	Roberts	Lippman	Yampolsky	AVG.
A -- General Orders Subcomm	5	8	6	**6.33**
B -- Fair & Imparial Subcomm.	1.5	1.5	3	**2.00**
C -- Surveillance Ord Subcomm.				
D -- Outreach Subcomm.	9	11	15	**11.67**
E -- Homeless Encampmt Sub.	10	5	8	**7.67**
F -- Revise G.O. W-1 Rt to Watch	6	9	9	**8.00**
G -- Review BPD budget	12	12	7	**10.33**
H -- BPD policy for shelter-in-place	13	14	14	**13.67**
I -- Amend Regs: knowingly submit false or misleading info in BOI commissioner challenge	8	7	13	**9.33**
J -- Handling informal complaints	11	13	10	**11.33**
K -- Release CPE Report	1.5	1.5	2	**1.67**
L -- BPD actions June 20, 2017	7	6	5	**6.00**
M -- Media Credentialing Subcomm.	15	10	11	**12.00**
N -- Regional radio interoperability	14	15	12	**13.67**
O -- Council Cmtee Urban Shield & NCRIC	3	3	4	**3.33**
P -- Police accountability reforms	4	4	1	**3.00**

COMPLAINT DEADLINES REPORT

INVESTIGATIONS										
NO.	*Complainant*	***Filed Date***	*Incident Date*	***Notice of Allegations Due (20 Bus. Day)***	*Notice of Allegations Issued*	***BOI Packet (80 days)***	*BOI Packet Issued*	***BOI Findings Report Goal (105 days)***	***120 Days***	*STATUS*
2418		05/10/17	Apr-17	06/07/17	05/17/17	07/28/17	07/28/17	08/23/17	**09/07/17**	**Findings 9/1; Continued**
2419		06/14/17	Jun-17	07/12/17	06/19/17	09/01/17		**09/27/17**	**10/12/17**	subject ofc. out to 9/29
2420		07/07/17	May-17	08/04/17	07/11/17	**09/25/17**		**10/20/17**	**11/03/17**	**BOI 9-20**
2422		07/12/17	Jun-17	08/09/17	07/31/17	**09/29/17**		**10/25/17**	**11/09/17**	Investigation
2424		08/07/17	Jul-17	09/01/17	08/09/17	**10/26/17**		**11/20/17**	**12/05/17**	Investigation
2426		09/05/17	Jun-17						**Will bring for admin closure 9-27-17**	

Item # 11.b.
PRC meeting of 9-6-17

DRAFT PRC letter to city council re ban on masks (Version 2)

Hon. Mayor Arreguin and members of the Berkeley City Council:

We write to express concern about the implementation of the "Urgency Ordinance to Authorize the City Manager to Issue Rules for Street Events without Permits," which Council passed on Friday, August 18. The ordinance creates a new Chapter 13.45 of the Municipal Code. The ordinance reads in part:

"The city manager or his or her designee is authorized to issue such narrowly tailored temporary regulations in a defined area of the City and consistent with the First Amendment to the United States Constitution and takes such other narrowly tailored actions as are necessary to preserve public health, public safety and property on City streets and sidewalks during street events planned or proposed to be held in the city and for which no permit has been obtained pursuant to Chapter 13.44 of this Title, limited to establishing perimeters or separations, and prohibiting certain items that have been known to be used as weapons or are hazardous or restriction of them to certain times and/or locations. Failure to obey any directive issued by the city manager for his or her designee pursuant to this section shall be a violation of this chapter."

The regulations announced by BPD on August 25 included this provision:

"On August 27, 2017, in Civic Center Park, wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face and shields the wearer's face from view, or partially from view, is prohibited, except for coverings worn due to religious beliefs, practices or observances."

The bulk of the regulations referred to banning weapons or items that could be used as weapons. These regulations are not objectionable to the Commission. We are concerned about the mask ban.

The anti-mask regulation appears to be unconstitutional under the following California appellate court decision overturning California Penal Code section 650a: Ghafari v. Mun. Court for San Francisco Judicial Dist. (1978) 87 Cal.App.3d 255. The decision declares that wearing a mask is First Amendment activity that cannot be prohibited unless used in the commission of a crime.[1] Enacting (or allowing staff to enact) unconstitutional laws puts the City at risk of lawsuit and financial loss as well as jeopardizing civil liberty.

We recognize the community concern about masked demonstrators. However, in its pursuit of public safety, the City government must remain vigilant in defense of the oaths

[1] "Penal Code section 650a is unconstitutional on its face under the United States Constitution because it is overbroad and vague and it denies equal protection of the laws....
"We are in agreement with appellants' claim that the wearing of a mask per se does not affect adversely any legitimate state interest. We conclude that the blanket prohibition of section 650a serves no legitimate law enforcement function and is unconstitutionally overbroad, both for the same reason--the state's interests are fully protected by more narrowly drawn prohibitions." "Ghafari v. Municipal Court (People) (1978) 87 Cal.App.3d 255 [150 Cal.Rptr. 813], " http://www.lawlink.com/research/CaseLevel3/55103

we have taken to uphold the Constitutions of the United States and the State of California. We urge the unconstitutional ban on masks be withdrawn immediately.

DRAFT PRC letter to city council
Recommend early sunset of the urgency ordinance

Hon. Mayor Arreguin and members of the Berkeley City Council:

The "Urgency Ordinance to Authorize the City Manager to Issue Rules for Street Events without Permits," enacted on Friday, August 18, contains a sunset, or expiration, date of December 31, 2017. The Police Review Commission recommends the council modify the expiration date to September 30, 2017.

The ordinance provides that:

> The city manager or his or her designee is authorized to issue such narrowly tailored temporary regulations in a defined area of the City and consistent with the First Amendment to the United States Constitution and takes such other narrowly tailored actions as are necessary to preserve public health, public safety and property on City streets and sidewalks during street events planned or proposed to be held in the city and for which no permit has been obtained pursuant to Chapter 13.44 of this Title, limited to establishing perimeters or separations, and prohibiting certain items that have been known to be used as weapons or are hazardous or restriction of them to certain times and/or locations. Failure to obey any directive issued by the city manager for his or her designee pursuant to this section shall be a violation of this chapter.

It is inadvisable for Council to delegate its regulatory power on the public safety function to staff. If necessary, there is already provision in city law for emergency powers. Yes, a state of emergency sounds frightening. However, Council created de facto emergency rule by enacting the ordinance. The critical difference is that the ordinance lacks the stricter controls of the existing emergency power under which staff have to come back to council for review "at the earliest practicable time" or the restrictions lapse.

The relevant portion of the city code is in BMC Section 2.88.040: "Director of Emergency Services—Powers and Duties."[1]

> A. The Director of Emergency Services is empowered:
>
> 1. If, in the Director's judgment, the conditions will require the combined forces of other political subdivisions to combat, to r**equest the City Council to proclaim the existence of a "Local Emergency"** if the City Council is in session, or to **issue such proclamation if the City Council is not in session.** Whenever a Local Emergency is proclaimed by the Director, the **City Council shall take action ratifying said proclamation within seven days** of issuance or the proclamation shall have no further force and effect....
>
> 6. In the event of the proclamation of a "Local Emergency," as herein provided, the proclamation of a "State of Emergency" by the Governor or the Director of the State Office of Emergency Services, or the existence of a "State of War Emergency ":

[1] http://www.codepublishing.com/CA/Berkeley/

a. To make and issue lawful rules and regulations on matters reasonably related to the protection of life, public health or safety, or improved property as affected by such emergencies; provided, however, **such rules and regulations must be confirmed at the earliest practicable time by the City Council,** shall be in writing, and shall be given widespread publicity and notice;

Our concern does not stem from a lack of respect for the City Manager and staff. The principle at stake is the issue of democratic control of governance by elected and accountable authority. Even if no negative outcomes result from the current ordinance, a precedent is set for a future time in which civil liberties and democratic rule may be less rigorously honored.

Furthermore, it has been said, for example with reference to the Japanese internment in World War II, that emergency situations often lead to bad policy. Let us take this time to reflect on the imperiled state of U.S. democracy today.

We respectfully recommend that the sunset date of the urgency ordinance be moved up from the present December 31, 2017, to September 30, 2017, and that the Council resume its direct responsibility for enacting laws and regulations governing public safety.

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August 26, 2017

Farimah Brown, Berkeley City Attorney, by email

Dear Ms. Brown:

I am writing on behalf of the National Lawyers Guild, San Francisco Bay Area Chapter (NLG), to express our concern over the unconstitutional regulations promulgated on August 25, 2017, by City Manager Dee Williams-Ridley, without public notice or comment. Among many other overbroad restrictions, the purported regulations state: "wearing of a mask, scarf, bandana or any other accessory or item that covers or partially covers the face and shields the wearer's face from view, or partially from view, is prohibited, except for coverings worn due to religious beliefs, practices or observances." (Berkeley Administrative Rules, AR-CCPark-Aug2717 "Restrictions And Prohibitions In Civic Center Park And In Civic Center Area City Buildings For August 27, 2017" and AR-DowntownBerk-Aug2717 "Restrictions And Prohibitions In Defined Area Of Downtown Berkeley For August 27, 2017".) Also on August 25, 2017, the Berkeley Police Department issued "Nixie Alert 6126423" regarding implementation of these rules and stating, "anyone violating these rules will be subject to citation and arrest".

The prohibition against face coverings "directly contravenes the First Amendment of the United States Constitution." *Ghafari v. Mun. Court for San Francisco Judicial Dist.* (1978) 87 Cal.App.3d 255. In *Ghafari*, a California appellate court struck down Cal. Penal Code 650a[1]. Defendants, Iranian students in this country and members of the Iranian Students' Association (I.S.A.), were arrested while picketing peacefully with others in front of the Iranian consulate with their faces partially covered. Among other things, the students asserted they were fearful that if their identity became known as I.S.A. members and demonstrators, agents of the Iranian government might retaliate against them here, and against their relatives in Iran. The court held that Penal Code section 650a was unconstitutional on its face under the First and Fourteenth Amendments

[1] Then Cal. Penal Code sec. 650a read, "It is a misdemeanor for any person, either alone or in company with others, to appear on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal his identity.

to the U.S. Constitution, because it was overbroad and vague and denied equal protection of the law. The court recognized that: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Ghafari, supra,* 87 Cal.App.3d quoting *NAACP v. Alabama* (1958) 357 U.S. 449, 462.

Like the statute struck down in *Ghafari,* the City Manager's regulation is a blanket prohibition on covering one's face. It serves no legitimate law enforcement function and is unconstitutionally overbroad because the state's interests are fully protected by more narrowly drawn prohibitions such as Penal Code section 185. *Ghafari v. Mun. Court,* supra, at p. 262 [citing *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856.]

"[T]he source of the constitutional protection of associational privacy is the recognition that, as a practical matter, compelled disclosure will often deter such constitutionally protected activities as potently as direct prohibition." *Britt v. Superior Court,* supra, 20 Cal.3d at p. 857. The First Amendment embraces the right to communicate and associate anonymously as a necessary corollary to freedom of association. See, *Buckley v. American Constitutional Law Foundation, Inc.* (1999) 525 U.S. 182; *McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334; *Buckley v. Valeo* (1976) 424 U.S. 1; *Talley v. California* (1960) 362 U.S. 60; *NAACP v. Alabama, supra,* 357 U.S. 449.

Moreover, masks or other face coverings may have a communicative purpose, as the *Ghafari* court recognized. (See *Ghafari, supra,* at pp. 264-265.)

We write to provide explicit notice that any implementation of these rules would expose the City to liability for violations of First, Fourth and Fourteenth Amendment rights. We demand that the City of Berkeley immediately desist from any implementation of the City Manger rules in question and notify us about what steps the city is taking to remedy the constitutionally infirm policy. These steps should include a retraction of the unconstitutional rules and instruction to the police department, and any law enforcement agencies providing mutual aid, that they cannot issue citations, make arrests, or otherwise sanction an individual for a putative violation of those rules. The NLG is prepared to take any legal action necessary to protect the people's right to protest the white supremacist rally in Berkeley.

My contact information is above and I will be available by cell on Sunday, 415-350-6496.

Sincerely,

Rachel Lederman

cc: Chief Greenwood, City Manager, Mayor Arreguin, City Council

87 Cal.App.3d 255
Court of Appeal, First District, Division 3, California.

Farzad GHAFARI, Plaintiff and Appellant,
v.
The MUNICIPAL COURT FOR the CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent;
The PEOPLE of the State of California, Real Party in Interest and Respondent.
Homayoon MAJD, Plaintiff and Appellant,
v.
The MUNICIPAL COURT FOR the CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent;
The PEOPLE of the State of California, Real Party in Interest and Respondent.

Civ. 41690, Civ. 41695.
|
Dec. 14, 1978.

Iranian students, charged with violating a statute prohibiting the wearing of masks in public, sought a writ prohibiting their prosecution. The Superior Court, City and County of San Francisco, Francis McCarthy, J., denied relief, and the students appealed. The Court of Appeal, Feinberg, J., held that the statute in question was unconstitutional as being overbroad and vague and as denying equal protection of the laws.

Reversed and remanded.

Attorneys and Law Firms

***258 **814** Jeffrey G. Lewis, Oakland, Donald J. Stang, Larson, Stang & Weinberg, San Francisco, Margaret C. Crosby, Alan L. Schlosser, Amitai Schwartz, American Civil Liberties Union Foundation of Northern California, Inc., San Francisco, for plaintiffs and appellants.

Evelle J. Younger, Atty. Gen., Jack R. Winkler, Chief Asst. Atty. Gen., Crim. Div., Edward P. O'Brien, Asst. Atty. Gen., Derald E. Granberg, Don Jacobson, Deputy Attys. Gen., San Francisco, for real party in interest and respondent.

Opinion

FEINBERG, Associate Justice.

In these consolidated appeals, we are confronted with a single issue is Penal Code section 650a constitutional?

The facts, for purposes of these appeals, are not in dispute.

Appellants are Iranian nationals, students in this country and members of the Iranian Students' Association (I.S.A.). It is an understatement to say that appellants and the I.S.A. are vigorously opposed to the present government in Iran. One of the views held by the I.S.A. is that the regime in Iran is maintained in power by reason of the support afforded by the United States government. Thus, members of the I.S.A. demonstrate, picket, hand out leaflets and so on, not only to show their own disaffection from their government, but to make known publicly their ***259** reasons for their views. I.S.A. hopes to affect public opinion, gain public sympathy, and thereby affect our present foreign policy vis-a-vis Iran.

Appellants have also alleged, and for purposes of this appeal, it is not denied that, for good reason, they are fearful that if their identity became known as I.S.A. members and demonstrators, retaliatory measures of an unpleasant nature may be taken against them here and against their relatives in Iran by agents of the Iranian government.

On August 24, 1976, on the sidewalk in front of the Iranian Consulate in San Francisco, appellant Ghafari was engaged in peaceful picketing, with other pickets, when he was arrested for violating Penal Code section 650a[1] on the ground that he was picketing in disguise by placing a leaflet between his glasses and face for the purpose of concealing his identity.

On October 1, 1976, appellant Majd was arrested for the same reason, in the same area, under similar circumstances.

Appellants have alleged and, again, for purposes of this appeal, it is not controverted that, had they known they could not protect their anonymity while demonstrating, they would not have demonstrated nor will they participate in demonstrations in the future if they cannot do so without disclosure of their identity.

The cases come before us having followed the same route. Each appellant demurred in municipal court to the charge of having violated section 650a. Each demurrer was overruled. Each appellant then petitioned the superior court for a writ of prohibition directed to the municipal

court. The superior court issued an alternative writ in each case and then after hearing, denied each petition; these appeals followed.

> Penal Code section 650a is unconstitutional on its face under the United States Constitution because it is overbroad and vague and it denies equal protection of the laws.

The statute.

Section 650a provides:

> It is a misdemeanor for any person, either alone or in company with others, to appear ****815** on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or ***260** other regalia or paraphernalia, with intent thereby to conceal his identity. This section does not prohibit the wearing of such means of concealment in good faith for the purposes of amusement, entertainment or in compliance with any public health order.

The statute was originally enacted in 1923 (Stats.1923, ch. 153, ss 1, 2, p. 316) in substantially its present form. It was not placed in a code, and it was never construed in a reported decision. It was reenacted in its present form and was codified as section 650a in 1953 (Stats.1953, ch. 32, s 18, p. 641). One reported decision has discussed the statute, but the constitutionality of it was not in issue and was not considered. (In re Martin (1963) 221 Cal.App.2d 14, 34 Cal.Rptr. 299; see also People v. Horner (1955) 137 Cal.App.2d 615, 621, fn. 1, 290 P.2d 902 (mentioning enactment of the section).) The issues raised herein are of first impression.

Section 650a is overbroad.

[1] The rights of freedom of speech, peaceful assembly and free association[2] are unquestionably protected activities which "lie at the foundation of a government based upon the consent of an informed citizenry . . . ." (Bates v. Little Rock (1960) 361 U.S. 516, 522-523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480; Britt v. Superior Court (1978) 20 Cal.3d 844, 852, 143 Cal.Rptr. 695, 574 P.2d 766.) Appellants contend that the statute is overbroad on its face because it flatly prohibits anonymity under circumstances where these protected activities may be involved and because the restriction is not required by a compelling state interest nor is it implemented in the least restrictive manner possible. We agree.

The proposition that, under certain circumstances, anonymity is essential to the exercise of constitutional rights is not a novel one. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." (N. A. A. C. P. v. Alabama (1958) 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488; Britt v. Superior Court, supra, 20 Cal.3d at p. 853, 143 Cal.Rptr. 695, 574 P.2d 766.)[3] "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws Either anonymously or not at all." (Emphasis added.) (Talley v. California (1960) 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559.)

***261** The People argue that section 650a in no way restricts the legitimate exercise of First Amendment freedoms. The assertion is patently in error. The fact that the state, through this statute, takes no direct action to restrict the exercise of constitutional rights is not dispositive, for in the area of First Amendment liberties, "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." (N. A. A. C. P. v. Alabama, supra, 357 U.S. at p. 461, 78 S.Ct. at 1171; Britt v. Superior Court, supra, 20 Cal.3d at p. 852, 143 Cal.Rptr. 695, 574 P.2d 766.) Nor is it persuasive for the state to argue that the restraint upon appellants' rights would come about as a result of private, as opposed to state, action. "The crucial factor is the interplay of governmental and private action, ****816** for it is only after the initial exertion of state power represented by . . . (enforcing section 650a) that private action takes hold." (N. A. A. C. P. v. Alabama, supra, 357 U.S. at p. 463, 78 S.Ct. at p. 1172; see also People v. Fogelson (1978) 21 Cal.3d 158, 164, fn. 6, 145 Cal.Rptr. 542, 577 P.2d 677; Huntley v. Public Util. Com. (1968) 69 Cal.2d 67, 73, 69 Cal.Rptr. 605, 442 P.2d 685.) Thus, here, by enforcing section 650a, the state either inhibits the exercise of free speech or exposes the speaker who dares, to retaliation by a foreign government.

It is clear that in flatly prohibiting anonymous public appearances by persons exercising their First Amendment rights, section 650a sweeps too broadly. It must be emphasized that appellants do not assert that there is an absolute right to anonymity while engaging in First Amendment activities. Nor do they fail to recognize that the state has a legitimate interest in crime prevention and detection, and that under certain circumstances

concealment of identity may give rise to law enforcement problems. But, as they point out, other statutes presently exist which prohibit illegitimate and improper use of concealment of identity and any dangers potentially arising from First Amendment activity which is undertaken by masked participants.

For example, section 185 provides:
It shall be unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of:

***262** One Evading or escaping discovery, recognition, or identification in the commission of any public offense.

Two Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor.

The People argue that section 185 is directed at a different stage of criminal activity than is section 650a. They claim that section 185 is directed at the "subsequent criminal offenses which 650a was designed to discourage." At oral argument, the People claimed that section 185 does not come into play until after a crime has been committed. This argument is unsupported by citation to applicable authority. Section 185 prohibits the use of a mask for the purpose of "(e)vading or escaping . . . recognition, or identification in the commission of any public offense." The plain meaning of this language covers the situation where a mask is worn prior to the actual commission of the offense.

The People argue that it is absurd to compel the state "to sit back and wait until . . . (appellants) and their 200 confederates have stormed the Iranian Embassy, sacked it, and then been captured before it is entitled to know even what . . . (they) look like." The notion that appellants and their co-demonstrators were about to storm the embassy and sack it is a "red herring"; it finds no support whatsoever in the record, as the People must be aware in that they stipulated to the facts set forth above. Had there been such an attack, or had there been any evidence that appellants planned to do so, and had they been masked for such criminal purposes, they would have been in violation of section 185. Furthermore, without delineating them all, a number of other penal statutes would have come into play, such as section 404 (riot), sections 406-407 (rout, unlawful assembly), section 415 (disturbing the peace), section 416 (refusing to disperse), section 647, subdivision (e) (refusal to identify self to police officer), section 647c (obstruction of thoroughfares and public places), and sections 726-727 (arrest after refusal to disperse), thereby providing the police with the legal armamentarium to deal effectively with such a disturbance.
Therefore, we are in agreement with appellants' claim that the wearing of a mask per se does not affect adversely any legitimate state interest. We conclude that the blanket prohibition of section 650a serves no legitimate law enforcement function and is unconstitutionally overbroad, both for the same reason the state's interests are fully protected by more narrowly drawn prohibitions. (****817** Britt v. Superior Court, supra, 20 Cal.3d at pp. 855-856, 143 Cal.Rptr. 695, 574 P.2d 766.)

***263** Section 650a is vague.
[2] Standing. The People argued that appellants' conduct was precisely proscribed by the statute and that therefore they do not have standing to raise the vagueness issue. We disagree for two reasons: First, it is not clear that petitioners' conduct was precisely proscribed. They were arrested for covering their faces by placing leaflets behind their eyeglasses. Other demonstrators covered their faces with picket signs and leaflets; some wore ski masks. Although a ski mask is clearly a "mask" within the meaning of the statute, to argue that a leaflet placed behind eyeglasses is "precisely proscribed" by the terms "regalia or paraphernalia" begs the question.

[3] Second, assuming that appellants' conduct was precisely proscribed by the statute, this is the kind of case wherein an exception from traditional rules of standing to raise constitutional issues applies, because "the very existence of . . . (section 650a) may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." (Young v. American Mini Theatres (1976) 427 U.S. 50, 60; id., at pp. 59-60, fn. 17, 96 S.Ct. 2440, 2447, 49 L.Ed.2d 310; People v. Fogelson, supra, 21 Cal.3d 158, 162-165, 145 Cal.Rptr. 542, 577 P.2d 677.)

[4] The merits. A penal statute is void on its face if it forbids "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." (Connally v. General Const. Co. (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.) Vague statutes offend several important values, as explained by the United States and California Supreme Courts: " 'First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know What is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit Standards for those

who apply them. . . . Third, . . . where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms " . . . (u)ncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone." . . . than if the boundaries of the forbidden areas were clearly marked.' " (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 151, 109 Cal.Rptr. 897, 514 P.2d 697, quoting Grayned v. City of Rockford (1972) 408 U.S. 104 at pp. 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222.)

***264** Appellants claim that section 650a is vague in two respects: It applies to a face "partially or completely concealed by means of a mask or other regalia or paraphernalia," and it contains an exception for "amusement" or "entertainment" purposes. The People argue that the statute is not vague because it gives clear notice that one is prohibited from appearing in public "with one's face covered by a mask or other means of disguise for the purpose of concealing one's identity." They concede, by way of example, that celebrities wishing to conceal their identity from autograph seekers and the general public are committing a public offense if they don large hats and/or sunglasses for this purpose.

We do not find the language "a mask or other regalia or paraphernalia" as unambiguous as the People represent. While it is arguable that this portion of the statute could be given a narrow construction (see Braxton v. Municipal Court, supra, 10 Cal.3d at p. 144, 109 Cal.Rptr. at p. 897, 514 P.2d at p. 697) and that the quoted portion could be read as meaning "covered by a mask or other means of disguise" (the People's proposed construction), the vagueness of the phrase "purposes of amusement (and) entertainment" cannot be cured.
It is well established that communication for amusement and entertainment purposes is protected by the First Amendment as fully as is communication for the exposition and exchange of ideas. There are several reasons for this view, the principal one being ****818** pragmatic it is impossible to draw a clear line between the two areas.[4] "The line between the informing and the entertaining is too elusive for the protection of . . . (First Amendment rights). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." (Winters v. New York (1948) 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840.) For this reason, "courts must . . . cast a wide net over all forms of communication in order to protect that which is of potential political relevance." (In re Giannini, supra, 69 Cal.2d 563, 570, fn. 3, 72 Cal.Rptr. 655, 660, 446 P.2d 535, 540.)

It follows that the "amusement (and) entertainment" exception is inherently vague. It does not give a citizen notice of what is prohibited; it fails to set standards for law enforcement officers; and it will have a chilling effect on the exercise of constitutional rights. (Braxton v. Municipal Court, supra, 10 Cal.3d at p. 151.) Consider, for example, that ***265** if Aristophanes' Lysistrata had been performed in a public square during the years of Vietnam, in the classical Greek manner, in masks, but worn for the purpose of disguise, under section 650a, both masked players and police would have had the insuperable burden of determining where the antic muse stopped and political protest began before deciding whether the masks were being worn lawfully.

We therefore hold that section 650a is void on its face for vagueness.

Section 650a denies equal protection of the laws.
[5] [6] Appellants claim that the distinction in section 650a between anonymous entertainment or amusement and anonymous public issue communication is a violation of the Equal Protection Clause. (U.S.Const., 14th Amend.; Cal.Const., art. I, s 7.) Because section 650a affects fundamental First Amendment rights, it is not clothed with the usual presumption of constitutionality which most legislation enjoys in the face of an Equal Protection argument. Rather, "The state must first establish that it has a Compelling interest which justifies the law and then demonstrate that the distinctions drawn by the law are Necessary to further that purpose." (People v. Olivas (1976) 17 Cal.3d 236, 251, 131 Cal.Rptr. 55, 65, 551 P.2d 375, 385.) The state has not met this burden. As discussed above, the state cannot show that section 650a is necessary to a compelling state interest other statutes safeguard any legitimate law enforcement concerns regarding anonymous public appearance.

Furthermore, the distinction in question cannot survive constitutional scrutiny because rather than regulating the time, place and manner of anonymous activities, section 650a metes out differential treatment based upon the content of the masked person's message. Content control is the essence of forbidden censorship under the Equal Protection Clauses. (Police Department of Chicago v. Mosley (1972) 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed.2d 212; cf. Young v. American Mini Theatres, supra, 427 U.S. 50, 63-71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (no majority).)

Finally, it is noteworthy that, as urged by petitioners, the favoritism shown in section 650a for entertainment and amusement over other protected First Amendment expressions reverses the traditional constitutional priorities which make discussion of public issues the

central paramount concern of that amendment (see ***266** Wirta v. Alameda-Contra Costa Transit Dist. (1967) 68 Cal.2d 51, 57, 64 Cal.Rptr. 430, 434 P.2d 982) for "speech concerning public affairs is more than self-expression; it is the essence of self-government" (Garrison v. Louisiana (1964) 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125).

****819** We hold that section 650a is void on its face because it violates the Equal Protection Clause of the United States Constitution.[5]

Conclusion. The People's assertion that this case does not involve the exercise of any First Amendment right is untenable. Underlying, and occasionally surfacing in their briefs and oral argument to this court appears an unfounded fear that the mere appearance of anonymous persons in public will inevitably lead to violence and other illegal activities. If, in a given situation, those fears prove justified, narrowly drawn statutes exist to protect legitimate state interests.[6] But where, as here, anonymous public appearance is related to the exercise of First Amendment rights, the following observation of Justice Tobriner seems apropos: "Protest may disrupt the placidity of the vacant mind just as a stone dropped in a still pool may disturb the tranquillity of the surface waters, but the courts have never held that such 'disruption' falls outside the boundaries of the First Amendment." (Braxton v. Municipal Court, supra, 10 Cal.3d at p. 146, 109 Cal.Rptr. at p. 901, 514 P.2d at 701.)

The orders are reversed and the causes remanded with directions to issue the writs.

WHITE, P. J., and SCOTT, J., concur.

All Citations

87 Cal.App.3d 255, 150 Cal.Rptr. 813, 2 A.L.R.4th 1230

Footnotes

1 Hereafter, all sections cited are to the Penal Code.

2 United States Constitution, First and Fourteenth Amendments.

3 We note that in both N. A. A. C. P. and Britt the right in question was that of association, whereas here the principal issue involves the freedom of speech. These rights are so interrelated, however, that decisions involving the former are relevant and persuasive in the case at bench. The United States Supreme Court has recognized that there is a "close nexus between the freedoms of speech and assembly." and that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (N. A. A. C. P. v. Alabama, supra, 357 U.S. at p. 460, 78 S.Ct. at 1171.)

4 The other reason is that works of art are considered the highest form of communication and that the life of the imagination and intellect is of comparable import to the preservation of the political process. (In re Giannini (1968) 69 Cal.2d 563, 570, fn. 3, 72 Cal.Rptr. 655, 446 P.2d 535, cert. den. (1969) 395 U.S. 910, 89 S.Ct. 1743, 23 L.Ed.2d 223; overruled on another ground in Crownover v. Musick (1973) 9 Cal.3d 405, 431, 107 Cal.Rptr. 681, 509 P.2d 497.)

5 In light of our holding, it is unnecessary for us to reach the other issues raised by petitioners, namely, that section 650a violates the right of privacy (Cal.Const., art. I, s 1; see White v. Davis (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222), and that as applied to them section 650a deprives them of their First Amendment free speech rights, in that the mask itself was a symbolic expression of words and ideas.

6 The ironies of history. The state vigorously defends a statute which, if 205 years ago the Royal Colony of Massachusetts had had an analogue thereof, Samuel Adams and Paul Revere, with their band of colonials disguised as Indians, might never have reached Boston Harbor, the greatest Tea Party in our history would never have occurred, and there, unlike here, there was an intent to do a wrongful act.