statute.30

23. Id.
24. See note 91 infra.
27. In Terry, the Court held that the fourth amendment requires that a police officer making a detention be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the conclusion that the individual is involved in criminal activity. Id. at 21.
28. 33 Cal. App. 3d at 435, 108 Cal. Rptr. at 871 (quoting Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring)).
30. Id. at 435, 108 Cal. Rptr. at 871.
Self-Incrimination

The *Solomon* court also considered whether the requirement of section 647(e) that the suspected loiterer furnish identification and account for his or her presence conflicted with the privilege against self-incrimination. The court noted that the United States Supreme Court in *California v. Byers* had stated that "[d]isclosure of name and address is an essentially neutral act." Observing that *Byers* had used a balancing test in determining whether the privilege against self-incrimination had been violated, the *Solomon* court employed a similar test. Weighing the public interest on the one hand and the individual claim to constitutional protections on the other, the *Solomon* court held that the balance fell on the side of identification. The court, however, did caution that application of the statute in each case would depend upon the particular fact situation involved.

The *Solomon* court further held that a person who has furnished suitable identification may not be arrested or prosecuted for failing to account for his or her presence. In this respect, the court interpreted the statute more narrowly than it had in *Weger*. To avoid impinging upon the privilege against self-incrimination, the *Solomon* court construed the requirement that one account for one’s presence as "subordinate and adjunct to" the identification requirement and operative only to the extent it assists in producing reliable, credible identification.

Developments in Other Jurisdictions

Courts in several jurisdictions have considered the constitutionality of stop and identify statutes similar to section 647(e) in recent years. These cases raise serious questions regarding the soundness of the *Solomon* court’s reasoning.

In 1979, the United States Supreme Court twice had the opportunity to rule on the constitutionality of a stop and identify

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33. 33 Cal. App. 3d at 436-37, 108 Cal. Rptr. at 871-72.
34. *Id.*
35. *Id.*
36. *Id.*
statute, but both times declined to do so. In Brown v. Texas, the Court overturned a conviction under the Texas stop and identify statute. The Court did not reach the issue of the statute's constitutionality, but found instead that police detention of the defendant violated the fourth amendment because the officers did not hold a reasonable belief that the defendant had engaged in criminal conduct. The Court held that the fourth amendment requires either that a seizure be based on "specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual," or that it "be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." The stop in Brown failed to meet these requirements because, while the arresting officers were of the opinion that the situation "looked suspicious," they were unable to point to objective facts supporting such a conclusion.

In Michigan v. DeFillippo, decided on the same day as Brown, the Supreme Court again avoided reaching the issue of the constitutionality of a stop and identify statute. Instead, the Court merely noted without further discussion that the Michigan Court of Appeals in People v. DeFillippo already had struck down the statute on constitutional grounds. The Court's decision, how-

37. Id. at 437-38, 108 Cal. Rptr. at 872-73. At the time Wegert was decided, the privilege against self-incrimination could not be violated prior to the time a person invoked its protection. The scope of the privilege was expanded in several United States Supreme Court cases decided subsequent to Wegert which held that the mere posing of questions in certain situations may intrude upon the privilege against self-incrimination under certain circumstances. See, e.g., Leary v. United States, 395 U.S. 6 (1969); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

39. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974). See note 1 supra.
40. 443 U.S. at 52.
41. Id. at 51.
42. Id.
43. Id. at 52. The facts of Brown are set forth in the text accompanying note 1 supra.
44. 443 U.S. 31 (1979).
46. The ordinance at issue in DeFillippo was Cty of Detroit Code § 39-1-5.3 (1976), which provided: "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascer-
ever, may be read as an implicit approval of the determination by the lower court.

Four grounds were offered by the Michigan court to support its determination that the ordinance was unconstitutional. First, the court stated that an innocent citizen cannot know when a police officer has "reasonable cause to believe that his behavior warrants further investigation for criminal activity." The statute therefore failed to provide fair notice of what conduct was forbidden. Second, the court found that the ordinance encouraged arbitrary and erratic arrests because it failed to specify what forms of identification would satisfy the police officer's request. Third, the court held that the ordinance made criminal an act which may be innocently done, reasoning that although the police may under certain circumstances intrude on a person's privacy by stopping him or her for questioning, the individual cannot be required to answer. Finally, the court found that enforcement of the statute could result in seizures that did not comply with the probable cause requirement of the fourteenth amendment.

A similar stop and identify statute was struck down as unconstitutional by the New York Court of Appeals in People v. Berck. The court in Berck first found that the statute failed to provide adequate notice of the prohibited conduct because it neither forbade any identifiable act or omission nor restricted its operation to a particular place or a clearly defined set of circumstances.

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47. 443 U.S. at 34. The Supreme Court nevertheless held that an arrest made in good faith reliance on the ordinance, which at the time of the arrest had not been declared unconstitutional, was valid regardless of the subsequent judicial determination of unconstitutionality. Id. at 39-40.
48. 80 Mich. App. at 201, 262 N.W.2d at 923.
49. Id.
50. Id.
51. Id. at 201-02, 262 N.W.2d at 923-24. In support of this analysis, the court cited Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969), and Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).
52. 80 Mich. App. at 202-03, 262 N.W.2d at 924.
53. N.Y. PENAL LAW § 240.35(6) (McKinney 1970) (repealed 1978). The statute provided that a person was guilty of loitering when he or she "[l]oiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes." Id.
stances. Instead it merely indicated that a person may be held for loitering if suspicion of criminality exists in the belief of the arresting officer. Second, because the statute did not contain standards for identifying what constitutes suspicious loitering, but left the determination solely to the discretion of the police officer, the court found that it encouraged arbitrary and discriminatory enforcement. Third, the court found that by authorizing an arrest for loitering "under circumstances which justify suspicion that [a person] may be engaged or about to engage in crime," the statute failed to satisfy the fourth amendment requirement that arrests be made only on a showing of probable cause. Finally, the court held that the statute violated the fifth amendment by imposing penal sanctions on persons who failed to identify themselves, or to account for their behavior.

In City of Portland v. White, decided one year prior to Solomon, the Oregon Court of Appeals struck down a Portland loitering ordinance based on the Model Penal Code. The ordinance was more specific than the California statute because it set forth criteria to be considered by a police officer in evaluating the conduct of a loiterer, including whether the actor took flight or manifestly attempted to conceal himself or herself or any object when the officer appeared. Refusal to identify oneself was listed as only one of the factors justifying concern for the public safety rather

55. Id. at 569-70, 300 N.E.2d at 413-14, 347 N.Y.S.2d at 36-37.
56. Id. at 571-72, 300 N.E.2d at 414, 347 N.Y.S.2d at 37-38.
59. Id. at 574, 300 N.E.2d at 415-16, 347 N.Y.S.2d at 40.
60. 9 Or. App. 239, 495 P.2d 778 (1972).
61. PORTLAND, ORE., CODE § 14.92.045. The ordinance provided: "No person shall loiter or prowl in a place, at a time, or in a manner not usual for law abiding persons under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a police officer, refuses to identify himself, or manifestly endeavors to conceal himself, or any object. Unless flight by the person or other circumstances make it impracticable, a police officer shall prior to any arrest for an offense under this section afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. Failure of a police officer so to do shall be a defense in any prosecution under the provisions of this section. It shall also be a defense if it appears at trial that the explanation given by the person was true and, if believed by the police officer at the time, would have dispelled the alarm." Id.
than constituting immediate grounds for arrest, as in the California statute. Nevertheless, the court held that the ordinance was unconstitutionally vague. The court found that the terms "loiter" and "prowl" and the phrase "in a place, at a time, or in a manner not usual for law-abiding persons" were so elastic that people of ordinary intelligence were forced to guess at their meaning. In addition, the court held that the statute was void for vagueness because it allowed an officer to make an arrest upon suspicion alone.

In contrast, the Supreme Court of Florida in *State v. Ecker* upheld the state loitering statute, also patterned after the Model Penal Code. The court construed the phrase "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" as meaning those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized. In addition, the court adopted the standard set forth in *Terry v. Ohio*—which provides that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

63. See note 61 supra.
64. See note 61 supra.
65. 9 Or. App. at 242, 495 P.2d at 779.
66. Id. at 243, 495 P.2d at 780.
67. 311 So. 2d 104 (Fla. 1975).
68. FLA. STAT. ANN. § 856.021 (West 1976). The statute provides:

"(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or any object. Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself  and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern."

Id.
69. See note 83 infra.
70. See note 68 supra.
71. 311 So. 2d at 109.
intrusion”—as the standard applicable in determining whether a breach of the peace was imminent or the public safety was threatened.

**Application of Current Constitutional Standards to Section 647(e)**

The failure to state with sufficient specificity the conduct for which a person may be subject to penal sanctions renders that statute void for vagueness. The vagueness doctrine may be divided into three related concerns: protecting against arbitrary enforcement of a statute; safeguarding constitutionally protected rights; and providing fair notice of what a statute prohibits. This Note argues that Penal Code section 647(e) is unconstitutionally vague in all three respects.

**Arbitrary Enforcement**

A statute violates the due process clause of the fourteenth amendment when it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement. Accordingly, a statute which casts a net so wide as to catch all possible offenders and leave enforcement to the discretion of the police or to the courts is unconstitutional.

Section 647(e) was held not susceptible to arbitrary and dis-

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73. *Id.* at 21.
74. 311 So.2d at 109.
75. The vagueness doctrine is called into play when a court, passing upon state or federal statutes, has to determine whether the “words and phrases of the statutes are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.” *Champlin Ref. Co. v. Corporation Comm’n*, 286 U.S. 210, 243 (1932). Due process is violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that contemplated conduct is prohibited. The broad contour of the vagueness doctrine is beyond the scope of this Note. For a more expansive discussion, see *Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960); *Note, Due Process Requirements in Statutes*, 62 Harv. L. Rev. 77 (1948).
criminatory enforcement by the Solomon court because it becomes operative only when the surrounding circumstances suggest to a reasonable person that the public safety demands such identification.\textsuperscript{79} This standard is intended to strike a balance between granting police officers complete discretion to detain any individual and forcing them to stand idly by when they observe what appears, on the basis of their experience, to be unlawful conduct.\textsuperscript{80} A close examination of the standard set forth in section 647(e), however, reveals that this balancing of interests is constitutionally suspect, and that virtually unfettered discretion has been placed in the hands of the police in enforcing section 647(e).

Cases have defined "loitering" as lingering with the intent to commit a crime when an opportunity is presented. Prohibited "wandering" has been similarly defined as movement for evil purposes. Both definitions exclude the notion of a lawful purpose.\textsuperscript{81} In some instances, the circumstances are such that an experienced police officer may easily recognize that an individual is lingering or wandering for an unlawful purpose.\textsuperscript{82} In the majority of cases, however, the individual's motives are less readily apparent. Section 647(e) contains no standards for determining either the type of conduct sufficient to indicate an unlawful purpose or the type of circumstances relating to public safety that would justify a request for identification.\textsuperscript{83}

\textsuperscript{79} 33 Cal. App. 3d at 438, 108 Cal. Rptr. at 873.
\textsuperscript{81} See note 4 \textit{supra}.
\textsuperscript{82} See, e.g., Terry v. Ohio, 392 U.S. 1, 23 (1968).
\textsuperscript{83} The American Law Institute discarded a loitering provision similar to Penal Code § 647(e). Model Penal Code § 250.12 (Tent. Draft No. 13, 1961) originally provided: "A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes." The revised Model Penal Code loitering provision, while it may not cure all of the constitutional defects inherent in the original provision, see, e.g., City of Portland v. White, 9 Or. App. 239, 495 P.2d 778 (1972), attempts to set forth the sort of circumstances which should be considered in determining whether alarm for the public safety is warranted. Model Penal Code § 250.6 (Proposed Official Draft, 1962) now reads: "A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal
Suppose, for example, that police officers stopped a person who was not engaged in inherently suspicious conduct but was the only person sighted in the vicinity of a home whose owner had reported a prowler. If the person explained his or her presence by stating that he or she had been visiting a friend and was going to work, but refused to disclose his or her identity, because section 647(e) contains no standards by which to evaluate the person's conduct, the officers would have absolute discretion to determine for themselves whether the person was "wandering" within the meaning of the statute and whether the circumstances indicated a threat to the public safety justifying a request for identification. This absolute discretion in applying the "surrounding circumstances" standard creates the potential for arbitrary and erratic enforcement. In this respect, it is significant that comparable statutory standards in other jurisdictions have been struck down as unconstitutional.

Section 647(e) is further susceptible to arbitrary enforcement because it fails to specify what forms of identification are sufficient to satisfy the statute. The Solomon court actually added to this uncertainty by expanding the statutory requirement from mere identification to identification that provides both a reasonable assurance of authenticity and sufficient information to permit future communication with the person so identifying himself or herself. While a request for such "credible and reliable" identification may pose little problem for people who carry drivers' licenses and credit cards, the expanded identification requirement transforms section 647(e) into a traditional vagrancy statute, penalizing the status of people who are unlikely to carry such forms of identification and thus creating a status offense.

In rejecting the void for vagueness challenge to section 647(e),
the Solomon court stressed that the reasonableness of an officer's decision that the person arrested was actually loitering and that the public safety was thereby jeopardized by such conduct or that suitable identification had not been produced are all decisions that are subject to review by an independent trier of fact. Although this provides a safeguard against unwarranted conviction, it affords no insurance against arbitrary arrest or harassment. The fourth amendment prohibits not only arbitrary conviction by the courts, but also arbitrary enforcement by the police. For these reasons, section 647(e) fails to meet constitutional requirements of specificity and should be declared void on the grounds of vagueness.

Overbreadth

A statute may be unconstitutional if its sweep is unnecessarily broad, thereby invading an area of protected rights; a governmental purpose may not be pursued by means which infringe on fundamental personal liberties if that end can be achieved by less drastic means. Among such fundamental personal rights is the right to be secure against unreasonable searches and seizures, guaranteed by the fourth amendment to the United States Constitution and by article I, section 13 of the California Constitution. When a police officer accosts an individual and restricts that person's freedom to walk away, the officer has seized that person;

87. *Id.* at 435, 108 Cal. Rptr. at 871. Solomon assumes that the jury will determine the validity of the detention. Generally, however, this is a question decided by the court. It is doubtful the jury could be adequately instructed on the relevant, complex fourth amendment principles necessary to fairly judge the validity of a detention.


91. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *In re Tony C.*, 21 Cal. 3d 888, 892, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978). *See generally Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 75-85 (1960). The fourth amendment and its counterpart in the California Constitution provide that: “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. CONSTR. amend. IV; CAL. CONST. art. II, § 13.

to satisfy the constitutional tests of validity, the seizure must be reasonable. This "reasonableness" requirement demands that the facts supporting an intrusion be capable of measurement against an objective standard—"probable cause" in the case of a full arrest. A brief detention, however, may be justifiable in the absence of probable cause if the officer has a "reasonable suspicion," based on objective facts, that the suspect is involved in criminal activity. The reasonableness, and hence the constitutionality, of such seizures depend on a balancing "of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

The requirements for a lawful investigative stop or detention were reiterated by the Supreme Court of California in In re Tony C., where the court held:

[T]o justify an investigative stop or detention the circumstances known or apparent to the police officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so; the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience, to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.

Despite application of the above standards, the court of appeal in

99. Id. at 893, 582 P.2d at 961, 148 Cal. Rptr. at 370 (citations omitted).
Solomon held that seizures properly made pursuant to section 647(e) were constitutional. The court based its decision on Terry v. Ohio, in which the United States Supreme Court approved a limited pat-down search for weapons for the protection of an officer investigating suspicious behavior of persons reasonably believed to be armed and dangerous "when the information available to [the officer] warrants the belief by a man of reasonable caution" that the intrusion is appropriate. The Solomon court compared the language of section 647(e) with language found in Terry and held that the California statute complied with fourth amendment requirements.

The Solomon court, however, merely extracted language from Terry which was somewhat similar to that used in section 647(e). The language relied upon is not the language of Terry which sets forth the test for a reasonable detention under the fourth amendment. Terry does not hold that a detention is justified "when the information available to [the police officer] warrants the belief by a man of reasonable caution" that the intrusion is appropriate, but that the fourth amendment requires that a police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts," reasonably warrant the conclusion that the individual is involved in criminal activity. Section 647(e), however, allows a police officer to make a detention whenever "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Hence, the statute fails to limit detentions to those which meet the fourth amendment standards enunciated in Terry.

Similarly, section 647(e) fails to meet the fourth amendment requirements for a reasonable detention reiterated by the California Supreme Court in In re Tony C. The court in Tony C. stated that a police officer making a detention must be aware of specific and articulable facts giving rise to suspicion that some crime-related activity has taken place, is in progress, or is about to occur, and that the person the officer intends to detain is involved in that

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100. 392 U.S. 1 (1968).
101. Id. at 22, 24.
102. 33 Cal. App. 3d at 435, 439, 108 Cal. Rptr. at 870-71, 873.
103. Id. (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).
104. 392 U.S. at 21.
activity. Moreover, the facts must be such as to cause any reasonable police officer in similar circumstances to suspect the same criminal activity and the same involvement by the person in question.\textsuperscript{106} The standard set forth in section 647(e) requires far less certainty that the individual is engaging in criminal conduct than is required under \textit{In re Tony C}. For example, the fact that two individuals are sighted alone in an alley in an area with a high incidence of drug traffic might arguably constitute circumstances "such as to indicate to a reasonable man that the public safety demands . . . identification," but these facts do not justify a reasonable suspicion of criminal conduct under the tests set forth in \textit{Terry}\textsuperscript{107} and \textit{In re Tony C}.

The reasoning of the \textit{Solomon} court is subject to criticism on a second ground. As the Supreme Court has emphasized in decisions rendered subsequent to \textit{Terry}, the constitutionality of a seizure less intrusive than traditional arrest depends not merely upon the formulation of a standard similar to that used in \textit{Terry}, but also upon a balancing of the relevant competing social interests.\textsuperscript{108} The California statute, therefore, must be analyzed in terms of a balancing test.

The public concern advanced in section 647(e) is prevention of crime.\textsuperscript{109} Specifically, the state has an interest in allowing police officers to gather information which will aid them in detecting and avoiding crimes. Such information includes identifying persons suspected of engaging in criminal activity.

On the other hand, the burden placed upon individual interests is great. The surrounding circumstances standard set forth in the statute is so vague as to allow police officers to stop innocent individuals and, under the threat of arrest, to force them to identify themselves. The mere possibility that such identification may prove the crucial link in a chain of evidentiary factors leading to arrest and prosecution for crime is far outweighed by the certainty that each request for identification constitutes a serious intrusion on personal security. Balancing the relevant factors thus leads to the conclusion that detentions under section 647(e) are not reason-

\textsuperscript{106}. \textit{Id.} at 893, 582 P.2d at 961, 148 Cal. Rptr. at 370.
able under the fourth amendment.

**Fair Notice**

Due process under the fourteenth amendment requires that citizens be able to determine what a statute commands or forbids.\(^{110}\) "No one may be required under peril of life, liberty or property to speculate as to the meaning of penal statutes."\(^{111}\) A statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."\(^{112}\)

The *Solomon* court circumvented the question of whether section 647(e) provided fair notice of prohibited conduct by stating that an individual is notified as to what constitutes unlawful conduct by the police officer's request for identification.\(^{113}\) While a citizen under some circumstances may have a duty to comply with a police officer's request,\(^{114}\) the enforcement standard of section 647(e) is vague, susceptible of arbitrary implementation,\(^{115}\) and overbroad in that detentions may be permitted which fail to meet the fourth amendment requirements set forth in *Terry* and *In re Tony C.*\(^{116}\) Hence, not every request for identification made pursuant to the statute is necessarily lawful. An individual has no way of determining whether the facts within the knowledge of the police officer justify a detention and accompanying request for identification.\(^{117}\) Thus, a person stopped by a police officer and asked to identify himself or herself must either comply with the request or face arrest without any concrete basis for determining whether a refusal constitutes a violation of the statute. Section 647(e), therefore, is unconstitutionally vague because it fails to notify persons

113. 33 Cal. App. 3d at 435, 108 Cal. Rptr. at 871.
114. For example, an individual has a duty to submit to an arrest. CAL. PENAL CODE § 69148 (West 1970 & Supp. 1980).
115. See notes 77-88 & accompanying text supra.
116. See notes 89-109 & accompanying text supra.
117. The "reasonable man" referred to in the statute has been held to be the police officer. Hence, the relevant circumstances are those within the officer's knowledge. People v. Solomon, 33 Cal. App. 3d 429, 435, 108 Cal. Rptr. 867, 871 (1973); People v. Bruno, 211 Cal. App. 2d Supp. 855, 862, 27 Cal. Rptr. 458, 462 (1963).
of ordinary intelligence what conduct constitutes a violation of the statute.\footnote{118}

\section*{Self-Incrimination}

The \textit{Solomon} court, relying on language in \textit{California v. Byers}\footnote{119} that "[d]isclosure of name and address is an essentially neutral act,"\footnote{120} also held that the identification requirement of section 647(e) did not violate the privilege against self-incrimination. In \textit{Byers}, the Supreme Court upheld a California statute\footnote{121} that required the driver of a vehicle involved in an accident to give the owner of any damaged property the name and address of both the driver and the owner of the vehicle involved.\footnote{122} A major factor considered by the Court in determining that the statute did not violate the privilege against self-incrimination was that the statute was "essentially non-criminal and regulatory" and not "directed at a highly selective group inherently suspect of criminal activities."\footnote{123} The Court recognized that compliance with the statute might lead to prosecution for some contemporaneous or related offense, but held that this mere possibility was outweighed by the strong public policies favoring disclosure.\footnote{124} It was in this context that the Supreme Court stated that disclosure of name and address was an essentially neutral act.\footnote{125} Section 647(e), however, is not only a criminal statute, but also one directed at loiterers, a "highly selective group inherently suspect of criminal activities."\footnote{126} A balancing of interests in determining whether the identification requirement of section 647(e) violates the privilege against self-incrimination therefore should not compel the same result as reached in \textit{Byers}.

A second consideration with respect to self-incrimination is

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\item \footnote{118}{Cf. People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), \textit{cert. denied}, 397 U.S. 915 (1970) (California abortion statute void for vagueness because, \textit{inter alia}, a physician would be required to decide at his or her peril whether an abortion was "necessary" within the meaning of the statute).}
\item \footnote{119}{402 U.S. 424 (1971).}
\item \footnote{120}{33 Cal. App. 3d at 436, 108 Cal. Rptr. at 871-72 (citing \textit{California v. Byers}, 402 U.S. 424, 432 (1971)).}
\item \footnote{121}{\textsc{Cal. Veh. Code} § 20002(a)(1) (West 1971).}
\item \footnote{122}{402 U.S. at 425-27.}
\item \footnote{123}{\textit{Id.} at 430.}
\item \footnote{124}{\textit{Id.} at 431-34.}
\item \footnote{125}{\textit{Id.} at 432.}
\item \footnote{126}{\textit{Id.} at 430.}
\end{itemize}
that two stop and identify statutes, in addition to having been held unconstitutional for vagueness, were struck down on the grounds that an individual may not be compelled to identify himself or herself.\textsuperscript{127} Support for this reasoning also may be drawn from Justice White's concurring opinion in \textit{Terry}: "[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest."\textsuperscript{128} Although the Supreme Court has never directly addressed this issue, Justice White's statement has been cited with approval on several occasions.\textsuperscript{129} A court passing on the constitutionality of a statute, therefore, must take notice that the question of whether identification may constitutionally be compelled pursuant to an officer's request has not yet been resolved by the Supreme Court.

\textbf{Conclusion}

The holding of the California Court of Appeal in \textit{People v. Solomon} is unsound and should be overruled. An analysis of the three aspects of the vagueness doctrine reveals that section 647(e) is unconstitutionally vague in all three respects. First, the statute contains a vague enforcement standard that encourages arbitrary and capricious enforcement by police officers. Second, the statute is overbroad because it permits detentions which fall short of the fourth amendment prohibition of unreasonable searches and seizures. Third, the statute's susceptibility to arbitrary enforcement and its overbreadth serve to deprive the individual of fair notice of the type of conduct prohibited by the statute. In addition, the \textit{Solomon} court's finding that the identification requirement of section 647(e) does not violate the privilege against self-incrimination is subject to criticism both on the grounds that the court may not have properly balanced the relevant issues and also on the grounds that the question of whether identification may constitutionally be required has not yet been answered by the Supreme Court.

Should a court once again be faced with a constitutional chal-

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  \item \textsuperscript{128} 392 U.S. at 34.
\end{itemize}
lenge to the validity of section 647(e), two alternate means are available to deal with any constitutional defect. The statute could be construed in accordance with fourth amendment standards set forth in *Terry v. Ohio* and *In re Tony C.*, or the statute could simply be struck down as unconstitutional. The first solution is unsatisfactory because a police officer has no readily available source of statutory interpretation and, therefore, is likely to act in accordance with the language of the statute, rather than with a judicial gloss placed upon that language. Hence, construction of Penal Code section 647(e) in accordance with *Terry* and *In re Tony C.* is unlikely to cure the constitutional defects of the statute as it is actually applied by police officers. Accordingly, this Note advocates that section 647(e) be struck down rather than attempting to save it by construction.

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130. 392 U.S. 1 (1968).