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State v. Ecker, 311 So. 2d 104 (Fla. 1975)

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Justice White's theory does, however, offer a rational approach to prejudgment creditors' remedies and a means to arrive at a loose reconciliation of *Sniadach, Fuentes, Mitchell,* and *Di-Chem.* Adoption of that theory would thus make it far easier to evaluate the constitutionality of various creditors' remedies. A majority of the Court might balk at equating "adequate safeguards" with judicial supervision of summary procedures, but the remaining elements of Justice White's test—as yet unarticulated in a prejudgment remedies case—may ultimately become law. It is at least clear that so long as Justice White holds a key vote in prejudgment seizure cases, legislators and lawyers who ignore the rationale propounded in *Arnett* risk adverse decisions in the United States Supreme Court.

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Constitutional Law—VAGRANCY—FLORIDA'S LOITERING STATUTE UPHELD AS CONSTITUTIONAL WHEN CONSTRUED TO PROHIBIT LOITERING WHICH THREATENS PUBLIC SAFETY OR A BREACH OF THE PEACE.—*State v. Ecker,* 311 So. 2d 104 (Fla. 1975).

In February 1975, four consolidated cases from Dade County[1] tested for the first time the constitutionality of Florida's loitering statute.[2] The various defendants were arrested for loitering or prowl-

1. State v. Ecker, 311 So. 2d 104, 106 (Fla. 1975).
2. FLA. STAT. § 856.021 (1975), provides:

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

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

ing in a place, manner, and time not usual for law-abiding citizens and under circumstances which threatened public safety. Defendant Bell was observed crouching behind some shrubbery near a private dwelling in the early morning hours. He attempted to flee when approached by police officers. Bell was found guilty of violating section 856.021, Florida Statutes.[3] Defendant Worth was observed in a warehouse area at night by three citizens. Fearing that Worth's plan was to strip an automobile in the area, the citizens apprehended the suspect and summoned the police.[4] Defendant Ecker was seen standing in front of an apartment building. Ecker was arrested when he was unable to produce proper identification upon an officer's request. The lower court dismissed the complaint against Ecker, holding that section 856.021, the statute upon which the complaint was based, was unconstitutional. The complaint against defendant Harris was similarly dismissed by the lower court.[5]

Defendants Bell and Worth brought direct appeals from trial court convictions under section 856.021, Florida Statutes. The State of Florida brought appeals with respect to dependants Ecker and Harris because the lower court had found the statute unconstitutional. On appeal, Florida's loitering statute was attacked by the defendants as being vague, overbroad, subject to arbitrary enforcement, and requiring self-incrimination. In *State v. Ecker* the Supreme Court of Florida addressed and rejected each of these contentions, upholding the statute as constitutional.[6]

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that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

(3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree . . . .

3. 311 So. 2d at 110–11. The trial court found that the circumstances surrounding the incident were sufficient to justify an arrest. The court concluded that Bell's surreptitious conduct at an early hour had caused a reasonable concern by the arresting officers for the safety of persons and property in the area. The defendant's attempted flight, coupled with the presence of a stolen tag on his automobile, raised an issue of credible identification.

During the trial, the defendant took the stand on his own behalf in order to explain his presence and conduct in defense to the charge. The defendant testified that his car had "quit" and that he was searching for help. The arresting officer testified, however, that following arrest the defendant's automobile had been driven to the impoundment area without difficulty. *Id.*

4. 311 So. 2d at 111. Since the citizens who had observed Worth failed to testify at the trial, the supreme court found that the elements of the offense were not properly established even though the circumstances implied a violation of the statute. *Id.*

5. 311 So. 2d at 111.

6. *Id.* In disposing of the cases on appeal, the court affirmed the conviction of defendant Bell, finding that the elements of the offense had been established. The majority

Since 1972, Florida and many municipalities have attempted to correct the constitutional infirmities of city and state vagrancy and loitering statutes. In that year, the United States Supreme Court struck down the vagrancy ordinance of Jacksonville, Florida,[7] in *Papachristou v. City of Jacksonville*.[8] The Court held that the ordinance

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nevertheless voiced disapproval of the arresting officer's statement that he had arrested Bell for loitering "because we could not prove anything else." The court warned that the statute should not be unconstitutionally applied as a "catchall" offense; each element of the crime enunciated in the statute must be established for a conviction to be obtained. *Id.* at 111.

The *Ecker* court noted that the testimony in the trial against the defendant Worth primarily consisted of statements made by the defendant to police officers after his *Miranda* warnings had been read to him. The court found the content of these statements, without more, insufficient to establish an offense under § 856.021. The citizens who had observed the defendant's peculiar conduct and summoned the police were not called to testify against the defendant. Because the arresting officers did not observe the circumstances which caused the citizens' concern, the offense was not properly established by the officers' testimony. The majority therefore reversed the conviction against Worth. *Id.*

The supreme court reversed the trial court's finding in State v. Ecker that § 856.021 was unconstitutional, but affirmed the dismissal of the complaint against Ecker. The charge failed to allege facts which established that the defendant had threatened the public safety. *Id.*

The lower court's holding that Florida's loitering statute was unconstitutional in State v. Harris was also reversed, and the case remanded to the trial court. The supreme court was unable to make a final determination concerning this case as the record on appeal included neither the complaint nor the charge against the defendant. *Id.*

7. The Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 156–57 (1972), *quoting* a Jacksonville, Florida, ordinance which was in effect at the time of these arrests and convictions, stated:

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

8. 405 U.S. 156 (1972). *Papachristou* is the first case in which the United States Supreme Court directly ruled upon the constitutionality of vagrancy laws. Earlier cases dealing with vagrancy statutes were based upon either procedural grounds or decided upon a narrow holding. For example, in Johnson v. Florida, 391 U.S. 596 (1968), the Supreme Court reversed a conviction under a Florida law prohibiting "wandering or strolling . . . without any lawful purpose or object." The Court held that the evidence was insufficient to convict the defendant, refusing to rule on the constitutionality of the statute itself. In Palmer v. City of Euclid, 402 U.S. 544 (1971), the Supreme Court considered an Ohio ordinance which allowed arrest of

> any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself.

Id. at 544. The Court's holding, however, was narrow and failed to provide much

was subject to the constitutional infirmities of vagueness, overbreadth, and arbitrary enforcement. The Court concluded that the ordinance was vague because it failed to provide notice of the prohibited conduct to the potential offender as well as to the police.[9] The absence of specific statutory criteria for determining whether a person had committed an offense under this section rendered the statute subject to arbitrary enforcement; a police officer could exercise virtually unfettered discretion in determining what conduct constituted an offense, and arrest whomever he pleased.[10] Due to the ordinance's vagueness and its susceptibility to arbitrary enforcement, the ordinance was overbroad in that it permitted an arrest for innocent, constitutionally protected conduct as well as for criminal activities.[11] The Court noted that the

guidance for other states in their struggle to determine the constitutionality of similar statutes. In reversing the conviction of defendant Palmer, the Court held that "as applied to Palmer, [the ordinance] failed to give 'a person of ordinary intelligence fair notice that his contemplated conduct [was] forbidden . . . .'" 402 U.S. at 545, *quoting* United States v. Harriss. 347 U.S. 612, 617 (1954).

9. 405 U.S. at 162, 168.

The Constitution requires a higher standard of certainty in criminal than in civil statutes. *See* Winters v. New York, 333 U.S. 507 (1948). *Cf.* Wright v. Georgia, 373 U.S. 284, 293 (1963); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 242 (1932).

Connally v. General Constr. Co., 269 U.S. 385 (1926) is one of a long line of cases enunciating the due process requirement of notice:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Id. at 391.

The Supreme Court of Florida has often enunciated this due process requirement. *See e.g.,* Zachary v. State, 269 So. 2d 669 (Fla. 1972); State v. Buchanan, 191 So. 2d 33 (Fla. 1966). The Constitution, however, does not require impossible standards. The United States Supreme Court has held that the existence of marginal cases where it is difficult to determine whether conduct falls within the statute's proscriptions, does not necessarily render a statute too ambiguous to define a criminal offense. Robinson v. United States, 324 U.S. 282, 285–86 (1945). *Accord,* Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); United States v. Petrillo, 332 U.S. 1, 7 (1947).

10. The Supreme Court noted that "[w]here . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." 405 U.S. at 170.

Definiteness is typically avoided in such statutes to allow the arrest of persons "who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." 405 U.S. at 166, *quoting* Frankfurter, J., *dissenting in* Winters v. New York, 333 U.S. 507, 540 (1948). The Court stated:

> It would be . . . unfortunate if . . . where there is not enough evidence to charge the [person] with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the [vagrancy law] . . . .

Id. at 170, *quoting* Frederick Dean, 18 Crim. App. 133, 134 (1924).

11. The distinctions and the interrelationships between the concepts of vagueness, arbitrary enforcement, and overbreadth are often confused. The void-for-vagueness doctrine contains two aspects: (1) fair warning to the potential offender (*see, e.g.,*

Jacksonville ordinance resulted "in a regime in which the poor and the unpopular [were] permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.' "[12]

As an intervening defendant in *Papachristou,* the State of Florida attempted to justify the vagrancy law as a necessary tool for the prevention of crime.[13] The Court responded by enunciating the fourth amendment's requirement of probable cause as a basis for arrest;[14] arrests on suspicion, said the Court, do not satisfy this constitutional

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Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)); and (2) precise standards to guide police officers, judges, and juries in determining whether an offense has been committed under the statute's terms (*see, e.g.,* Musser v. Utah, 333 U.S. 95, 96 (1948); Winters v. New York, 333 U.S. 507, 515–16 (1948); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 68 n.3 (1960)). It is this second aspect of the vagueness doctrine which is referred to when a statute is said to be subject to arbitrary enforcement. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972).

A statute may, however, be either vague or overbroad, or suffer from both these constitutional infirmities. A statute is overbroad if under its terms conduct which the state may not constitutionally regulate is subject to proscription. Overbreadth may result in one of two ways. The terms of a statute may be so vague that its subjects constitutionally protected activities to arrest as well as conduct which the statute may validly regulate. *See* Winters v. New York, 333 U.S. 507, 509 (1948). The language of a statute may, however, clearly define the prohibited conduct and thus not suffer from vagueness, yet be overbroad by infringing upon constitutionally protected freedoms. *See* Zwickler v. Koota, 389 U.S. 241, 250 (1967).

Alternatively, a statute may not suffer from overbreadth and yet be struck down as unconstitutionally vague. *See* Connally v. General Constr. Co., *supra* at 391. This concept is illustrated by what has been termed the "true uncertainty case" under the void-for-vagueness doctrine:

> [In] the "true" uncertainty case . . . a legislature which might constitutionally have proscribed either or both of two classes of behavior, *A* and *B*, has chosen to proscribe only *A*, but in language so uncertain that whether most fact situations are *A* or *B* is a matter for guesswork . . . .

109 U. PA. L. REV. 67, 76 (1960). In the "true" uncertainty case, the statute is not overbroad, as the legislature may constitutionally prohibit both classes of activity; but it suffers from vagueness by failing to provide notice to the citizen and guidelines for police, prosecutors and the triers of fact.

12. 405 U.S. at 170, *citing* Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965).

13. Historically vagrancy laws have served purposes other than crime prevention. In feudal times vagrancy laws protected the rights of the lords in their fugitive serfs by subjecting wanderers to arrest. These laws also attempted to place the burden of the poor on their home districts, punishing beggars found outside of such areas. After the black death destroyed nearly half the population, the Statute of Labourers compelled individuals to work for anyone willing to pay the customary wage. Such laws also sought to control bands of wandering robbers which emerged as the feudal system began to decay. Today, the control of potential criminals and other undesirables remains the common justification for these laws. MODEL PENAL CODE § 250.12, Comment (Proposed Final Draft No. 1, 1961).

14. The citizen's fourth amendment right of freedom from unreasonable searches and seizures is based upon the common law "right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891).

mandate.[15] The implied statutory presumption that all persons who loitered or looked suspicious to the police were potential criminals was deemed "extravagant," and the ordinance itself was found to be "plainly unconstitutional."[16]

Subsequent to *Papachristou,* the Florida Legislature repealed the state's vagrancy statute, which was similar to the Jacksonville ordinance found unconstitutional by the Supreme Court.[17] The state's vagrancy statute was replaced with the present "loitering or prowling" provision of the Model Penal Code.[18] *State v. Ecker* considered the *Model Penal*

15. In Brinegar v. United States, 338 U.S. 160 (1949), the Supreme Court said that probable cause

> has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they [have] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

338 U.S. at 175–76, *quoting* Carroll v. United States, 267 U.S. 132, 162 (1925).

In Sibron v. New York, 392 U.S. 40 (1968), the Court made it clear that probable cause cannot be "manufactured" by the mere enactment of a statute.

> [The state] may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question . . . "is not whether the search [or seizure] was authorized by state law . . . [but] whether [it was] reasonable under the Fourth Amendment."

392 U.S. at 61, *quoting* Cooper v. California, 386 U.S. 58, 61 (1967).

16. 405 U.S. at 171.

17. Fla. Laws 1971, ch. 71–132, § 17A, repealed by the Florida legislature in 1972, provided:

> Vagrants.—Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame or gaming houses, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants . . . .

For text of Jacksonville ordinance, and FLA. STAT. § 856.021 (1973) (which replaced Fla. Laws 1971, ch. 71–132, § 17A), *see* notes 7, 2 respectively, *supra.*

18. MODEL PENAL CODE § 250.6 (Proposed Official Draft, 1962), *as codified in* FLA. STAT. § 856.021 (1973). This Code provision replaced the Code's former "suspicious loitering" provision which provided:

> A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes.

Code's provision as codified in the Florida law and held that it passed constitutional muster. The defendants in *Ecker* relied upon the constitutional deficiencies found by the United States Supreme Court in *Papachristou,* alleging that the Florida statute was vague, overbroad, and subject to arbitrary enforcement.

In addition, the defendants attacked the provision of the loitering statute which afforded a suspect an opportunity to avoid arrest by identifying himself and offering a reasonable explanation for his presence and conduct.[19] The defendants alleged that this provision violated a suspect's fifth amendment privilege against compulsory self-incrimination. They contended that section 856.021 *required* a suspect to explain his presence and conduct and to identify himself in order to avoid an arrest.[20] The suspect was subject to arrest if he chose to exercise his constitutional right to remain silent, or if he made incriminating statements while availing himself of the statutory "opportunity" to avoid arrest.

The Supreme Court of Florida rejected each of these arguments, utilizing statutory construction to save section 856.021 from constitutional attack. The *Ecker* court reiterated the elements of the offense as

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MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961).

In the comments to the new "loitering or prowling" provision, which section was subsequently adopted by the Florida legislature, the drafters strongly implied that § 250.12 was repealed because of its susceptibility to constitutional attack.

> We have changed the basis of the offense from justifiable "suspicion" that the actor was engaged or about to engage in crime, to justifiable "alarm" for the safety of persons or property. This seems desirable to save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause.

MODEL PENAL CODE § 250.6, Comment (Proposed Official Draft, 1962).

The drafters' reservations in rendering such conduct an offense were clearly expressed in the Comment dealing with the "suspicious loitering" provision, which states:

> The proposals here made to penalize what might be called "suspicious loitering," are all that would be left in the . . . ancient protean offense designated "vagrancy," if indeed even this much should be retained in a code of substantive penal law. The reasons for doubt . . . are that a statute which makes it a penal offense for a person to fail to identify himself and give an exculpatory account of his presence is in effect an extension of the law of arrest, and trenches on the privilege against self-incrimination. It authorizes arrest of persons who have not given reasonable ground for believing that they are engaged in or have committed offenses. Alternatively, it can be regarded as a legislative determination that in "suspicious" circumstances, failure to respond to police inquiries supplies reasonable ground.

MODEL PENAL CODE § 250.12, Comment (Tent. Draft No. 13, 1961). In referring the reader of the new provision, § 250.6, to this commentary, the Institute indicated that the reservations expressed with respect to the original sections are equally applicable to the revised provision.

19. *See* note 2 *supra* for text of FLA. STAT. § 856.021 (1975).

20. 311 So. 2d at 109.

enumerated in the statute: 1) Loitering or prowling in a place, at a time or in a manner not usual for law-abiding persons; and 2) such conduct occurring under circumstances which warranted a reasonable alarm for the safety of persons or property in the vicinity.[21] The majority construed the second element to "mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized."[22]

In response to the argument that the statute was vague and overbroad, thereby encroaching upon constitutionally protected liberties, the Florida court relied upon the United States Supreme Court cases of *Shuttlesworth v. City of Birmingham*[23] and *Chaplinsky v. New Hampshire*.[24] The Florida court noted that the statutes upheld in those cases prohibited conduct which threatened a breach of the peace or the public safety; it determined that section 856.021 also proscribes such conduct.[25] Based upon statutory construction and its reliance upon *Shuttlesworth* and *Chaplinsky*, the *Ecker* court concluded that Florida's loitering statute narrowly defined conduct which the state was constitutionally empowered to prohibit. Therefore, reasoned the court, section 856.021 was neither vague nor overbroad.[26] Moreover, the

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21. *Id.* at 106.

22. *Id.* at 109.

23. 382 U.S. 87 (1965). *Shuttlesworth* upheld an ordinance which prohibited loitering on a street or sidewalk so as to obstruct traffic, and refusing to comply with a police officer's order to move on. The Court, quoting the Birmingham, Alabama, Code, stated:

> It shall be unlawful for any person . . . to so stand, loiter or walk upon any street or sidewalk . . . 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 . . . after having been requested by any police officer to move on.

382 U.S. at 88. The Supreme Court observed that a literal reading of the statute allowed a person to stand on a sidewalk only at the whim of a police officer. The Court declared that:

> The constitutional vice of so broad a provision needs no demonstration. It "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."

382 U.S. at 90 (footnotes omitted), *quoting* Cox v. Louisiana, 379 U.S. 536, 579 (1965) (separate opinion of Mr. Justice Black concurring in part). The Alabama court of appeals had, however, interpreted the provision to allow a police officer to order a person to move on only after traffic had been obstructed. The Supreme Court held that the statute, as construed, was constitutional.

24. 315 U.S. 568 (1942). In *Chaplinsky* the Supreme Court approved a statute which prohibited the public use of offensive words which were deemed to directly tend to provoke the addressee to violence. The test is not the subjective opinion of the addressee, but "'what men of common intelligence would understand would be words likely to cause an average addressee to fight.'" 315 U.S. at 573. Utilizing this test, the Court determined that the statute prohibited the use of "the lewd . . . the profane, the libelous, and the insulting or 'fighting' words . . . ." *Id.* at 572.

25. 311 So. 2d at 109.

26. *Id.*

statute did not, in the court's opinion, confer unbridled arrest powers upon law enforcement officials, and thus was not subject to arbitrary enforcement. To justify an arrest, the police officer must point to "specific and articulable facts" to show that a breach of the peace was imminent or that the public safety was threatened.[27]

In response to the appellant's contention that the requirement of identification infringed upon the suspect's fifth amendment rights, the court noted the United States Supreme Court's decision in *California v. Byers*.[28] In *Byers* the Supreme Court sustained a regulatory statute which carried criminal sanctions for non-compliance with its provisions. The statute required a driver involved in an automobile accident which resulted in property damage to leave his name and address at the scene of the accident.[29] The Supreme Court found that information in the form of a name and address was essentially neutral, and the mere possibility that it might tend to incriminate the driver was too remote to be of constitutional significance.[30] Based upon the *Byers* rationale, the *Ecker* court found no constitutional violation in requiring credible and reliable identification under circumstances where the public safety was threatened. The court held that such identification, and compliance by the suspect with the officer's orders necessary to remove the threat, would preclude an arrest under the statute.[31] The *Ecker* court noted, however, that immediate arrest is proper if an individual whom the police officer believes to be a threat flees when confronted by the officer.[32]

The Florida court recognized that to require a suspect to explain his presence and conduct to a police officer under threat of arrest might well violate the individual's fifth amendment privilege against compulsory self-incrimination.[33] Therefore, in construing the statute, the court held the issues of identification and explanation were separate and distinct. The court noted that the issue of explanation

> is an additional defense to the charge. Clearly, an accused cannot be compelled to explain his presence and conduct without first being properly advised under *Miranda* standards. If the accused voluntarily explains his presence and such explanation dispels the alarm, no charge can be made.[34]

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27. *Id.*
28. 402 U.S. 424 (1971).
29. CAL. VEHICLE CODE § 20002(a) (West 1971).
30. 402 U.S. at 431.
31. 311 So. 2d at 109.
32. *Id.* at 110.
33. *Id.*
34. 311 So. 2d at 110. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme

In addition, if it appeared at trial that the suspect's explanation was true, and that the explanation would have dispelled the alarm if believed by the arresting officer, a conviction could not be obtained under the statute.[35]

Under the construction of Florida's loitering statute rendered by the *Ecker* court, the constitutional difficulties are too numerous to ignore. The majority has seemingly misconstrued the Supreme Court cases upon which its opinion is based, and has failed to address other important precedents established by the United States Supreme Court in the area of civil liberties.

In dismissing the allegation that the loitering statute was vague and overbroad, the Florida majority relied upon the Supreme Court cases of *Chaplinsky* and *Shuttlesworth*. The statutes upheld in these cases did, in fact, prohibit conduct which threatened the public safety, as Florida's loitering statute purports to do. Unlike the statutes in these two cases, Florida's loitering statute fails to specifically define the conduct which constitutes the proscribed threat to the public safety. In *Shuttlesworth*[36] and *Chaplinsky*,[37] and in other lower court cases where similar statutes have been upheld, the term "loiter" pointed to a prohibited act, described more specifically elsewhere in the

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Court held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom . . . in any significant way and is subjected to questioning . . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . [Otherwise] no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478–79. In Orozco v. Texas, 394 U.S. 324 (1969), the Supreme Court made it clear that a formal arrest is not required to necessitate such warnings.

35. 311 So. 2d at 106.

36. *See* note 23 *supra*.

37. *See* note 24 *supra*. The Supreme Court's definition of "fighting words" is admittedly somewhat vague. It may be contended that "men of common intelligence" could also have a common understanding of what conduct gives rise to alarm for the public safety. The distinction, however, is that the ordinance in *Chaplinsky* prohibited conduct—the use of "fighting words" in public—which in itself could cause a breach of the peace by provoking the addressee to violence. Section 856.021 proscribes conduct which, rather than itself capable of causing harm, merely indicates that the suspect may intend to engage in such conduct in the near future.

It can hardly be said that standing behind some shrubbery, or even fleeing upon the appearance of a police officer is conduct capable of harming others. The police officer does not need Florida's loitering statute to authorize an arrest if the suspect's conduct reaches the stage of an attempt to commit a specified crime. An arrest under this statute is one solely for what the officer believes to be the "evil intentions" of the suspect, in order to "nip crime in the bud."

statute.[38] The term "loiter" in section 856.021 does not specifically define the prohibited acts. Thus the provision appears to be contrary to the requirements of *Papachristou* in that it "fails to give a person of ordinary intelligence fair notice" of what conduct is prohibited by the statute.[39]

The *Ecker* court concluded that section 856.021 was not subject to arbitrary enforcement and that the statute clearly defined the conduct to be prohibited. In addition, the validity of each arrest under the loitering statute would be tested by requiring the arresting officer to support with specific and articulable facts[40] his belief that the public safety was endangered. This check upon the officer's arrest powers, however, seems to do little to alleviate the statute's vagueness; as one federal court noted, "The matter is not helped any by the supervisory power of a judge who is given no more certain a standard when called upon to decide if he should dismiss charges against the alleged offender."[41]

The Florida court relied upon the Supreme Court case of *California v. Byers*[42] in upholding the statutory "requirement" of identification under section 856.021.[43] *Byers,* however, seems to offer little support for the court's rationale in the instant case. The law upheld in *Byers* was not subject to the infirmities of the Florida law under consideration in *Ecker.* The *Byers* Court disposed of the case solely on fifth amend-

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38. *See* note 21 and accompanying text *supra. Cf.* Note, *Control of Incohate Crime—New York Anti-Liberating Statute Declared Unconstitutional,* 38 ALA. L. REV. 363, 367 & n.49 (1974), *citing* N.Y. PENAL LAW § 240.35(5) (McKinney 1967) which subjects to arrest a person who

> [l]oiters or remains in or about a school, college or university building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or student, or any other specific, legitimate reason for being there, and not having written permission from anyone authorized to grant the same . . . .

See People v. Merolla, 172 N.E.2d 541 (N.Y.), *cert. denied,* 365 U.S. 872 (1961); People v. Johnson, 161 N.E.2d 9 (N.Y. 1959).

39. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The rationale of an Oregon court in construing a similar loitering provision illuminates the vagueness inherent in the language of Florida's provision. In City of Portland v. White, 495 P.2d 778 (Or. Ct. App. 1972), the court found that the words "loiter" and "prowl" were vague and, standing alone, "so elastic that men of common intelligence must necessarily guess their meaning." Nor did it find that the modifying phrase "in a place, at a time or in a manner not usual for lawabiding persons" rendered these terms any less nebulous. "What seems usual to one law abiding person," said the court, "might seem quite unusual to another." *Id.* at 779. Under Florida's loitering statute, as well as under the ordinance struck down by the Oregon court, the officer's subjective belief is the sole criteria in the determination of whether an individual's loitering has threatened the public safety.

40. 311 So. 2d at 109.

41. Goguen v. Smith, 471 F.2d 88, 96 (1st Cir. 1972), *aff'd,* 415 U.S. 566 (1974).

42. 402 U.S. 424 (1971).

43. *See* note 2 *supra* for text of FLA. STAT. § 856.021 (1975).

ment grounds. It is evident, however, that, unlike Florida's provision, California's statute was neither vague, overbroad, nor subject to arbitrary enforcement. The California statute provided that all persons involved in an automobile accident which resulted in property damage were subject to that provision's requirements.[44] There was no question of whether an individual was subject to the statute's proscriptions, nor was there any necessity for police subjectivity in invoking its application as is required by the terms of Florida's loitering provision.

The same Model Penal Code provision adopted by Florida and promulgated in section 856.021 has been interpreted by a court of a sister state. The court's decision offers an enlightening approach to the fifth amendment problem presented by this provision. In *People v. Solomon,* [45] a California district court found the statute contained three elements: (1) refusal to furnish identity, (2) by one loitering on the streets, (3) under circumstances which threaten the public safety.[46] The statute empowered a police officer to demand "suitable identification" from an individual only if the officer reasonably believed that such person was a threat to the public safety. A suspect's refusal to furnish identification was the final element which rendered the offense complete, justifying an arrest. "Suitable identification" was construed as "one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person . . . ."[47] The California court held that the provision for explanation was operative only to the extent that it assisted in producing credible and reliable identification. Once this identification had been furnished, the suspect could not be arrested—even for failing to account for his presence.[48]

The *Ecker* court added an additional element to the suitable identification "defense" to arrest, and in so doing, created a constitutional problem of vagueness which the California court successfully avoided. To prevent an arrest under the Florida statute, the suspect

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44. *See* notes 28–30 and accompanying text *supra.*

45. 108 Cal. Rptr. 867 (Ct. App. 1973).

46. *Id.* at 873.

47. *Id.*

48. *Id.* The *Solomon* court concluded that an explanation of one's presence might continue to play an important role in authenticating the identification supplied by the suspect. An alternative means of authentication might be written identification such as a driver's license. Seemingly, it would be unconstitutional to arrest an individual because he failed to verify his oral identification by accounting for his presence; to arrest a person under such circumstances would penalize one who exercised his fifth amendment privilege by remaining silent. Thus the statute, in effect, requires a person walking on a public street to carry written identification or risk arrest should he be stopped and unable to verify his oral identification.

must provide identification and, in addition, comply with the officer's orders necessary to remove the threat to the public safety.[49]

This method of avoiding arrest is deficient because it lacks standards to guide either the suspect or the arresting officer. Presumably, an "order necessary to remove the threat" would be a command to the suspect to move on. However, the court fails to indicate how far an officer may order a person to remove himself from the scene, or when the suspect may return to the area. The suspect is required to guess at his peril what course of conduct he may lawfully pursue. Seemingly, this is law making by the moment-to-moment decisions of the policeman on the beat of the sort condemned by the Supreme Court in *Shuttlesworth*.[50] The *Ecker* court held that a reasonable explanation by the suspect sufficient to dispel the officer's belief that a threat to the public safety existed, was an "additional defense" to an arrest under the statute. The majority noted that the suspect must be given his *Miranda* warnings prior to being compelled to explain his presence. The court stated, however, that if a voluntary explanation by the suspect dispelled the officer's alarm, no charge could be made under the statute.[51] This additional "defense" of a reasonable explanation, is also subject to the constitutional infirmity of vagueness. The court did not indicate what constitutes a "reasonable explanation." Not only does the officer's subjective belief determine whether "loitering" threatens the public safety,[52] but the adequacy of the explanation is also prone to subjective evaluation.[53]

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49. 311 So. 2d at 110.

50. *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965).

51. 311 So. 2d at 110.

52. The Supreme Court has expressed the constitutional difficulties inherent in allowing arrests based upon such subjective determinations.

> "[G]ood faith on the port of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons . . ." only in the discretion of the police.

Beck v. Ohio, 379 U.S. 89, 97 (1964).

53. The Court of Appeals for the District of Columbia considered an ordinance which prohibited a person from wandering "about the streets at late or unusual hours . . . without any visible or lawful business and not giving a good account of himself." The court commented: "We discern no significant difference . . . between a law licensing one's presence on a public street upon a police officer's favorable judgment and one conditioning it upon the officer's satisfaction with the explanation as to why the person is there." Ricks v. District of Columbia, 414 F.2d 1097, 1105 (D.C. Cir. 1968). The effect of the District of Columbia ordinance was found to be no different than the Jacksonville ordinance condemned by the Supreme Court in *Papachristou*. *See* note 8 *supra*.

Loitering statutes of other states have been held unconstitutional due to similar "reasonable explanation" provisions. *See, e.g.*, Arnold v. City and County of Denver, 464 P.2d 515 (Colo. 1970); Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967); City of Portland v. White, 495 P.2d 778 (Ore. Ct. App. 1972).

The courts of states with loitering statutes containing similar "reasonable explanation" provisions have recognized the fifth amendment issue. These courts have held that the suspect's failure to offer an explanation for his conduct is not to be considered in determining whether the individual's loitering has threatened the public safety.[54] The provision is merely a procedural safeguard to prevent unjust application of the statute to a person who, if afforded an opportunity, could dispel the officer's suspicion by giving a credible explanation for his presence and actions.[55] Whether a reasonable explanation is a defense to an arrest, or whether the failure to offer such an explanation is an element of the offense, is a meaningless distinction for *Miranda* purposes. The individual is subject to arrest should he choose to exercise his fifth amendment rights and remain silent. Under such circumstances the *Miranda* warnings are little more than an empty formality.[56]

The "saving clause" of Florida's statute provides that a person cannot be prosecuted if the arresting officer failed to afford the suspect an opportunity to identify himself, or to explain his presence prior to arrest. Additionally, prosecution is precluded if the court finds unreasonable either the officer's belief that the suspect was a threat, or his failure to accept the explanation offered.[57] Such a provision is little consolation to a defendant who has been subjected to the indignities and financial hardship which accompany arrest and detention.[58] The

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In People v. Berck, 300 N.E.2d 411 (N.Y. 1973), § 250.12 of the MODEL PENAL CODE as codified in a New York state penal statute, was struck down as unconstitutional. The highest court of that state held that the statute was vague, violative of the constitutional right to freedom of movement, allowed arrests on suspicion, and was subject to arbitrary enforcement.

54. *See, e.g.*, State v. Zito, 254 A.2d 769 (N.J. 1969); People v. Berck, 300 N.E.2d 411 (N.Y. 1973); City of Seattle v. Drew, 423 P.2d 522 (Wash. 1967).

55. *See* MODEL PENAL CODE § 250.6, Comment (Proposed Official Draft, 1962).

56. Arguably, the "reasonable explanation" provision of Florida's loitering statute is subject to the charge that it shifts the burden of proof to the accused. He must show, under threat of arrest, that he is not a potential criminal. It might seem logical to assume that if the suspect's business was lawful, he would readily furnish an explanation for his conduct which would dispel the officer's alarm, and thus preclude an arrest. In Tehan v. Shott, 382 U.S. 406, 415 (1966), however, the Supreme Court noted that

> the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."

Therefore, shifting the burden to the accused to prove his innocence, as Florida's loitering statute seemingly does, is not constitutionally permissible.

57. *See* note 2 *supra* for text of FLA. STAT. § 856.021 (1975).

58. *See* Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

judge has no more certain a standard to guide him in determining whether the charges should be dismissed than the policeman has in making a decision to arrest.[59]

The *Ecker* court noted that under section 856.021, prompt arrest is proper if a person whom the police officer believes to be a threat flees when approached by such officer. The suspect need not under these circumstances be given an opportunity to dispel the alarm by disclosing his purpose or by supplying the officer with identification.[60] But it may not be constitutionally permissible to allow flight to constitute probable cause for an arrest. In *Wong Sun v. United States*,[61] the Supreme Court commented that a suspect's flight was insufficient to constitute probable cause for an arrest.

> [I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.[62]

Since there appears to be no conceivable distinction between using flight as a basis for a belief that a person has committed a crime and using it as evidence that he is about to commit a crime, both may be attacked as unconstitutional presumptions.

The Florida court held that the statute came into operation "only when the surrounding circumstances suggest[ed] to a reasonable man some threat and concern for the public safety."[63] The court noted that those circumstances were not very different from those described by the United States Supreme Court as "specific and articulable facts"

Justice Douglas noted that persons arrested on suspicion, like those arrested for vagrancy, are the undesirables of society. They are not the "sons of bankers," but are members of a group who lack "the prestige to prevent an easy laying-on of hands by the police." Douglas, J., *supra* at 13.

As Foote points out, even if a person wrongfully arrested under such a statute were to bring a civil suit for loss of pay, damage to his reputation and other injuries resulting from such an arrest, his chances of recovery are slim.

> Very few [potential plaintiffs] are persons who are respectable in the sense that they have some measure of status and financial security in society and have acquired the kind of reputation which will be "damaged" by illegal police activity. . . .
>
> . . . [I]f the [person] is a skid row "bum" . . . or has a record of prior arrests. . . . the defendant officers can prove the plaintiff's bad reputation in mitigation of damages and so poison him in the eyes of the jury.

Foote, *supra* at 500–01.

59. *See* note 39 and accompanying text *supra*.

60. 311 So. 2d at 106.

61. 371 U.S. 471 (1963).

62. *Id.* at 483 n.10 (1963), *quoting* Alberty v. United States, 162 U.S. 499 (1896).

63. 311 So. 2d at 110.

in *Terry v. Ohio.*[64] Florida's decision, however, constitutes a clear extension of the *Terry* rationale. In *Terry,* an officer who was investigating possible criminal conduct, but lacked probable cause to arrest, had reason to believe that the suspect was armed. The Supreme Court held that under those circumstances the officer could frisk the suspect for weapons in order to protect himself from possible harm.[65] The officer's decision to conduct a "stop and frisk" is subject to the same broad discretion which is conferred by the Florida loitering statute.

Arguably, a request for identification and an order to the suspect to "move on" is a less serious intrusion than a search of the suspect's person, but the Court in *Terry* did not hold that a refusal to allow such a search or to answer an officer's question or obey an order could be rendered an offense. To the contrary, in *Davis v. Mississippi,*[66] decided 1 year after *Terry,* the Court strongly suggested that criminalization of a mere failure to answer an officer's inquiries, without more, would be unconstitutional.[67]

In *Davis,* the state contended that a suspect could be involuntarily detained for fingerprinting in connection with a crime which the police lacked probable cause to believe the person had committed. In support of its position, the state cited statements by the Supreme Court in prior cases which approved the general questioning of citizens during the investigation of a crime.[68] In response to the state's contentions, the Court noted that these cases stood for no more than the proposition that

> while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.[69]

The Court held that detention of the suspects under these circumstances was an unreasonable seizure under the fourth amendment.[70] The Court did not address the issue of whether such action additionally violated the suspect's privilege against self-incrimination, preferring instead to dispose of the case on the narrow fourth amendment ground.

64. 392 U.S. 1, 21 (1968).

65. *Id.* at 27. The Court was unable to determine from the facts in the record whether a "seizure" had occurred. The majority noted, however, that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. at 16.

66. 394 U.S. 721 (1969).

67. *Id.* at 727 n.6.

68. *See* Miranda v. Arizona, 384 U.S. 436, 477–78 (1966); Culombe v. Connecticut, 367 U.S. 568, 635 (1961).

69. 394 U.S. 727 n.6.

70. *Id.* at 725.

Seemingly, the threat of arrest, should one fail to answer an officer's request for identification under Florida's loitering statute, constitutes the criminalization condemned by the Supreme Court in *Davis*. In addition, the Supreme Court in *Papachristou* may have disposed of the question of whether a suspect's refusal to obey an officer's orders "necessary to remove the threat to the public safety" may justify an arrest.[71]

The distinction between the Florida statute and the statute upheld in *Terry v. Ohio* is significant. In *Terry*, the Supreme Court allowed the officer's virtually unfettered discretion to form the basis of a limited stop and frisk where the suspect's refusal to allow such was not held to justify an arrest. Florida's statute allows the same discretion to permit an officer to make a request which, if not complied with, may subject the suspect to a fine or to imprisonment. The constitutional infirmities of Florida's loitering statute, as presently construed, are legion. Were the United States Supreme Court to review the constitutionality of this statute, in the light of its precedent set by *Papachristou*, Florida's statute would likely be stricken. Attacks upon the statute as being vague and overbroad and subject to arbitrary enforcement would, it seems, be sustained. Indeed, the Supreme Court might additionally find the reasonable explanation "defense" in Florida's provision violative of the fifth amendment.

If the Florida court narrowly construed the statute to require identification alone, from a person deemed by a police officer to be loitering in a suspicious manner,[72] the statute might well be upheld. Under the statute, as so construed, the suspect would not be required to speculate as to what conduct would render him subject to arrest. Admittedly, the policeman would have broad discretion in deciding whether to demand identification from a suspect. However, such an intrusion on an individual's personal liberty is slight, and compliance with the officer's request would preclude an arrest. At the present, however, the dissent of Justices Ervin and Boyd contains a seemingly realistic appraisal of Florida's loitering statute as construed by the *Ecker* court.

> [This statute] seeks to resurrect constitutionally but in different verbiage coloration all of the old invasions of personal freedom of movement of the citizen . . . condemned [by the United States Supreme Court] . . . .
>
> All of the attempted rationalization and effort to distinguish in principle this new statute from the older vagrancy statute[s] . . . which were stricken is sheer sophistry. . . . But today we must manifest

71. *See* note 8 and accompanying text *supra*.

72. *See* People v. Solomon, 108 Cal. Rptr. 867, 873 (Ct. App. 1973).

ourselves to be "law and order" exponents—constitutional guarantees to the contrary notwithstanding.

DEBORAH MILLER

Zoning Ordinance—ENHANCEMENT OF AESTHETIC VALUES ALONE NOT SUFFICIENT BASIS FOR EXERCISE OF POLICE POWER IN FLORIDA.—*City of Coral Gables v. Wood,* 305 So. 2d 261 (Fla. 3d Dist. Ct. App. 1974).

William L. Wood stored his camper-type vehicle in his backyard. After a neighbor complained to the police, Wood was issued a citation for violating a Coral Gables zoning ordinance. The ordinance provided that such vehicles, if kept on private property, must be stored inside garages.[1] The trial court found Wood guilty and fined him $15. On appeal to the circuit court, the judgment was reversed on the grounds that the ordinance was "facially overbroad, unconstitutionally vague and violative of the guarantees of the first, fifth and fourteenth amendments to the United States Constitution."[2] In reversing the circuit court, the Third District Court of Appeal stated that aesthetic considerations have been held to be valid basis for zoning in Florida.[3] The court added that "the Coral Gables ordinance is aimed at preventing unsightly appearances and diminution of property values which obtain when camper-type vehicles are parked or stored out of doors in a residential area of the community."[4] Several authorities, including the United States Court of Appeals for the Fifth Circuit, have announced that aesthetic considerations alone will support a zoning

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73. 311 So. 2d at 111–12.

1. CORAL GABLES, FLA., CODE § 4.09(a) (1974), provides:
No House Car, Camp Car, Camper or House Trailer, nor any vehicle, or part of vehicle, designed or adaptable for human habitation, by whatever name known, whether such vehicle moves by its own power or by power supplied by separate unit, shall be kept or parked on public or private property within the City, except if enclosed within the confines of a garage, and unoccupied; or parked upon a duly licensed or legally operating parking area, which is not a concomitant and required under the zoning—or other—ordinance of the City.

2. 305 So. 2d 261, 263 (Fla. 3d Dist. Ct. App. 1974).

3. *Id.*

4. *Id.*

5. *See* Masotti & Selfon, *Aesthetic Zoning and the Police Power,* 46 J. URBAN L. 773,