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tive approach may preview a new clarity in jurisdictional analysis. In future opinions the court should give *explicit* recognition to the relative values of various due process factors. Such action would assure greater predictability and promote orderly legal development.

Even without an explicit differentiation among due process factors, *Griffiths'* sole reliance on the purposeful act may produce a significant expansion of jurisdiction. The court may be saying that it need only find some intentional course of conduct upon which an inference of submission to jurisdiction may be rationally based.[49] The court's willingness to find such conduct in our integrated economy suggests a more certain remedy for forum businessmen in their contract disputes with foreign corporations.[50]

A CONSTITUTIONAL DILEMMA FOR LOITERING STATUTES?

Defendant was stopped on a public sidewalk by a police officer and asked to identify himself and account for his presence. He refused to comply with this request, and was arrested and charged with disorderly conduct.[1] On appeal to the California District Court of Appeals, the lower court's dismissal was reversed. *Held:* One who loiters or wanders upon the streets or from place to place without apparent reason or business has no constitutional right to remain silent when the surrounding circumstances are such as to indicate to a peace officer as a reasonable man that the public safety demands

[49] The Washington court expressed this notion while commenting on Gray v. Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Oliver v. American Motors Corp., 70 Wash. Dec. 2d 845, 858, 425 P.2d 647, 655 (1967).

[50] Critics have suggested that exposure of businessmen to foreign suits will discourage casual interstate commerce. *See* Fourth N.W. Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, 117 N.W.2d 732, 736 (1961); Conn. v. Whitmore, 9 Utah 2d 250, 342 P.2d 871, 874 (1959); Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196, 204-06 (1957). A more likely inhibiting factor would be the uncertainty engendered by "essays in jurisdictional analysis." Businessmen who can anticipate the legal consequences of foreign transactions are able to seek appropriate protection.

[1] The relevant portion of CAL. PEN. CODE § 647(e) (West Supp. 1967) reads as follows:

> Every person who commits any of the following acts shall be 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.

that he identify himself. *People v. Weger*, 251 A.C.A. 663, 59 Cal. Rptr. 661 (2d Dist. Ct. App., 1967), *cert. denied*, 36 U.S.L.W. 3280 (U.S. Jan. 15, 1968).

Out of nearly five million arrests in 1966, over one-hundred thousand were for vagrancy.[2] The present rationale[3] behind vagrancy statutes was stated in a 1947 District of Columbia decision: "A vagrant is a probable criminal; and the purpose of the [vagrancy] statute is to prevent crimes which may likely flow from his mode of life."[4] In a 1950 article criticizing this approach, Mr. Justice Douglas stated a basic limitation in this area:

> Arrests for suspicion are not countenanced by the Bill of Rights. The fourth amendment allows arrests—as well as searches—only for "probable cause".... Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time.[5]

Advocates of vagrancy statutes argue that there is a social need for such legislation to prevent supposed incipient crime,[6] but draftsmen face constitutional problems when they attempt to strike "... a balance between a person's interest in immunity from police interference and the community's interest in law enforcement."[7] The principal case sought to determine whether California Penal Code § 647(e) struck such a balance in a constitutionally permissible manner.[8]

[2] FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (UNIFORM CRIME REPORTS—1966) 110-11 (1967).

[3] For a discussion of the historical background of such statutes, see MODEL PENAL CODE § 250.12, Comment (Tent. Draft No. 13, 1961).

[4] District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947). *See*, Comment, *Criminal Penalties for Vagrancy—Cruel and Unusual Punishment Under the Eighth Amendment?*, 18 W. RES. L. REV. 1309, 1325 (1967).

[5] Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13 (1960). For a thorough discussion of the development and application of vagrancy laws, see Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

[6] An example of the widespread use of vagrancy statutes to offset the difficulties inherent in obtaining attempt convictions is State v. Grenz, 26 Wn. 2d 764, 175 P.2d 633 (1946) (*vagrancy* conviction of defendant caught in early stage of apparent attempted chicken theft affirmed). *But cf.* MODEL PENAL CODE § 5.01 (Proposed Official Draft, 1962).

[7] People v. Machel, 234 Cal. App. 2d 37, 43, 44 Cal. Rptr. 126, 130 (1st Dist. Ct. App. 1965).

Wording the balance in this way is question-begging because (1) a balance of all of society against one individual is generally going to favor the social interest, and (2) the balance here really involves not just a *person's* interest in immunity from police interference but rather the *community's* interest in freedom of its citizens from unwarranted police intereference.

[8] This note argues that, at least as far as the self-incrimination issue is concerned, the United States Supreme Court has already struck a definitive balance in Miranda v. Arizona, 384 U.S. 436 (1966), and that a statute cannot now be justified by attempting to strike a balance different from that achieved in *Miranda*. *See* text p. 854 *infra*. However, if the balance were against some other constitutional interest, a different question would be involved than the direct governmental-individual confrontation with which the fifth amendment is concerned.

This note analyzes vagrancy statutes in terms of two constitutional issues raised:[9] vagueness[10] and self-incrimination. The attempt to separate culpable from non-culpable loitering has proved futile in some statutes attacked for vagueness.[11] Recent statutes seek to circumvent this problem be defining vagrancy in terms of failure to explain one's presence in certain circumstances rather than in terms of loitering conduct itself. But this new approach raises problems of self-incrimination. While the California statute successfully meets the vagueness challenge, this note argues that it is still unconstitutional as an abridgment of the privilege against self-incrimination.[12]

[9] Although there might be both undifferentiated due process and equal protection problems with such legislation, these are not presented in *Weger*. From the limited authority, it does seem clear that prohibition of a class of persons from the public thoroughfares in certain circumstances is constitutionally permissible provided that this prohibition does not exceed the bounds of reasonableness, i.e., it must be reasonably related to a legitimate state or municipal concern. Thistlewood v. Trial Magistrate for Ocean City, Worcester County, 236 Md. 548, 204 A.2d 688, 693 (1964), and cases cited therein.

The limiting factor, Alves v. Justice Court of Chico Judicial District, 148 Cal. App. 2d 419, 306 P.2d 601, 605 (3d Dist. Ct. App. 1957), is that

> the general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation. Any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens.

See also City of Seattle v. Drew, 70 Wash. Dec. 2d 383, 423 P.2d 522, 524 (1967).

[10] For an excellent discussion of this type of constitutional attack, see Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[11] Once a detention or "stop" is made under a statute such as that in the principal case, there are only two ways in which police officers can investigate the stopped person: by questioning or by searching. For the purposes of this note, the search alternative is not considered under the general heading of vagrancy statutes, since issues raised by such a search are more appropriate to so-called "stop and frisk" statute cases. *See* Sibron v. New York, 18 N.Y. 2d 723, 220 N.E. 2d 805, 274 N.Y.S. 2d 161 (1966), *prob. juris. noted*, 386 U.S. 954 (1967) (No. 1139, 1966 Term; renumbered No. 63, 1967 Term); Terry v. Ohio, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966), *cert. granted*, 387 U.S. 929 (1967) (No. 1161, 1966 Term; renumbered No. 67, 1967 Term).

If these cases result in a holding that the act of stopping a "suspicious" person violates the fourth amendment's search and seizure provisions, this would render moot the entire subject of whether vagrancy ordinances of the California form are either vague or contrary to the self-incrimination privilege, since the initiating conduct of the police officer in such statutes—the stopping—would be invalid. *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court) *with* Wong Sun v. United States, 371 U.S. 471 (1963) (at least in federal prosecutions, testimonial evidence of the accused following an unlawful arrest or search must be excluded as the "fruit" of the unlawful police conduct).

A vagrancy statute drafted in terms of the loitering conduct itself is vague because (1) it is almost impossible to sort out lawful from unlawful loitering on the basis merely of objective appearances, and (2) if the separation is made on the basis of a dichotomy between lawful and unlawful purpose (*cf.* City of Portland v. Goodwin, *infra* note 20.), not only is the definitional problem great, but no effective standards are apparent for guiding the policemen. This approach comes very close to statutory justification for arrests on suspicion.

[12] The fifth amendment's privilege against self-incrimination is applicable to the states by virtue of the fourteenth amendment's due process clause. Malloy v. Hogan, 378 U.S. 1 (1964).

VAGUENESS

"Vagueness" may encompass at least two discrete problems: (1) clarity—does the statute convey sufficiently definite warnings;[13] and (2) overbreadth—does the statute strike so broadly as to proscribe non-culpable behavior.[14] Related to both is the problem of limiting police discretion.[15]

The *Weger* court concluded that the statute was sufficiently clear to enable a citizen to guide his conduct. Citing *Roth v. United States*,[16] the court argued that although loitering is difficult to define,

> lack of precision is not itself offensive to the requirements of due process.... [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice.[17]

The court reasoned that the requirement of precision must be measured "in the light of the objective sought to be achieved by... [the] statute as well as the evil sought to be averted,"[18] and concluded that "the words 'loiter' and 'wander' are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to

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[13] *See, e.g.*, Connally v. General Construction Co., 269 U.S. 385 (1926).

[14] *See* Cox v. Louisiana, 379 U.S. 536 (1965).

[15] *See id.*; Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

Of course, every criminal statute vests considerable discretion in the police, in the sense that they may enforce the statute selectively. The typical constitutional attack on this type of statute would be an equal protection attack on the statute as applied. But that type of discretion is distinguishable from discretion vested in the police which goes to the very issue of culpability.

[16] Roth v. United States, 354 U.S. 476 (1957).

[17] People v. Weger, 251 A.C.A. 663, 59 Cal. Rptr. 661, 665 (2d Dist. Ct. App. 1967) quoting from Roth v. United States, 354 U.S. 476, 491 (1957).

[18] 59 Cal. Rptr. at 666.

Apparently, the court was referring to the high degree of deference generally given to important governmental interests which are difficult to further through any but imprecise language. *See* Nash v. United States, 229 U.S. 373 (1913) (criminal sanctions of Sherman Act (26 Stat. 209 (1890) upheld against vagueness objections); Dennis v. United States, 341 U.S. 494 (1951) (Smith Act convictions (18 U.S.C. 11 (1946)) upheld against vagueness objections); Boyce Motor Lines v. United States, 342 U.S. 337 (1952) (conviction for violation of I.C.C. regulation (49 C.F.R. § 197.1(b)) about permissible highway routes for vehicles transporting inflammables or explosives upheld against vagueness objections). The case relied on by the court, *Roth v. United States, supra* note 16, was a consolidation of two cases. *Alberts v. California*, the companion case, originated in a state prosecution. The act of consolidation and joint affirmance of the convictions in *Roth* indicates that this deference to governmental interest is also paid to state governmental interests.

In the *Weger* context, the court begs the question of important governmental interest because its unsupported belief that loitering must be proscribed is the basis for allowing this "evil" to be made illegal in statutory language which is imprecise. This circular approach could be used to justify vague language in any case, simply by labeling the conduct in question as "evil."

their application."[19] Section 647(e) differs from older vagrancy statutes because it does not proscribe *all* loitering, but only loitering *and* refusing to offer an explanation when the objective circumstances make such questioning by a police officer reasonable. Because of this, there is no need to become enmeshed in elaborate definitions of loiter and wander.[20] The criminality of the conduct will depend not upon the scope and clarity of those terms, but rather upon the reasonableness of the questioning by the police under the objective circumstances.[21]

The *Weger* court further concluded that introduction of this reasonable man limitation saved the constitutionality of the statute by limiting police discretion.[22] The United States Supreme Court, focusing on the issue of discretion, found a Louisiana breach of the peace statute unconstitutionally broad and uncertain in 1965.[23] In his concurring opinion, Mr. Justice Black stated:

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[19] Cal. Rptr. at 667.

[20] To avoid the pitfall of vagueness, a statute must be reasonably clear and certain. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). In light of the emphasis in this statute on failure to identify and account for oneself, the court placed too much emphasis on the meanings of the words "loiter," "wander," and "to account." Lay meanings of these terms afford sufficient clarity and certainty for constitutional purposes.

In the context of § 647(e), it is clear that the meaning of "to account" is simply to explain why one is present; there is no added statutory language which requires that the explanation be of one type or another. Thus, an explanation in terms of being present just to enjoy the evening, or to take a relaxing walk, would be enough to satisfy the statute.

It may be impossible to find definitions of the above words which will constitutionally sort out culpable from nonculpable "loitering." To take the court's finding that the act of loitering itself must reveal some sinister purpose is suspect. The Washington Supreme Court was not willing to take this course in the case of City of Seattle v. Drew, 70 Wash. Dec. 2d 383, 423 P.2d 522 (1967). The court reversed defendant's conviction for violation of a loitering ordinance (SEATTLE, WASH., CODE § 12.11.290(1967) which read:

> It shall be unlawful for any person wandering or loitering abroad, or abroad under other suspicious circumstances, from one-half hour after sunset to one-half hour before sunrise, to fail to give a satisfactory account of himself upon the demand of any police officer.

Compare City of Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949). In that case the Oregon Supreme Court upheld an ordinance prohibiting loitering during certain hours unless the loiterer had and disclosed to a police officer a lawful purpose. There was no such limitation of lawful purpose in the Seattle ordinance.

[21] The statute apparently attempts to create a watered-down "probable cause" for questioning, as opposed to arrest. *See* note 11 *supra*. Thus, the focus of attention on police discretion deprives the pejorative "loiter" of any definitional force.

[22] 59 Cal. Rptr. at 669.

The 1961 modernization of the statute was due in large part to the work of Professor Sherry of the Law School of the University of California at Berkeley. See his influential article: Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960).

[23] Cox v. Louisiana, 379 U.S. 536 (1965). This case arose from a civil rights demonstration in Baton Rouge, where police ordered the demonstrators to desist and to remove themselves from the area. The police acted under a broad statute (LA. REV. STAT. § 14.103.1 (Cum. Supp. 1962)) which prescribed no definite standard to guide police authority in such situations.

> ... Louisiana has by a broad, vague statute given policemen an unlimited power to order people off the streets, not to enforce a specific, nondiscriminatory state statute forbidding patrolling and picketing, but rather whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.[24]

This language was later relied upon in *Shuttlesworth v. Birmingham*[25] where defendant was charged with obstructing a sidewalk and refusing to move on after being requested to do so by a police officer.[26] Speaking for the Court in reversing defendant's conviction, Mr. Justice Stewart said:

> Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.[27]

In spite of its shortcomings, the reasonable man standard meets constitutional objections of vagueness by establishing an effective limitation on police discretion.[28] Under such a statute, police are aware that checks to their authority exist, and that a "good faith" suspicion is not a valid basis to detain and question.[29] Although as a practical matter few persons detained and questioned under the statute would be aware of its form, the "reasonable man" standard at least is designed to allow a person stopped by the police to use his judgment about the propriety of the detention at that time and to construct a legal defense later. Accused, at the time of detention, and his counsel later at trial, may always inquire whether the arresting officer was reasonable in concluding from the facts immediately prior

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[24] *Id.* at 579.

[25] 382 U.S. 87 (1965).

[26] Defendant was convicted on a general verdict of violation § 1142 of the BIRMINGHAM, ALA., Code:

> It shall be unlawful for any person ... to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.

[27] 382 U.S. 87, 90 (1965).

[28] *But see* note 11 *supra* about the effect on the fourth amendment issues of this reading of the statute.

[29] These checks would inhibit the "stop and question" conduct, since the possibility of a later judicial scrutiny of an arrest under the state would give an arresting officer pause.

to the detention that "the public safety demands that . . . [the accused] identify himself."[30]

Statutes which allow police discretion greater than that of § 647(e) run the risk of being declared unconstitutionally vague and uncertain. Thus, to draft a vagrancy statute which overcomes vagueness objections, one should not define the proscribed conduct in terms of loitering itself,[31] but rather in terms of failure to account for oneself in carefully defined circumstances.[32]

SELF-INCRIMINATION

The other basis of the defendant's argument in the principal case was that to impose criminal liability for refusal to answer police inquiries constituted a violation of the privilege against self-incrimination.[33] The *Weger* court rejected defendant's self-incrimination arguments, but its reasoning was unsatisfactory.

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[30] This is the language of CAL. PEN. CODE § 647(e) (West Supp. 1967).

The thrust of the preceding analysis is applicable to § 250.6 of the MODEL PENAL CODE (Proposed Official Draft 1962), notwithstanding the endorsement by the Washington Supreme Court of this provision in dictum in City of Seattle v. Drew, 70 Wash. Dec. 2d 383, 423 P.2d 522 (1967). *See* note 20 *supra*. § 250.6 reads as follows:

> 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 himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm 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 peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm. (Emphasis added).

The use of the critical word "among" in the second sentence relating to determining if the penal provision is "triggered" clearly implies that other circumstances unknown to a citizen may be employed by the policeman in his determination of the legality of the individual's conduct. Putting aside the self-incrimination issue (another fatal defect of the Model Penal Code provision, for the same reasons discussed *infra* in the "Self-Incrimination" section of this note), close analysis of § 250.6 suggests that it may be unconstitutionally vague because the provision does not clearly specify what conduct is proscribed but leaves this determination to the individual policeman on his beat. *See* Cox v. Louisiana, 379 U.S. 536 (1965) *supra* at note 23 and text accompanying.

[31] *See* note 11 *supra*.

[32] *Id.*

[33] The California court rejected one aspect of defendant's self-incrimination argument by reasoning that "[t]he privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical evidence' derived from him." 59 Cal. Rptr. at 672, citing to People v. Ellis, 65 Cal. 2d—, 421 P.2d 393, 55 Cal. Rptr. 385, 386 (1966). The court took the position that the conduct involved here (silence) "... is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one."

The purpose and concern of the fifth amendment privilege is set out in *Murphy v. Waterfront Commission:*

> [The privilege against self-incrimination] ... reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play ... ; ... and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent. (citations omitted).[34]

Prior to *Miranda v. Arizona,*[35] the "compulsion" required to violate the self-incrimination privilege usually meant exercise of contempt power.[36] Only a body invested with such power could "compel" testimony, and the privilege protected witness or defendant against exercise of this power when testimony might be incriminating, unless of course, the privilege was waived.[37] Where power to compel was lacking, questions regarding the privilege could not arise.[38] Section 647(e) effectively extends the power to "compel" testimony to police on the beat; it might be characterized as a "contempt of police" statute.

Id., citing to People v. Wilson, 238 Cal. App. 2d 447, 456, 48 Cal. Rptr. 55, 61 (1st Dist. Cit. App., 1965).

In reaching this conclusion, the court cited Schmerber v. California, 384 U.S. 757 (1966), where evidence of analysis of the defendant's blood taken over his objection by a physician after an arrest for drunken driving was held admissible despite fifth amendment self-incrimination objections; "[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." 384 U.S. at 761.

This distinction has no relevance in *Weger.* There is no basis for treating silence (nonassertive conduct) as real evidence a la Schmerber. People v. Wilson, the case used to ground this treatment of silence, is pre-*Miranda,* and there is language in *Miranda* directly contrary to the approach taken by the California court in *Wilson*:

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not ... use at trial the fact that he stood mute or claimed his privilege in the face of the accusation.
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> 384 U.S. at 469 n.37.

Of course, *Schmerber* made reference by way of dictum to the valid requirement of voice exemplars. While this requirement means a defendant can be required to speak, it is clear that this requirement does not extend to affirmative expression of self-incriminating communication, since such information is squarely within the privileged area of testimonial or communicative evidence, not "real evidence."

[34] 378 U.S. 52, 55 (1964).

[35] 384 U.S. 436 (1966), discussed *infra* p. 853. In *Miranda,* the Court found a certain type of factual setting to be compulsive per se, broadening substantially the coverage of the privilege.

[36] Confessions which were produced by physical or psychological coercion, rather than by threat of legal sanction, were attacked on due process grounds. *See, e.g.,* Brown v. Mississippi, 297 U.S. 278 (1936).

[37] *See generally* 8 J. WIGMORE, EVIDENCE § 2276 (McNaughton rev. ed. 1961).

[38] *See* note 37 *supra.*

It would seem anomalous indeed if the protections of the fifth amendment against self-incrimination should allow a person to stand mute before a judge or legislator, but not before a policeman.[39]

The Supreme Court recently restated the sweep and breadth to be accorded the privilege:

> It is true that the statement of the privilege [against self-incrimination] in the Fifth Amendment . . . is that no person "shall be compelled in any *criminal case* (Court's emphasis) to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, *but upon the nature of the statement or admission and the exposure which it invites.*[40]

Under § 647(e), the defendant is required to make potentially incriminating statements. To remove fifth amendment objections, it would be necessary to assert that nothing a § 647(e) defendant would say could create a "real and appreciable danger" of incriminating him.[41] But such an assertion is false with respect to guilty defendants or those likely to be prosecuted wrongfully on the basis of their testimony. There is no practical way to separate these defendants from the remainder of defendants, nor does the statute, as construed, attempt to do so.

When the danger of self-incrimination is not "imaginary and unsubstantial,"[42] the issue is raised: who decides whether the defendant may invoke the privilege? Since Chief Justice Marshall's opinion in *United States v. Burr*[43] in 1807, it has been settled that this judgment rightly belongs to defendant. To sustain § 647(e) is, in effect, to remove defendant's right to invoke his privilege and give that right to the policeman.[44] A more direct abridgment of the privilege is hard to imagine.[45]

[39] In *Weger,* there is no possibility of a "waiver" argument, since defendant expressly attempted to invoke the privilege, and refused to explain his conduct.

[40] *In re* Gault, 387 U.S. 1, 49 (1967) (emphasis added). *See* concurring opinion of Mr. Justice White in Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964), quoted with approval *In re* Gault, 387 U.S. at 47.

[41] Brown v. Walker, 161 U.S. 591, 600 (1896).

[42] *Id.*

[43] 25 Fed. Cas. 38, (No. 14,692E) (C.C.D.Va. 1807).

[44] Here, defendant is not allowed to judge what answers may incriminate him, and no immunity is provided to him. It would be anomalous for a court to uphold the statute by excluding any testimony relating to a substantive crime admitted in response to the § 647(e) questions, since a major legislative purpose to elicit just such information underlies such statues. *Cf.* Marchetti v. United States, 36 U.S.L.W. 4143, 4149 (U.S. Jan. 29, 1968); Grosso v. United States, 36 U.S.L.W. 4150, 4152 (U.S. Jan. 29, 1968).

[45] *Cf.* Garrity v. New Jersey, 385 U.S. 493 (1967) (conviction of police officers for conspiracy to obstruct justice on basis of confession resulting from statutory choice between self-incrimination or job forfeiture reversed because confessions

The situation in which defendant found himself is so analogous to *Miranda*[46] that the full *Miranda* safeguards should be applied,[47] yet the *Weger* court denied that *Miranda* was even relevant. In that case the United States Supreme Court held:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[48]

Anticipating the obvious question, the Court went on to state that:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise reprived of his freedom of action in any significant way.[49]

The question is how the word "significant" is to be evaluated in the context of *Miranda*. There are two approaches to this definitional problem: (1) "significant deprivation of freedom of action" may be defined by balancing the social interest in individual freedom from police questioning against the social need for the deprivation in any particular instance, or (2) a "significant deprivation" may be defined

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were coerced, not voluntary); Spevack v. Klein, 385 U.S. 511 (1967) (refusal of attorney to produce demanded financial records or to testify at judicial inquiry on grounds of the privilege aginast self-incrimination was not a valid basis for disbarment). These cases were cited in the *Weger* dissent; 59 Cal. Rptr. at 676 n.2. *See also* Griffin v. California, 380 U.S. 609 (1965).

[46] 384 U.S. 436 (1966).

[47] For reference to the *Miranda* "safeguards," *see* note 48 *infra*.

Even if the *Miranda* warnings were given, there would be difficulties, since either (1) the effect would totally vitiate the purpose of § 647(e) since no information would be forthcoming, or (2) if defendant were still arrested for his silence, fourth amendment problems would be raised squarely. *See* note 11 *supra*. Moreover, it is impermissible to draw inferences of guilt (or probable cause) from such silence. *See* Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956); Griffin v. California, 380 U.S. 609 (1965).

The differences in the character of the privilege against self-incrimination accorded a *witness* and an *accused (see generally* 8 J. WIGMORE, EVIDENCE § 2276 (McNaughton rev. ed. 1961)) are of no concern here, since § 647(e) is a clear instance of the accused's privilege.

[48] 384 U.S. at 444 (emphasis added). This is the explicit holding of the case, but other language is broader in its sweep. The three main "safeguards" provided under *Miranda* are warnings to the defendant that (1) he has a right to remain silent, (2) that anything he hays may be used against him later, and (3) that he has an immediate right to counsel, which will be provided for him if he cannot afford to hire his own.

[49] *Id.* In footnote 4 on the same page, the Court states: "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." (The reference is to Escobedo v. Illinois, 378 U.S. 478 (1964)). In light of this explanation or definition, the dichotomy in *Escobedo* between the accusatory and general investigatory stages is no longer relevant as the determinant of the moment when the constitutional safeguards here discussed become operative and controlling.

exclusively in terms of certain unassailable rights of the individual vis-a-vis the powers of government.[50]

The court in the principal case found support for the social balance test in the following language in *Miranda*:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may . . . seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons *not under restraint*. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.[51]

A careful reading of this language,[52] however, shows that the police freedom to investigate is only applicable to persons "not under restraint." Thus, persons under restraint do not fall within that aspect of police investigation "not affected by our holding." *Miranda* replies explicitly to advocates of social balancing:

> The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. *That right cannot be abridged*.[53]

Thus, the Court in *Miranda* has already struck what it regarded as the appropriate social balance. This balance must control over any attempt by government to strike a different balance abridging these *Miranda*-protected rights.

Applying this analysis to *Weger*, the defendant could not simply tip his hat to the questioning officers and walk on—if he had, he would have been arrested for not complying with § 647(e). When arrest can only be avoided by remaining on the spot, there has been a considerable restraint of defendant's freedom of action. *Miranda* leaves no doubt that for the purpose of determining when an accused's fifth

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[50] What this language actually means is that a "right" has been defined by a balance already struck, and that "right" is no longer open to ascertainment by further balancing.

[51] 384 U.S. at 477 (emphasis added).

[52] Note that all the exceptions allowing questioning on the spot of an actual crime are centered on a certain past act, and not on a specific individual with reference to a future act. The questioning under a loitering ordinance is a prime example of questioning a person *on suspicion*.

[53] 384 U.S. at 479 (emphasis added).

amendment privilege against self-incrimination becomes effective, a restraint by police officers is a significant deprivation of freedom of action, which in turn is one of the definitions of "custodial interrogation." The police restraint of defendant in the principal case was a sufficient deprivation to render *Miranda* applicable. To administer the statute constitutionally, *Miranda* warnings should be given. But use of these warnings,[54] or exclusion of testimony when they are not used, will vitiate the purposes of the statute: to elicit information of incipient crime and to allow arrest in circumstances where objective conduct does not yet constitute attempt.[55]

CONCLUSION

California Penal Code § 647(e) cannot be reconciled with the privilege against self-incrimination, because (1) the threat of penal sanctions cannot be used to compel self-incriminating testimony, and (2) *Miranda* clearly requires the giving of warnings prior to questioning which are not provided for in the statute, and which would, if given, vitiate the objective of the statute.

Thus, any loitering statute is faced with a constitutional dilemma. To avoid the dangers of vagueness, the statute should focus on failure to account for oneself in certain circumstances; yet, to respect the privilege against self-incrimination, the statute must focus on loitering conduct itself. Loitering ordinances of either type are constitutionally suspect.

[54] *See* note 48 *supra.*
[55] *See* note 6 *supra.*