The Impact of *Kolender v. Lawson* on Law Enforcement and Minority Groups

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Introduction

The press dubbed him the Walkman. He was a tall, black, thirty-six year-old San Francisco business consultant given to sporting dreadlocks and unconventional clothes. He liked to walk whenever possible—especially in white neighborhoods late at night. While in San Diego on business between 1975 and 1977, Edward Lawson was stopped fifteen times by police.[1] Pursuant to California Penal Code section 647(e),[2] officers told him to provide identification and account for his presence. Later, the officers offered a variety of explanations for stopping Lawson that fell far short of the reasonable cause requirement read into section 647(e) by the courts.[3] One officer thought that Lawson's behavior, which he described as "dancing around," might lead to someone's injury.[4] In an-

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1. Kolender v. Lawson, 461 U.S. 352, 354 (1983).

2. Section 647(e) of the California Penal Code provided:

> 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.

CAL. PENAL CODE § 647(e) (West Supp. 1984).

3. Kolender v. Lawson, 461 U.S. 352, 354-55 (1983); Lawson v. Kolender, 658 F.2d 1362, 1364-65 n.3 (9th Cir. 1981); People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 415 U.S. 95 (1974).

4. On February 29, 1976, Mr. Lawson was hitchhiking in a white area of San Diego. He was the only black present. Trial record at 25, Lawson v. Kolender, No. 77-0213-N (S.D. Cal. Mar. 21, 1979). Patrolling Officer Kinslow observed Lawson "dancing" along the street, so he turned into a gas station and stopped to observe Lawson further. *Id.* at 245. Lawson was then

other stop, the officer thought Lawson looked like someone "with his hand caught in a cookie jar."[5] In yet another stop, the officer testified that a flat refusal to identify oneself "is common to people who are wanted in other states, wanted locally, or who are mental cases."[6] Lawson generally refused to provide the requested identification and was arrested. In one case, he was arrested solely because he refused to provide identification, not because an officer's suspicions that he had broken the law prior to the stop proved justified—*that* never happened.[7]

On May 2, 1983, the United States Supreme Court declared section 647(e) unconstitutional.[8] The majority took a very narrow approach:

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detained and questioned. At trial, Officer Kinslow testified, "I thought if a pedestrian was to walk by, possibly just by [Lawson's] actions or what I observed, that [he] could have assaulted a pedestrian. I thought, by the way [Lawson was] dancing around, that [he was] capable of moving into the street in front of a car, injuring [himself] or causing somebody else to be injured." *Id.* at 257-58. Kinslow admitted that Lawson was "hitchhiking in a legal manner," and that he did not know of a law against dancing. *Id.* at 255-56. No criminal or even potential criminal activity was seen.

5. On May 27, 1976, San Diego Police Officer Moulton stopped Lawson. Moulton testified at trial that he had been on the lookout for a burglary suspect identified as a "tall, slender, black male." *Id.* at 180. On cross examination the following colloquy took place:

> Q. Was there anything in terms of what you observed the subject doing which led you to believe that the subject was a prowler or the prowler in question, or the hot prowler in question?
> A. Let me see if I understand you correctly. Was he doing anything at that particular time?
> Q. During any period of time that you observed him.
> A. Just, other than the gesture of resolution when he saw me.
> Q. The gesture of resolution. Could you explain that to me? I'm sorry; I don't understand it.
> A. Basically the look of someone who's caught with their hand in the cookie jar.
> Q. Could you describe for the Court the standard that you are proposing, [what] the "caught with your hands in the cookie jar look" basically is?
> A. The shrugging of the shoulder, the mumbling to oneself.
> Q. The shrugging of one's shoulders, the mumbling to oneself—you're indicating that led you to believe that this individual might in fact be the hot prowler in question?
> A. It started me wondering, yes.

Id. at 186-87.

When asked whether he stopped each suspect who met the description, Moulton responded that he did not. *Id.* at 188. Before contacting Lawson, Moulton did not observe Lawson "wandering" or "loitering." *Id.* at 191. A vague, unarticulable standard formed the basis for the stop.

6. *Id.* at 340.

7. *See infra* note 70. The general rule is that an arrest must be based on probable cause to believe criminal activity has taken place. Florida v. Royer, 460 U.S. 491, 497-99 (1983); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 262-67 (5th ed. Supp. 1984). Pursuant to § 647(e) however, failure to provide identification was itself a crime that could lead to arrest.

8. Kolender v. Lawson, 461 U.S. 352 (1983). Lawson, representing himself, brought a civil action in federal district court seeking (1) a declaratory judgment that § 647(e) was unconstitutional, (2) an injunction against its enforcement, and (3) damages from the officers who

the failure to specify what kind of identification a detainee must provide rendered the statute unconstitutionally vague.[9] Justice Brennan's concurring opinion addressed broader constitutional concerns.[10] He suggested that the majority should have used the balancing test developed in *Terry v. Ohio*.[11] In *Terry*, the Court balanced the governmental interest against the intrusion on the individual's Fourth Amendment rights. The result was a relaxation of the Fourth Amendment requirement that search and seizure be based on probable cause. After *Terry*, an officer can stop an individual for questioning if the officer has a reasonable, articulable suspicion that criminal activity is afoot.[12]

Justice Brennan applied the balancing test to the identification requirement of section 647(e). He found that requiring an individual to identify himself during a police stop did not further governmental interests. He therefore concluded that the Constitution prohibits arresting an individual for refusing to identify himself.[13]

No one, however, satisfactorily addressed the fundamental problem with stop-and-identify statutes: they are traditionally used in an arbitrary manner against minority groups. Sociological studies conclude that police officers enforcing stop-and-identify statutes allow racial prejudice to influence their judgment.[14] While it is true that section 647(e) did not provide guidelines for police conduct, revisions in the statutory language will not remedy the problem of arbitrary enforcement until police officers are retrained or restrained.

This Article argues that an application of the *Terry* balancing test would completely nullify stop-and-identify statutes. Part I examines the history of section 647(e). Part II analyzes sociological studies of police

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detained him. The Southern District of California found the statute overbroad and issued the injunction, but held that Lawson could not recover damages because the officers acted in good faith. Lawson v. Kolender, No. 77-0213-N (S.D. Cal. Mar. 21, 1979). On appeal, the Ninth Circuit affirmed the district court's holding that the statute was unconstitutional. Lawson v. Kolender, 658 F.2d 1362, 1364 (9th Cir. 1981). It held the statute unconstitutionally vague and in violation of the Fourth Amendment's search and seizure provisions. *Id.* at 1364-70. It also reversed the district court's holding that Lawson was not entitled to a jury trial for determining whether the officers acted in good faith and remanded that issue for trial. The officers appealed from the portion of the judgment that related to the injunction and the statute's constitutionality.

9. 461 U.S. at 361.

10. *Id.* at 363 (Brennan, J., concurring).

11. 392 U.S. 1 (1968). *See also* Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1973) (Marshall, J., dissenting); Chimel v. California, 395 U.S. 752 (1969).

12. *Lawson*, 461 U.S. at 362 (Brennan, J., concurring).

13. *Id.*

14. *See infra* notes 46-70 and accompanying text.

practices during on-the-street stops. It examines the governmental interest, if any, in demanding identification and contrasts this interest with the concomitant intrusion on constitutional liberties. Part III examines the constitutional issues raised by section 647(e). The Article concludes that determining a suspect's identity during a street stop seldom advances a police investigation materially, nor turns reasonable suspicion to stop into probable cause to arrest. On the other hand, the power to require identification upon pain of arrest invites abuse of discretion, disproportionately directed at minorities.

I. The History of California's Stop-and-Identify Law

Had Edward Lawson taken his late night strolls before 1961, the strolls themselves would have been a crime. Before section 647(e) was amended, it was a crime to wander from place to place without lawful business, to be unemployed, to beg, to loiter, or to take shelter on private property without permission or in a "house of ill fame." Moreover, it was a crime simply to *be* a prostitute, a drunkard, or an attorney's capper.[15]

In short, section 647(e) was a typical vagrancy statute, no better or worse than similar statutes in other jurisdictions. Vagrancy statutes first

15. CAL. PENAL CODE § 647(e) in its original form provided:

1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or,
2. Every beggar who solicits alms as a business; or,
3. Every person who roams about from place to place without any lawful business; or,
4. Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car or omnibus, or any public gathering or assembly; or,
5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,
6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or,
7. Every person who lodges in any bar, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,
8. Every person who lives in and about houses of ill-fame; or,
9. Every person who acts as a runner or capper for attorneys in and about police courts or city prison; or,
10. Every common prostitute; or,
11. Every common drunkard; or,
12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; . . . is a vagrant, and is punishable . . . ."

1961 CAL. STAT., ch. 560, at 1672 (amended 1969).

originated in England, during the decline of feudalism. No longer tied to their lords, workers began to roam in search of better working conditions.[16] The Statute of Laborers,[17] enacted in 1349 and 1350, prohibited such movement. In 1961, using language a fourteenth century court would have found perfectly suited to its purposes, California still prohibited roaming "from place to place without any lawful business."[18]

In 1960, section 647(e) began to come under attack. The California Supreme Court declared unconstitutional a subsection of the act that made being a "common drunkard" a crime.[19] With the rest of the statute's constitutionality in doubt, the California Legislature rewrote section 647(e) in 1961. When section 647(e) emerged in its present form, it was no longer technically a vagrancy statute but rather a disorderly conduct statute.[20] Despite the efforts of the legislature, it was not clear whether the new section 647(e) had succeeded in transforming a vague "street-sweeping"[21] law into a modern disorderly conduct law.[22]

In the early 1970's the Supreme Court reviewed the constitutionality

16. [T]he peasant had begun to drift to the towns and it was unlikely that the old village life in its unpleasant aspects should not be resented . . . . [I]n 1348 the Black Death reached England and the vast mortality that ensued destroyed that reserve of labour which alone had made the manorial system even nominally possible.

F. BRADSHAW, *A Social History of England, quoted in* Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOCIAL PROBLEMS 67, 69 (1964).

17. S. GIFIS, LAW DICTIONARY 503 (quoting Statutes of Laborers, 23 Edw. 3, c.1 (1349) and 25 Edw. 3, c.1 (1350)).

18. CAL. PENAL CODE § 647 (3) (West 1960). Later English vagrancy laws controlled "wild rogues" and the "notorious brotherhood of beggars." S. GIFIS, *supra* note 17, at 503. California's vagrancy law, as late as 1872, singled out for punishment armed persons "commonly known as 'Greasers' or the issue of Spanish and Indian blood." 1855 CAL. STAT., ch. 175, at 217, *amended by* 1863 CAL. STAT., ch. 525, at 770, *quoted in* Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 562 (1960). Although no longer known by the same name in 20th century California, "wild rogues" were clearly of concern to the drafters of the pre-1961 version of § 647(e). Judging from the statute's prohibitions, "wild rogues" generally could be found loitering at public toilets, at houses of ill fame, and—when in the employ of attorneys—at police courts and prisons. *See supra* note 15.

19. *In re* Newbern, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960) (subdivision 11).

20. Statutory language to the contrary, both the Ninth Circuit and the press continued, 20 years later, to refer to § 647(e) as a vagrancy statute. *E.g.*, Lawson v. Kolender, 658 F.2d 1362, 1363 (9th Cir. 1981); *State Vagrancy Law Voided as Overly Vague*, Los Angeles Times, May 3, 1983, at 1, col. 3. *See supra* note 2.

21. "[T]he laws are now used principally as a mechanism for 'clearing the streets' of the derelicts who inhabit the 'skid roads' and 'Bowerys' of our large urban areas." Chambliss, *supra* note 16, at 75 (quoting Foote, *Vagrancy Type Law and Its Administration*, 104 U. PA. L. REV. 603, 613 (1956)).

22. For a complete analysis of vagrancy statutes prior to *Lawson*, see Keenan, *California Penal Code § 647(e): A Constitutional Analysis of the Law of Vagrancy*, 32 HASTINGS L.J. 285 (1980).

of laws proscribing loitering. In *Papachristou v. City of Jacksonville*,[23] the Court found unconstitutionally vague a statute that prohibited loitering in the streets. In *Palmer v. City of Euclid*,[24] the Court struck down a similar statute that added a second element, failing to account for oneself, on the grounds that the statute was too susceptible to arbitrary enforcement. In *Lawson*, the issue was whether a third element, requiring an individual to identify himself under circumstances that indicate to a reasonable man that the public safety demands such identification, cured the constitutional defects.[25] Prior to *Lawson*, a California court of appeal held that further constraints on police interrogation would render the statute constitutionally acceptable if they comported with the standard described in *Terry v. Ohio*.[26]

Pursuant to *Terry* an officer who has reasonable, articulable suspicion that criminal activity is afoot may stop a suspect for questioning.[27] The officer may arrest the suspect only if the questioning elicits additional evidence that raises his reasonable suspicion to probable cause.[28] The identification provision in section 647(e) effectively lowered the standard for an arrest. It allowed the officer, after making the *Terry* stop, to demand identification from the suspect. If the identification was not satisfactory, the officer could *arrest* on these grounds. The officer could not arrest the suspect for the underlying crime because the initial stop was based only on reasonable suspicion, not probable cause. Under section 647(e) reasonable suspicion plus failure to provide identification became,

23. 405 U.S. 156 (1972).

24. 402 U.S. 544 (1971).

25. A number of lower courts already invalidated criminal statutes similar to California Penal Code § 647(e). *See, e.g.*, United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974), *aff'd on other grounds sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975); Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972); People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977), *rev'd on other grounds*, 443 U.S. 31 (1979); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973); City of Portland v. White, 9 Or. App. 239, 495 P.2d 778 (1972); City of Bellevue v. Miller, 85 Wash. 2d 539, 536 P.2d 603 (1975) (en banc); State v. Starks, 51 Wis. 2d 256, 186 N.W.2d 245 (1971); *but see* State v. Ecker, 311 So.2d 104, 109 (Fla. Dist. Ct. App.), *cert. denied*, 423 U.S. 1019 (1975).

Other jurisdictions have limited provisions in statutes that require suspects to account for their presence, and prohibit lack of compliance from constituting a specific element of an offense. *See, e.g.*, United States v. McClough, 263 A.2d 48 (D.C. 1970); State v. Zito, 54 N.J. 206, 254 A.2d 769 (1969).

26. People v. Solomon, 33 Cal. App. 3d 429, 435, 108 Cal. Rptr. 867 (1973), *cert. denied*, 415 U.S. 95 (1974).

27. 392 U.S. 1, 21 (1968); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (reasonable suspicion warrants temporary seizure for questioning limited to purpose of stop).

28. 392 U.S. at 26.

without any additional evidence of criminal activity, probable cause to arrest.

As a result of the lower standard for arrest under section 647(e), the potential for intrusion on individual constitutional liberties increases. However, in *Terry* the Supreme Court stated that an intrusion upon Fourth Amendment rights is justified only when the governmental interest involved outweighs the constitutionally protected right.[29] Accordingly, to properly evaluate the identification requirement of section 647(e) it is necessary to determine what governmental interest is advanced by requiring identification during a *Terry* stop and to what extent granting police such power intrudes on constitutional freedoms.

II. Stop-and-Identify Statutes: What Happens on the Street

The Supreme Court in *Lawson* held section 647(e) unconstitutional because it did not define with sufficient precision what kind of identification a detainee must provide. The Court pointed out that leaving the decision "to the moment-to-moment judgment of a police officer on the beat"[30] leads to "harsh and discriminatory enforcement . . . against particular groups deemed to merit their displeasure."[31] It gives police "virtually unrestrained power."[32]

Other questions of vagueness, however, were not considered by the majority opinion. Under section 647(e), the detainee need not produce identification unless attending circumstances indicate the public safety necessitates such disclosure.[33] The exigencies of public safety frequently are not overt, and are engendered solely by the reasonable suspicions of patrolling officers. But a detainee has no way of knowing whether the officer has reasonable suspicion. Nor can he predict whether a court would find that the reasonable suspicion was justified. Thus, the detainee cannot know whether the law actually requires him to produce identification in a particular situation.

Harsh and discriminatory enforcement is the principal problem with stop-and-identify statutes. Even if police were free of all vice and prejudice, the statutes leave too much to police discretion. Officers base their decisons on "reasonable suspicion." What guidance they get from their

29. *Id.* at 21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967)).

30. 461 U.S. at 360 (quoting Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring)).

31. 461 U.S. at 360 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

32. 461 U.S. at 360 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

33. *See supra* note 2.

departments in interpreting this phrase, and how well departments control the behavior of their officers in conducting street stops merit discussion.

A. Guidance

Police departments rarely issue formal guidelines to their officers for determining when "reasonable suspicion" exists.[34] This lack of guidance by police departments means that a statute such as section 647(e) cannot be enforced uniformly. Police manuals often do not mention reasonable suspicion,[35] although they may refer to "suspicious persons" without defining the term.[36] Accompanying discussion may imply that the officer is to use common sense gained through field experience.[37] When police manuals do attempt to define reasonable suspicion, they do so with varying degrees of generality.[38] If manuals address factors to be considered in stopping and interrogating, they do not specify the significance of each factor.[39]

Examining manuals of several police departments indicates that officers are to formulate their own individual procedures.[40] The decision to stop a person on the street "rests on the officer's subjective (sometimes intuitive) conclusion that the appearance, demeanor, or activities of the potential subject are not normal for the particular time, place and circumstances under which they are observed."[41] A recent study of four

34. W. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOMS, AND MORALITY 155-60 (1970).

35. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 38-43 (1967).

36. *Id.* at 38.

37. *Id.*

38. *Id.* at 38-40.

39. *Id.* at 40.

40. NATIONAL CENTER ON POLICE AND COMMUNITY RELATIONS, SCHOOL OF POLICE ADMINISTRATION AND PUBLIC SAFETY, A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS 329 (1967).

41. J. BOYDSTON, SAN DIEGO FIELD INTERROGATION FINAL REPORT 7 (1975). Circumstances involving Mr. Lawson illustrate the lack of standards. In one instance, a police officer looking for a felony suspect described as a "white male that had one leg" instructed Mr. Lawson and a black business associate to leave their restaurant table and step outside. Lawson and his associate were the only black persons in the restaurant. The officer testified that he felt the need to contact some people and determine if anybody had ever seen anyone matching the description. Lawson was not released until he had identified himself to the satisfaction of the officer. Trial Record at 15-16, Lawson v. Kolender, No. 77-0213-N (S.D. Cal. Mar. 21, 1979).

On another occasion, January 24, 1977, Mr. Lawson was stopped while walking in the vicinity of the University of San Diego at about 1:00 A.M. Although the detaining officer testified that it was not illegal for pedestrians to be on the road at that time, that Lawson was neither "wandering" nor "loitering," and that Lawson had done nothing to lead the officer to

Southern California communities found that police administrators and field supervisors have little influence or actual control over field officers' routine decisions.[42]

The lack of a manual presents an additional problem. Absent written guidelines, new recruits are likely to give more weight to what they learn from experienced officers in the field than to formal training.[43] As the Westley study pointed out, those experienced officers will disparage playing by the book.[44] Other literature corroborates these findings:

> Field training is rarely formal, often poorly conceptualized and usually pitifully meager. So-called field training experiences are very short and trainees are given little if any opportunity to reflect

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believe that he was preparing to commit a crime, had committeed a crime, or was committing a crime, she stopped him. *Id.* at 272-74. She explained the basis for the stop as follows: "My legal authority was 647(e) under certain circumstances, and [Lawson] fell within those certain circumstances. I said that [Lawson was] not committing a crime, to the best of my knowledge. I had not observed any activity that made me think [he was] going to commit a crime. However, I felt the safety of the citizens in that area was at stake enough to talk to someone who was unusual in the area at that hour, walking in the area. It's a high crime area. That [made] it legal for me to stop [him] and at least find out who [he was] even though [he had] not committed a crime, and I don't think [he was] about to commit a crime. [Lawson] may have committed a crime without my knowledge and without any indication on my part of even knowing whether [he] had or not at that time." *Id.* at 275-76. Upon providing identification, Lawson was released.

On March 22, 1976, Lawson was stopped by Officer Sanchez. The stop took place in the middle of the day in Lawson's neighborhood. Officer Sanchez claimed to have stopped Lawson because he was "walking on the paved portion of the roadway, approximately five or four feet from the shoulder of the road, which constituted a hazard to public safety and to his safety." *Id.* at 165. Officer Sanchez acknowledged that there were no sidewalks in the area. *Id.* at 177. Sanchez also testified that the term "wandering" did not enter his head as the reason for the stop, nor did he think that Lawson was "loitering." *Id.* at 170-71. Nevertheless, Sanchez stopped Lawson and demanded that he identify himself because of the "hazard to the public safety." *Id.* at 171. Upon providing identification, Lawson was released.

Concerning still another stop, when asked to describe the meaning of 647(e), the officer testified as follows: "Essentially, any person wandering about with no apparent reason, no apparent cause . . . is required by 647(e) to identify himself to a peace officer and also to explain his reasons why he is there." *Id.* at 138. According to the officer, the first thing he did when he made contact with the individual was to ask for identification. "I asked him specifically who he was, where he was coming from, and specifically where he lived and where he was going." *Id.* at 119. Lawson refused to answer these questions, was arrested, and went to jail. These stops demonstrate neither a common understanding by police officers of the standard required to demand identification under § 647(e), nor uniform enforcement of the statute.

42. M. BROWN, WORKING THE STREETS, POLICE DISCRETION AND THE DILEMMA OF REFORM 96-131 (1981); *cf.* L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 35, at 87-89.

43. De facto training often consists of permitting new recruits to make the rounds with experienced officers. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEPT. OF JUSTICE, THE NATIONAL MANPOWER SURVEY OF THE CRIMINAL JUSTICE SYSTEM 304-306 (1978).

44. W. WESTLEY, *supra* note 34, at 154-59. *See* A. BRENT, THE POLITICS OF LAW 36 (1974).

on, discuss, and understand their experience.[45]

Peer pressure and custom teach rookie officers that minorities are treated differently.[46] This conditioning may account for studies showing that racial prejudice dramatically increases as a result of time spent on the police force.[47] Numerous studies indicate that factors such as race, sex, age, general appearance, demeanor, and social class routinely influence an officer's decision to make a stop or an arrest.[48] Of these characteristics, officers most often perceive race as the salient factor in establishing reasonable suspicion.[49]

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45. Wasserman & Couper, *Training and Education*, in POLICE PERSONNEL ADMINISTRATION 129 (1974).

46. W. WESTLEY, *supra* note 34, at 160-65.

47. As a result of this prejudice, for example, the use of racial epithets by police in street contacts is widespread and "in most cases the language is chosen deliberately to demean the citizen and demonstrate the superiority of the officer." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 180-82 (1967) (quoting N. GOLDMAN, THE DIFFERENTIAL SELECTION OF JUVENILE OFFENSES FOR COURT APPEARANCES 106 (1963)). *See also* Ford, Meeker & Zeller, *Police, Students, and Racial Hostilities*, 3 J. POLICE SCI. & AD. 9 (1975); Reese, *Police Academy Training and Its Effects on Racial Prejudice*, 1 J. POLICE SCI. & AD. 257 (1973); Teahan, *A Longitudinal Study of Attitude Shifts Among Black and White Police Officers*, 31 J. SOC. ISSUES 47 (1975).

48. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 35, at 18-43. *See also* L. RADELET, THE POLICE AND THE COMMUNITY 158-61 (2d ed. 1977); R. TROJANOWICZ & S. DIXON, CRIMINAL JUSTICE AND THE COMMUNITY 80-82 (1974); Bogomolny, *Street Patrol: The Decision to Stop a Citizen*, 12 CRIM. L. BULL. 544, 567-74 (1976); Lundman, *Police Misconduct*, in POLICE BEHAVIOR: A SOCIOLOGICAL PERSPECTIVE 169-71 (1980); Reed & Reed, *Status, Images and Consequences: Once a Criminal, Always a Criminal*, in IMAGES OF CRIME: OFFENDERS AND VICTIMS 123 (T. Thornberry & E. Sagarin eds.1974).

49. M. BROWN, *supra* note 42, at 166. Three instances involving Lawson illustrate this factor. In the first instance, he was walking in a business district. A murder suspect had been described to an officer as a black male. When asked at trial what distinguished Lawson from the people whom he did not elect to stop, the officer replied: "Apparently all the facts adding up to (sic) I had never seen him before. He was walking in an area uncommon for blacks to be walking at that hour, in a closed business district, and in fact matched the description . . . ." Trial Record at 160, Lawson v. Kolender, No. 77-0231-N (S.D. Cal. Mar. 21, 1979). Lawson provided identification after being stopped and questioned.

In another stop an officer had been told that a tall, long-haired male negro was "loitering" in the area of a public school. Lawson was seen about "half a block" from the school. *Id.* at 195-96. He was stopped and released only when he provided identification. The officer testified at trial that Mr. Lawson was not loitering, wandering or engaged in any crime—he was only walking. *Id.* at 197-200. The officer justified stopping Lawson because he *was the only tall, male negro* he had seen that day. *Id.* at 201. In this case, a complaint by an unnamed person resulted in Lawson's detention and may have resulted in his conviction for a crime if he did not have sufficient identification or had chosen not to identify himself.

In the third example, the officer who stopped Lawson testified that he did so because the police were seeking a suspect for a crime. He stated that "the only information the police department had on it was that it was a black male and no other description." *Id.* at 306. When identification was demanded, Lawson complied and was released.

Perhaps one reason police officers use stereotypes is that the modern patrol car approach to law enforcement cuts them off from the community. Modern patrolmen "do not so much involve themselves with people as they observe from a distance."[50] In addition, an officer's operational style,[51] moods, prejudices, past experience (or lack of experience),[52] interfere with accurate observation and often make community contact arbitrary and fragmented.

Lack of administrative control over individual officer behavior means that, in practice, a statute such as section 647(e) can provide a conscious or unconscious tool for harassment and discrimination.[53] The Supreme Court failed to address this problem in *Lawson*.

B. The Impact on Minority Communities

Arbitrary enforcement of stop-and-identify statutes affects minority communities disproportionately.[54] In the name of crime prevention, many departments have adopted a "show the flag" policy, essentially maintaining a visible presence in the community.[55] The purpose is not necessarily to respond to calls but to detect and prevent crime via aggressive investigation—stopping, questioning, frisking, and searching.[56]

50. M. BROWN, *supra* note 42, at 21.

51. The operational style of a police officer has a tremendous impact on the exercise of discretion to stop an individual for field interrogation. *See* J. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 16-56 (1968).

52. M. BROWN, *supra* note 42, at chs. 6, 7, 8.

53. However, even police manuals and training programs cannot be expected to establish meaningful standards for the enforcement of stop-and-identify laws when the laws themselves offer no guidance.

54. A recent study by the Rand Corporation found that although blacks comprise only 12% of the U.S. population, they comprise 48% of the prison population. Courts in California, Michigan and Texas typically impose longer sentences on Hispanics and blacks than on whites convicted of comparable felonies with similar criminal records. Not only do these minorities receive longer minimum sentences from the court, but once imprisoned they often serve a greater proportion of their original sentences than their white counterparts. After a misdemeanor conviction, white defendants receive probation rather than jail sentences more often than their minority counterparts. J. PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 32, 63-68 (1983).

55. Officers are under substantial pressure from their superiors to conduct aggressive patrols. J. RUBINSTEIN, CITY POLICE 43-48 (1973); *see* M. BROWN, *supra* note 42, at 138-41.

56. Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681, 692-93 (citing L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *supra* note 35, at 16) ("Few police administrators or patrol officers view stop-and-frisks as narrowly limited to investigatory functions. The assumption, in fact, has long been directly to the contrary."); *see generally* EFFECTIVE POLICE ADMINISTRATION 402, 418 (H. More ed. 1975); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 183 (1968); A. RIESS, THE POLICE AND THE PUBLIC 90-94 (1971); Bogomolny, *supra* note 48, at 552; Kuykendall, *Styles of Community Policing*, 12 CRIMINOLOGY 229, 234 (1974); Larson, *Crime Prevention on Patrol*, POLICE CHIEF, June 1976, at 56;

They are there "to create an atmosphere of police omnipresence which will dissuade persons from attempting to commit crimes because of the likelihood of their being detected and apprehended."[57] They believe that, when the situation calls for it, a competent police officer must act brusquely or use aggressive—possibly illegal—tactics.[58]

Aggressive patrol tactics have their greatest impact in the minority community, where police officers have a well-documented tendency to base their behavior on negative stereotypes. Studies show, for example, that police officers perceive blacks as more likely to engage in criminal activity or to be armed and dangerous.[59] When minorities are found outside minority neighborhoods, race may become the principal basis for an officer's suspicion.[60]

In neighborhoods where police are showing the flag, *Terry* stops most often involve minorities. A 1973 police study shows that black males are far more likely to be stopped and interrogated than one would expect from their arrest records.[61] It follows that they are more likely to be arrested for refusing to identify themselves in circumstances that justi-

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Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DEN. L.J. 389, 395-98 (1966); Note, *Orders to Move on and the Prevention of Crime*, 87 YALE L.J. 603, 604 (1978); Note, *Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593, 610-16 (1965).

A survey by Michael K. Brown revealed that a majority of patrol officers believe an aggressive police presence deters crime. Over 80% believed that the need for such presence justified rigorous stop-and-question tactics in some neighborhoods, even though the tactics might exceed the letter of the law. M. BROWN, *supra* note 42, at 163-69. *See id.* at 164-65 table 6.3.

57. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 23 (1967). *See also* A. BRISTOW, FIELD INTERROGATION 5 (2d ed. 1964).

58. M. BROWN, *supra* note 42, at 163-69.

59. *Id.* at 170-77; J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 80-87 (1967); J. WILSON, VARIETIES OF POLICE BEHAVIOR 96-104 (1968); Werthman & Piliavin, *Gang Members and the Police*, in THE POLICE: SIX SOCIOLOGICAL STUDIES (D. Bordua ed. 1967).

60. M. BROWN, *supra* note 42, at 166; J. SKOLNICK, *supra* note 59, at 86-87; AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 Comment (b) (Proposed Official Draft 1975).

Statistics, along with their own experience, often convince officers that minorities are predisposed to crime. These beliefs may, in turn, distort the statistics. Since concentrating on the activities of a particular group may lead to biased estimates of the propensity of that group to commit crimes, "non-whites are more likely than whites to be arrested under circumstances that will not constitute sufficient grounds for prosecution." Bogomolny, *supra* note 48, at 571-72, table 2.

61. Inn, Report on Two Police Practices: High-Speed Chase and Field Interrogation 14 (unpublished study, Center for Police Development, Southern Methodist Univ. School of Law, 1973) (the center was directed by Robert L. Bogomolny; the source is quoted in Bogomolny, *supra* note 48, at 571-72, table 2).

fied neither the stop nor the interrogation in the first place. A federal district court in *Gregory v. Litton Systems, Inc.*[62] found: "Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, negroes nationally compose some eleven percent of the population and account for twenty-seven percent of reported arrests and forty-five percent of arrests reported as 'suspicion arrests.' "[63]

Police also tend to discriminate against those who do not defer to their authority.[64] Objects of harassment tend to lose respect for the police officers. The Report of the National Advisory Commission on Civil Disorders states: " 'Harassment' or discourtesy may not be the result of malicious or discriminatory intent of police officers. Many officers simply fail to understand the effects of their actions because of their limited knowledge of the Negro community . . . ."[65] In their own eyes, officers stop no one except for good cause.[66] They expect detainees to recognize that they have been detained for good reason and to defer politely to authority.[67] However, based on their prejudices, police officers are more likely to stop minorities, and minorities are less likely to respond with deference because of their hostility toward police. An officer will view lack of cooperation as an indication of guilt, thereby justifying an arrest.[68] Thus, failure to cooperate with the police greatly increases the odds of getting arrested.[69]

Section 647(e) gave police a handy tool for making such an arrest.[70]

62. 316 F. Supp. 401 (1970), *aff'd and modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

63. 316 F. Supp. at 405. *See also* Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165 (1970) (analysis of *Gregory*).

64. *See generally* M. SKIES, THE ADMINISTRATION OF JUSTICE (1975); J. SKOLNICK, *supra* note 59, at 80-83; Burkoff, *supra* note 56, at 706-77 (citing L. RADELET, *supra* note 48); Rafky, *Police Race Attitudes and Labeling*, 1 J. POLICE SCI. & AD. 65 (1973). *See also* SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); Rafky, Thibault, & Lynch, *Are Cops Prejudiced?*, 40 POLICE CHIEF, Mar. 1973, at 60; Swan, *The Politics of Identification: A Perspective of Police Accountability*, 20 CRIME & DELINQ. 119 (1974).

65. THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 159 (1968).

66. M. BROWN, *supra* note 42, at 196-98.

67. *Id.* at 198.

68. *Id.*; L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 35, at 59-60.

69. Black, *The Production of Crime Rates*, 1970 AM. SOC. REV. 733, *discussed in* J. PETERSILIA, *supra* note 54, at 43. *See also* Piliavin & Briar, *Police Encounters with Juveniles*, 1964 AM. J. SOC. 206. As Jerome Skolnick notes, "If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one." J. SKOLNICK, *supra* note 59, at 218.

70. As an illustration, one of Lawson's arresting officers testified at trial that he thought Lawson's refusal to answer questions proved he was guilty of something. Trial Record at 340,

It legitimized arbitrary and unproductive relations between the police and minority communities. A detainee's refusal to provide identification during a *Terry* stop elevated reasonable suspicion, on which the stop was based, to probable cause for arrest. That the arrest might later be invalidated did not reduce the inconvenience or stigma.

C. The Effectiveness of Section 647(e)

Section 647(e) and similar statutes did not lead to large-scale apprehension of criminals. According to one study, 5,998 stop-and-identify encounters turned up only 78 criminal acts—60 traffic violations and 18 infractions that were, most likely, minor.[71] In another study, 11,244 encounters produced only 1,488 criminal suspects. Of those, police searched twenty percent, but only one out of every four of the searches turned up evidence of crime.[72] Furthermore, field interrogations were found to have had "no significant impact either on the level of crime or the public's feeling of security."[73]

Lawson v. Kolender, No. 77-0213-N (S.D. Cal. Mar. 21, 1979). In another instance, a San Diego police officer stopped Lawson as he walked on a residential street carrying a legal pad. The officer observed Lawson for 15 to 30 seconds, judged him to be soliciting door-to-door, but did not see a solicitor's permit. *Id.* at 286-89, 291. The officer grabbed Lawson's arm when he ignored questions and attempted to walk away. *Id.* at 289. On another occasion, Lawson was stopped by Officer Caplenor. Officer Caplenor stated that he had been patrolling an area where a number of car burglaries had occurred. He assumed that they had taken place in the late evening or early morning hours. He saw Lawson at approximately 4:00 a.m. *Id.* at 211. Caplenor testified as follows:

> Q. Was there anything in the fifteen seconds in which you observed the subject that the subject did which would lead you to believe that the subject had just committed a crime?
>
> A. No.
>
> Q. Was there anything that the subject did during the fifteen seconds that you observed the subject which would lead you to believe that the subject was in the process of committing a crime?
>
> A. Other than being in the particular area that he was, and the time that he was there, no.

Id. at 229-30.

Caplenor stopped Lawson, demanded his identification, and upon Lawson's refusal to provide such information, arrested him. Upon first observing Lawson, Caplenor stated that there was nothing unusual about his appearance. *Id.* at 208. It was only after approaching him that Caplenor noticed that Lawson's pants were torn and that he was "wet from the hips down." *Id.* at 208-09. The condition of Lawson's clothes were claimed by the officer to be the basis for the stop although the record clearly indicates that the officer had decided to stop him before he noticed that condition.

71. Bogomolny, *supra* note 48, at 567, 571-77.

72. 2 STUDIES OF CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS, § 1 (1967), *cited in* AMERICAN LAW INSTITUTE, *supra* note 60, at 275 n.37.

73. Bogomolny, *supra* note 48, at 550; Tytell, *Citizens, Patrol Commanders, and the Kansas City Preventive Patrol Experiment*, POLICE CHIEF, Nov. 1975, at 42.

While section 647(e) stops did not significantly aid the police, they created much hostility in the community.[74]

> Extensive and detailed empirical studies revealed great hostility resulting from the widespread use of field interrogations in San Diego. In that city, approximately 200,000 such field interrogations are reported annually for a city of about 600,000 people. Although it is not clear what proportion of these would be considered stops in the terms of this Code, many of these encounters were perceived to be peremptory and coercive.[75]

These empirical studies demonstrate that section 647(e) fails the *Terry* test since it does not promote a legitimate governmental interest. In addition, the intrusion on individual liberties, especially those of minorities, is great.

III. Constitutional Issues and the Supreme Court Opinion

The press hailed *Kolender v. Lawson* as a victory for Lawson.[76] Justice O'Connor's majority opinion struck down section 647(e) as unconstitutional. While the majority spoke sternly about "arbitrary enforcement," it decided the case on a very narrow ground. The statute was too vague in describing what kind of identification the detainee must produce. The majority buried its real message in footnote ten:

> Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so (citations omitted). The remaining issues raised by the parties include whether section 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal justice statute creates other vagueness problems. The appellee also argues that section 647(e) permits arrests on less

74. R. FOGELSON, BIG-CITY POLICE 183, 184, 187, 231-42 (1977). Black males and people under the age of 21 are far more likely to be stopped and interrogated than comparable arrest or population statistics should allow. Bogomolny, *supra* note 48, at 567-73. Further, "[m]isuse of field interrogations . . . is causing serious friction with minority groups in many localities." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 57, at 184. *See also* J. PETERSILIA, *supra* note 54, at xxx ("our findings do not discount the charge that the police arrest minorities on weaker evidence").

75. AMERICAN LAW INSTITUTE, *supra* note 60, at 274.

76. *See, e.g., State Vagrancy Law Voided as Overly Vague*, Los Angeles Times, May 3, 1983, at 1, col. 3.

than probable cause.[77]

The majority's holding, while valid, failed to reach other important constitutional issues. There is no doubt that the statute vested too much authority in the detaining officer who, at his own discretion, could decide whether or not a detainee provided adequate information under section 647(e).[78] Too much discretion, the Court noted, leads to arbitrary enforcement.[79] The detainee did not know what kind of identification he must produce and thus did not know when he was breaking the law.

Section 647(e) did not present especially novel constitutional questions. The Court was being asked to clarify what it meant in *Terry*, given that California courts had construed a section 647(e) stop as equivalent to a *Terry* stop.[80] It was unclear whether *Terry* represented a one-time exception to the Fourth Amendment probable cause requirement or whether it opened the door to widespread use of a balancing test whenever the government argues that its own interests outweigh individual freedoms. Section 647(e) did present more than one constitutional question, but the tension created by its enforcement in minority communities suggests that the Court should have ruled on each question.

Justice Brennan, in a concurring opinion, stated that *Terry* represented a limit beyond which he was unwilling to go. He noted that the Court had agreed with him in the past:

> Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. . . . We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. . . . But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion.[81]

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77. *Lawson*, 461 U.S. at 361 n.10.

78. *Id.*

79. Section 647(e), as presently drafted and construed by California courts, contains no standard for determining how a suspect can satisfy the requirement to provide "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute. An individual, whom police find suspicious but lack probable cause to arrest, may walk the public steets "only at the whim of any police officer" who happens to stop that individual under § 647(e). *Lawson*, 461 U.S. at 358 (quoting Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965)).

80. People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973).

81. *Lawson*, 461 U.S. at 363, 365 (Brennan, J., concurring). Justice Brennan also noted:

> [T]he statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis

Put another way, Justice Brennan's legal conclusion confirmed the sociological conclusion: the government interest advanced by section 647(e) does not outweigh the intrusion on individual liberties.

Section 647(e) distorted *Terry* by making reasonable suspicion not only grounds for a stop and frisk but also grounds for arrest. After a stop and frisk, a subject is free to go, unless the search produces probable cause.[82] After a stop and a refusal to provide identification, however, the subject may be arrested and convicted under section 647(e).[83]

The majority noted the dangers of arbitrary enforcement of section 647(e), but only Justice Brennan considered the additional dangers posed when an officer has at his disposal not only the power to stop and frisk on less than probable cause but also the power to arrest.[84] A stop and frisk, however unpleasant, represents no more than a temporary intrusion on privacy. Although California courts have implied that a demand for identification represents less of an intrusion on privacy than a frisk,[85] the Ninth Circuit's *Lawson* opinion disagreed: "[P]olice knowledge of the identity of an individual they have deemed 'suspicious' grants the police unfettered discretion to initiate or continue an investigation of that person long after the detention has ended."[86] Arrest and conviction intrude even more significantly.[87]

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described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order. . . . Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights.

Id. at 367. The empirical studies discussed in part II further explain why the weak governmental interest does not outweigh intrusions on individuals' rights. *See supra* notes 30-75 and accompanying text.

82. Police may briefly detain the subject against his will during the search by means of physical force or a "show of authority," but cannot compel him to answer questions or use his refusal as a basis for arrest. *Terry*, 392 U.S. at 34 (White, J., concurring). Anything beyond these limitations requires probable cause to believe a crime has been committed. Florida v. Royer, 460 U.S. 491, 500 (1983).

83. Of course, where an individual refuses or is unable to produce proof of identity, probable cause to arrest under § 647(e) exists. But, as the Ninth Circuit held:

> [A]s a result of the demand for identification, [the statute] bootstraps the authority to arrest on less than probable cause. . . . "It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result by making suspicious conduct a substantive offense."

Lawson v. Kolender, 658 F.2d 1362, 1366-67 (9th Cir. 1981) (quoting Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1973), *rev'd on other grounds*, 428 U.S. 465 (1976)).

84. 461 U.S. at 367-68 (Brennan, J., concurring).

85. *Solomon*, 33 Cal. App. 3d at 435, 108 Cal. Rptr. at 871.

86. *Lawson*, 658 F.2d at 1368.

87. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Failure to produce identification was a crime under section 647(e) only if an individual was wandering the streets "without apparent reason or business" and "if the surrounding circumstances [were] such as to indicate to a reasonable man that the public safety demand[ed] such identification."[88] A person who set out to violate section 647(e) could easily satisfy the first element by wandering around without apparent business, but fulfilling the second element would prove more difficult. First, section 647(e) does not specify the type of identification that would be sufficient. Whether an unofficial identification would satisfy the statute is left to the officer's discretion. Second, if the potential lawbreaker refused to provide any identification, he could not know whether the surrounding circumstances would indicate to a reasonable person that the public safety demanded his identification. He could not read the officer's mind. He lacks the officer's training, experience, and prejudices. He would not know what crime has been reported in that neighborhood in the past hour or what suspects matching his description were at large.[89] The potential lawbreaker could not possibly know whether an officer possessed "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[90] Nor would the potential lawbreaker know whether a court would agree with the officer. Reasonable persons, including members of the Supreme Court reviewing the same record, can and do differ as to when reasonable suspicion exists.[91] Thus, section 647(e) provides inadequate notice of what kind of identification a detainee must produce, and when he must produce it.

To sum up, section 647(e) presented classic vagueness problems: (1) it failed to give a person of ordinary intelligence reasonable opportunity to know what was prohibited so that he could act accordingly[92] and (2) it

88. *See supra* note 2.

89. *See, e.g.*, Reid v. Georgia, 448 U.S. 438, 440 (1980) (suspicion based on drug courier profile); United States v. Mendenhall, 446 U.S. 544, 563-65 (1980) (suspicion based in part on DEA profile); State v. Ochoa, 111 Ariz. 582, 544 P.2d 1097, 1100 (1976) (profile for detection of stolen vehicles transported to Mexico).

90. United States v. Cortez, 449 U.S. 411, 417-18 (1981). In California, an officer may consider a suspicious explanation of behavior in choosing to make a stop even though there is also an innocent explanation. Thus, an individual can arouse suspicion by innocent conduct that merely appears suspicious. *In re* Tony C., 21 Cal. 3d 888, 894, 582 P.2d 957, 960, 148 Cal. Rptr. 366, 369 (1978).

91. *Compare* majority and dissenting opinions in United States v. Mendenhall, 446 U.S. 544 (1980) *and* Adams v. Williams, 407 U.S. 143 (1972). *Cf.* Ybarra v. Illinois 444 U.S. 85 (1979) (majority opinion at 92-93, and dissenting opinion of Rehnquist, J., at 106, differing as to existence of "reasonable belief or suspicion" that person to be frisked was "armed and dangerous").

92. *Grayned*, 408 U.S. at 108; Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

"impermissibly [delegated] . . . basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[93] On the street, the constitutional subtleties vanished and only the practical reality remained: as long as the officer believed he was acting correctly, the detainee was best advised to produce identification—provided he had the foresight to bring it along—or face the prospect of being arrested.[94]

Footnote ten allowed the majority to bypass several constitutional issues.[95] For instance, when an officer makes a *Terry* stop in a jurisdiction that has no section 647(e), he may not compel the detainee to produce identification without probable cause. But section 647(e) authorized the officer to make the same kind of stop and, on the basis of reasonable suspicion alone, threaten to arrest the the detainee for failure to produce identification. Simply by enacting a statute, the California Legislature raised reasonable suspicion to the level of probable cause. As Justice Brennan noted, "California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody."[96]

Stop-and-identify laws implicate other Fourth Amendment rights, such as the right to mobility.[97] If black males with long braids believe they will be subject to *Lawson* stops for strolling through white neighborhoods after hours, they may choose to stay closer to home. In addition, such laws implicate Fifth Amendment rights against self-incrimination and the right to "a private enclave where [an individual] may lead a pri-

93. *Grayned*, 408 U.S. at 108-09; *Papachristou*, 405 U.S. at 168-69. *See also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 290 n.12 (1982); Colautti v. Franklin, 439 U.S. 379, 390 (1979).

94. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bailbondsmen, first-hand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma.

Lawson, 461 U.S. at 368-69 (Brennan, J., concurring) (footnotes omitted).

95. The majority opinion did note First Amendment and freedom of movement concerns, but only in passing and only in regard to the identification requirement. 461 U.S. at 358.

96. 461 U.S. at 366-67 (Brennan, J., concurring).

97. Kent v. Dulles, 357 U.S. 116, 126 (1958) (a constitutional right to travel exists "as close to the heart of the individual as the choice of what he eats, or wears, or reads").

vate life."[98] Section 647(e), in effect, compelled a detainee to extract from his private enclave a coherent explanation of his activities, keeping in mind that "breathing the cool night air" was unlikely to placate an officer who thought he had just caught a burglar.

One of the more lyrical Supreme Court opinions in recent memory quoted Walt Whitman, Henry Thoreau, and Vachel Lindsay on the virtues of strolling from place to place without any lawful purpose:

> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[99]

In Whitman's vision of America, one who had done nothing wrong except failing to produce identification could reasonably claim what Justice Brandeis called "the right to be let alone."[100] While section 647(e) was in effect, the black, the poor, the unconventional, and the unwanted found that, in the same situation, color or status became reasonable suspicion to stop them on the street and arrest them.

Conclusion

Justice Frankfurter once observed that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[101] This Article has cited numerous studies indicating that stop-and-identify statutes often provide a pretext for arbitrary treatment of minorities. The studies also suggest that such statutes do little to aid in crime prevention but much to create fear and hostility in minority communities. Should the California Legislature attempt to revive section 647(e), it must address not only the Supreme Court's narrow concerns but the social realities as well. A new statute must specify what kind of identification a detainee needs, and meet the *Terry* balancing test by showing that the governmental interest in such a stop outweighs the intrusion on privacy. Justice Brennan argued that section 647(e) failed to make such a showing. Our discussion

98. Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Tehan v. Shott, 382 U.S. 406, 416 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting)).

99. *Papachristou*, 405 U.S. at 164.

100. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

101. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

indicates why there cannot be such a showing. No mere rewording will change the essential balance and make the slight governmental interest in requiring identification during a *Terry* stop outweigh the intrusion on individual freedoms. Now that the Supreme Court has overturned section 647(e), California would do well to let it rest in peace.