CRIMINAL LAW—PRESENTENCE REPORTS—ALLEGATIONS OF PRIOR CRIMINAL ACTIVITY—FACTUAL DETERMINATION—DEGREE AND BURDEN OF PROOF—*United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

Janice Weston, the defendant in a federal narcotics case, was convicted of receiving, concealing, and facilitating the transportation of heroin, knowing it to have been imported contrary to law.[1] The trial judge indicated that he felt a minimum statutory sentence of five years would be appropriate, to which counsel for the government objected, asking for the production of a presentence report. The report given to the court contained defendant's prior criminal record and further alleged that she had: (1) operated as the chief supplier of heroin to the western Washington area; (2) made periodic trips to Mexico and Arizona to purchase heroin for resale, perhaps as often as every two weeks; (3) made profits of approximately $140,000 on investments of $60,000 in connection with each of the aforementioned trips; and (4) worked with four distributors who had already been apprehended, two of whom had been tried and sentenced, and all of whom were identified by name.[2] Pursuant to his statutory discretion[3] the trial judge made the presentence report available to counsel for the defendant and the government. During the discussion of the report at the sentencing hearing the defendant denied the allegations noted above, but offered no evidence in rebuttal. The court, aware of the seriousness of the information set forth in the report, nevertheless considered itself bound to accept it as prima facie valid. The rationale was that

> when statements are made categorically as they are made here, the Court has no alternative, in the face of contrary factual information, rather than simply a vehement denial, but to accept as true the information furnished the Court which in turn was obtained by the probation officer from the officers of the Federal Bureau of Narcotics and Dangerous Drugs.[4]

The court then imposed a 20 year sentence upon Weston, the statutory maximum for the offense charged.

In an apparent effort to insure every possible opportunity for mitigation of the report's impact, the trial judge advised defendant's counsel that defendant had 120 days in which to file a motion for modification of sentence.[5] He also advised that the 120 days could be used to obtain factual data rebutting the presentence report, which information should accompany the motion and would be taken into consideration. Finally, the judge announced that he was requesting the probation department to produce the factual material used to support the allegations of the report, and that if it was insufficient, he would modify the sentence on his own motion. The defendant filed no motion for modification of sentence and the trial judge subsequently filed an order noting his satisfaction with the supporting material provided by the probation department. The order also confirmed the maximum statutory sentence of 20 years imposed upon defendant, which replaced the

---

[1] 21 U.S.C. § 174 (1970).

[2] United States v. Weston, 448 F.2d 626, 628 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

[3] F. R. CRIM. P. 32(c) (1966) provides, in part, "The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contined in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon."

[4] 448 F.2d at 629.

[5] F.R. CRIM. P. 35 (1966).

five year sentence the judge had originally indicated would be adequate.[6] On appeal, the 20 year sentence was vacated on the ground that the defendant had a constitutional right to be sentenced on accurate factual information. It was also held that rather than having the defendant carry the burden of proving a negative, *i.e.*, that the report's allegations were untrue, it was the responsibility of the prosecution to factually support allegations of the report with data "such as to be persuasive of the validity of the charge there made."[7] The Ninth Circuit remanded the case for resentencing, relying upon the due process clause of the fifth amendment as ground for the reversal.

I. INTRODUCTION

The presentence report, which is a brief history and profile of a convicted defendant prepared by a local probation department, has long been a tool used by some judges in attempting to prescribe an appropriate sentence for an individual defendant. Neither federal nor state courts require the report for all persons sentenced, and oftentimes a distinction is made on the basis of the severity of the crime. The report itself is an attempt to reflect objectively a person's background and thereby acquaint the trial judge with the factors most relevant in considering what sentence should be imposed, though it usually does not contain a recommendation of a specific sentence. The reports have come under frequent attack by commentators, largely because of the heavy reliance upon unsworn hearsay; and their use has met with minimal judicial limitation. The presentence report typically covers a defendant's childhood, neighborhood reputation, schooling, employment, prior criminal record, religion, habits, family circumstances, and mental and physical health.[8] It is generally prepared by a probation officer in conjunction with public agencies and other law enforcement personnel that may have been involved in the particular case. Most often it is read just prior to the sentencing hearing by the trial judge and used in determining a proper sentence. Though the incorporation of evidentiary procedures into the sentencing hearing has been supported by numerous commentators, these procedures are presently available only at the judge's personal discretion in federal jurisdictions. This discretion covers a defendant's request to read the report, to challenge its contents, to rebut the contents by cross-examination, to call witnesses, and to introduce evidence.[9] However, the result of implementing full procedural and evidentiary requirements at the sentencing stage might well be to convert it into another trial, a step that the courts are extremely reluctant to take.[10]

Weston represents a significant departure from the existing procedure in sentencing hearings. The Ninth Circuit held that when there is disclosure of a presentence report to a defendant and reliance by the trial judge upon that report in determining what sentence to impose, the defendant has an undeniable right to a factual determination of allegations of other criminal behavior or misconduct. The mechanism for such a determination must insure that the prosecution establish, at least "persuasively," the facts which are used by the trial judge to increase a sen-

[6] 448 F.2d at 629-30.

[7] *Id.* at 634.

[8] Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499, 504 (1966).

[9] *See generally* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968); Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUTGERS CAMDEN L.J. 111 (1971).

[10] *Id.*

tence beyond that which would have been imposed had such allegations not been made. Further, a court's judgment as to the persuasiveness of proof is subject to judicial review. The need for such procedures has been recognized by courts and commentators alike. The rationale of *Weston* is simply that a person should not be given an increased sentence on the basis of criminal activity, that was neither alleged nor proven at the trial of the crime for which he was convicted.

The existence of a constitutional guarantee to a factual determination of crimes and misconduct alleged in a presentence report and relied upon by the judge in sentencing has never before received judicial sanction. Constitutional standards safeguarding procedures prior and subsequent to the adjudicatory stage have finally been applied to sentencing, which is arguably one of the most important non-adjudicatory steps in the criminal process. It is difficult to imagine anything that is more important to a defendant who has been found guilty than the determination of what specific penalty will follow his conviction. A combination of a trial judge's discretion in the length of sentences to be imposed and the fact that the defendant is not legally entitled to know the contents of the presentence report relied upon by the judge in determining the sentence can only lead to justifiable apprehension on the part of the defendant. The real damage, however, lies in the injustice done to the defendant when the undisclosed presentence report is materially false, a fact which neither he nor the trial judge may ever know. Federal sentencing procedure does not require the judge to reveal any allegations of a presentence report, criminal or otherwise, nor does it require him to disclose to what degree, if any, he relied upon the report in deciding on an appropriate sentence. Given this situation, mathematical probability would suggest that many defendants have received excessive sentences because of simple mistakes, however innocent, in the preparation of presentence reports. Similarly, a probation officer could in good faith report damaging accounts of the defendant which were completely fabricated (for whatever reason) by the people to whom the officer spoke while preparing the report.

The potential for injustice is obvious, and *Weston* by no means cures all the defects of the present system. It does deal, however, with what is probably the area most seriously in need of attention. Information in a presentence report regarding existing, but thus far unprosecuted, criminal activity is the surest way, aside from prior criminal convictions, to guarantee that a defendant will get a sentence in excess of the statutory minimum. Ideally, any defendant receiving more than a minimum sentence would be told why, and the record would reflect the reasons for purposes of appeal. The Ninth Circuit did not reach that point, but it did hold that *if* there is disclosure of the presentence report and *if* allegations regarding other criminal activity are relied upon by the judge for the purpose of increasing the sentence, then the defendant has a constitutional right to a determination (presumably at an evidentiary hearing) of whether or not such allegations are in fact true. Given the right to such a determination, several collateral issues invite analysis for purposes of classifying its precise dimensions: (1) whether such a right assumes or even requires that the defendant have a right of access to the presentence report; (2) whether the scope and nature of the right to be sentenced only upon factually accurate data is limited in any significant way; and (3) whether the constitution prohibits the defendant from being required to carry the burden of proof.

II. Discretionary Disclosure After Weston

The most striking part of the *Weston* opinion may well be its omission of discussion concerning the fact that disclosure of presentence reports is entirely optional.

This creates a procedural anomaly in that there is now a right to prohibit the increasing of sentences based upon presentence reports which are not "persuasive," but that right accrues only to those defendants to whom the report has been disclosed. The question results from the fact that there is no constitutional right of disclosure of presentence reports, disclosure being an opportunity for a convicted person to hear and perhaps see the contents of the report being used by the trial judge. In fact, the discretionary power of federal judges to disclose is not frequently exercised,[11] and only a few states have elevated disclosure to the status of a right.[12] It is improbable that the *Weston* court would simply assume that such a right exists in all cases, and it is equally implausible to suppose that this court recognized such a right by implication. This is true both because a holding of such significance probably would not be made without some reference to the authority or constitutional ground supporting it, and because of the continuing controversy surrounding the federal rule as to whether disclosure should be mandatory or discretionary.[13] Moreover, *Weston* cannot be used as authority for a proposition to which it does not even allude, much less discuss. A distinction must, therefore, be made between situations of voluntary disclosure, in which a judge recognizes the requirements of accuracy and persuasiveness, and those situations in which a judge chooses not to disclose the report. This implies, however, that a right to accuracy and factual determination can only exist subsequent to disclosure, and that if a particular trial judge chooses to withhold the contents of the report, the requirement of persuasive validity becomes meaningless and the convicted person may be sentenced without regard to what may be erroneous in the report.

The most reasonable interpretations of the *Weston* court's omitting any mention of disclosure are either that a right of accuracy exists only when the trial judge actually discloses the report, or that when a judge increases a sentence in at least partial reliance upon the presentence report, the report must be disclosed to the defendant who then becomes entitled to a factual determination of disputed allegations. The latter construction is obviously much broader, but seems to follow from the emphasis the court places upon the change in sentences in *Weston* from five to 20 years, solely because of the allegations in the report. The issue of whether or not *Weston* represents a limited right of disclosure involves several considerations. The trial judge originally indicated that a five year sentence would be appropriate and acknowledged his subsequent reliance upon the presentence report. A difficulty may arise in distinguishing those situations in which the report actually influences the length of the sentence but the judge does not make that fact known, from those in which it does not. Ideally, there might be a rule to the effect of "disclosure whenever the sentence exceeds that which is normally given in a similar situation," but in light of all the extrajudicial factors that influence a particular judge, and given the disparity in sentences that are given to similarly situated defendants, such a rule would probably be of limited utility. Without a more explicit statement of a limited right of disclosure, however, it would be unwise to assume that *Weston* stands conclusively for such a right. The resolution of that issue will have to await subsequent cases involving the specific issue.

III. Prohibiting Sentences Based on Misinformation

The Supreme Court has never ruled directly on the question of a convicted

[11] Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125-27 (1963).

[12] *See, e.g.*, the cases cited in note 50 *infra*.

[13] Fed. R. Crim. P. 32.2, Advisory Comm. Note at 64-66 (Prelim. Draft of Proposed Amend. 1970).

person's right to be sentenced only upon the valid or undisputed aspects of a presentence report. Though early federal cases might have suggested a poor prognosis for such a proposition, policy and dicta in recent Supreme Court cases, together with lower court decisions on the subject, indicate increasing judicial approval of the idea. The most noted case dealing with a sentencing hearing is *Williams v. New York*,[14] a murder case in which the jury found the defendant guilty and recommended life imprisonment, but the trial judge imposed the death sentence, relying in part upon a specious presentence report. The report was paraphrased and disclosed to the defendant and his counsel, neither of whom challenged it. The Supreme Court affirmed the judgment, carefully distinguishing the applicability of the constitutional rights of notice of charge and confrontation of adverse witnesses to the adjudicatory stage and not to the sentencing process.[15] After generally discussing the value and need for presentence reports, the care taken in their preparation, and the penal objectives they serve, the Court concluded that a judge in a sentencing hearing is not restricted to the information received in open court. It noted, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."[16]

Courts of appeal are extremely reluctant to review the length of sentences falling within statutory limits, but *Williams*, though cited as authority for such a proposition, does not actually hold that. Despite the broadness of the language, it is more frequently distinguished than it is followed. Of particular note in *Williams* are the facts that however specious the report, no general or specific challenge was made at the time of disclosure, and that the Supreme Court did not find the report to be inaccurate. What *Williams* clearly does stand for is the proposition that due process does not include extending procedural and evidentiary rules into the sentencing process. That is far short of saying that misinformation, though objected to during disclosure, may nevertheless be used.

Though *Williams* seems to imply that rights in the sentencing hearing are severely limited, a case just prior to it, *Townsend v. Burke*,[17] held that a judgment would be vacated when the presentence report contained allegations that were materially untrue and the defendant was without counsel. Petitioner Townsend was read a presentence report that listed crimes for which he was tried and found not guilty, but the charges were treated by the trial judge as convictions.[18] The Supreme Court decided that the "uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record."[19] The grounds for reversal were an inaccurate report disclosed to a defendant who did not object and who was without counsel. The presence of counsel in *Williams* clearly distinguishes it from *Townsend*, but the crucial issue remaining is whether misinformation alone is sufficient for reversal, assuming the presence of counsel. If the Court in *Williams* had actually found that the presentence report was false, it could be assumed that a lack of counsel was requisite to reversal; but no such finding was made.

There is some language in *Townsend* suggesting that the reversal turned more

---

[14] 337 U.S. 241 (1949).

[15] *Id.* at 245-46.

[16] *Id.* at 251.

[17] 334 U.S. 736 (1948).

[18] The Supreme Court indicated that the sentencing record was not sufficiently clear so as to permit a finding of either "carelessness" or "foul play," or whether the fault was that of the prosecution, probation department, or the judge. *Id.* at 740.

[19] *Id.*

on the absence of counsel than on a factually inaccurate presentence report. The Court summarized its rationale by saying, "It is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process."[20] Of course, the absence of counsel would not alone invalidate a sentence because the right to counsel at trial was not recognized until 1963,[21] and not found applicable to the sentencing hearing until 1967.[22] However, one is constrained to ask at this point why the presence of counsel should make a difference. Apparently the Court felt that counsel would advise the defendant to challenge the inaccurate information in the report, since the defendant himself is the only one who can really assess the validity of the information. But, if this is so and, if the defendant challenges the report on his own, then the need for counsel no longer exists and what remains is a constitutional right to be sentenced only on accurate factual data relating to the report. To suppose that one could be sentenced on misinformation which he challenged at the time of disclosure simply because counsel was available to advise him that he ought to challenge it is to distort severely the import of *Townsend*. Now that a right to counsel at the sentencing stage exists, it would be somewhat ludicrous to assume that there is no longer a need for factual accuracy in presentence reports.

Support for this conclusion may be drawn from other Supreme Court cases, some lower court holdings, and the general policy considerations underlying both. Especially germane is the case of *North Carolina v. Pearce*,[23] in which petitioner challenged the constitutionality of receiving a longer sentence at the second trial on a charge for which a previous conviction had been set aside by a higher court. The analogy with *Weston* is striking; both questioned the kind of information that may be properly considered by a trial judge in determining the appropriate sentence in a given case. *Weston* concerned allegations of widespread narcotics involvement, and *Pearce* dealt with the fact that a higher court had reversed the case on appeal and the defendant had been convicted again at a second trial. The Supreme Court said with regard to petitioner Pearce:

> Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.[24]

If a sentence upon a new trial may only be increased in conformance with the above procedure, it is difficult to imagine what reasoning would permit the original sentence to be increased based upon a factually defective presentence report.

Equally persuasive support may be derived from the Supreme Court's approach in *Kent v. United States*,[25] a case dealing with the application of due process to the

---

[20] *Id.* at 741.

[21] Gideon v. Wainwright, 372 U.S. 335 (1963).

[22] Mempa v. Rhay, 389 U.S. 128 (1967).

[23] 395 U.S. 711 (1969).

[24] *Id.* at 726.

[25] 383 U.S. 541 (1966).

waiving of juvenile court jurisdiction and transfer to adult criminal court. In discussing the hearing at which the decision of waiver is made, the Court concluded that it is a decision of tremendous consequence, and hence cannot be reached "without ceremony, without hearing, without effective assistance of counsel, without a statement of reasons"[26] and that "as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court . . . ."[27] A decision of "tremendous consequence" relates to what the Court calls "a 'critically important' action determining vitally important statutory rights of the juvenile."[28] The analysis lends itself well to *Weston*, assuming that the underlying purpose of affording counsel an opportunity to see the social and probation records is to insure the accuracy of the contents. What must be established is that sentencing is a "critically important" stage in the adult criminal process. Two factors strongly support this conclusion: (1) the similarity of extending a sentence from the statutory minimum to the maximum (as in *Weston*) with waiving juvenile court jurisdiction, which increases a juvenile's potential period of incarceration from until his majority to the adult sentence for the particular crime;[29] and (2) the Supreme Court has already demonstrated that sentencing is sufficiently critical to require the presence of counsel. The import of the analogy is the significance the Supreme Court attached to the use of extrajudicial records and, implicitly, the importance of their containing accurate, factual data.[30]

Numerous courts of appeal have undertaken an examination of the proper role of a presentence report. As long ago as 1955 the Fifth Circuit cited *Townsend* in *Smith v. United States*[31] held that representations as to prior offenses supplied to the court by an agent of the FBI could not be used as the basis for imposing a harsher sentence unless the state could prove that the defendant was guilty of the crimes so alleged, the commission of which the defendant denied. In *United States ex. rel. Jackson v. Myers*[32] the Third Circuit vacated a judgment based upon an erroneous presentence report which indicated that the defendant had been found guilty of three prior crimes when, in fact, he had only been convicted of one. Regarding the fact that the defendant had been represented by counsel, the court said:

> Recognizing that *Townsend* rests upon this dual basis [error and lack of counsel], we nevertheless think that the facts of the present case entitle

---

[26] *Id.* at 554.

[27] *Id.* at 557.

[28] *Id.* at 556.

[29] *Kent* represented this situation, wherein a juvenile of 17 could be held only until age 21 regardless of the crime, but a waiver of juvenile court jurisdiction meant possible imprisonment for life under the adult penal system. The converse of this principle is the one most often noted for producing inequity under the juvenile law system. A juvenile found guilty of what constitutes a misdemeanor under the adult criminal code, hence punishable by perhaps six months at the maximum, may nevertheless be incarcerated until his majority, conceivably a period of many years.

[30] It should be noted that *Kent* is perhaps the best precedent to argue for a constitutional right of disclosure of presentence reports. Everything that can be said in justifying disclosure at a juvenile court waiver hearing applies with equal force to the defendant who stands before a judge who is in possession of a probation report, the contents of which are unknown to the defendant. Indeed, the latitude allowed a trial judge in sentencing makes it just as critical as the waiver hearing in which a juvenile may be made subject to sentences governing the crime of which he is accused. For a recent judicial assertion of a constitutional right of disclosure, see United States v. Dockery, 447 F.2d 1178 (D.C. Cir. 1971) (Wright, C.J., dissenting).

[31] 223 F.2d 750 (5th Cir. 1955).

[32] 374 F.2d 707 (3d Cir. 1967).

> the appellant to relief. The Supreme Court saw the wrong incurred as careless or designed sentencing on the basis of materially untrue facts and assumed that such injustice would normally be precluded by the presence of counsel. This, of course, is premised upon the effective protection by counsel at this juncture, not merely his physical attendance.[33]

The same result was reached in *United States ex. rel. Brown v. Rundle*,[34] in which petitioner's sentence was vacated because it was based, in part, upon an admission alleged to have been made by petitioner to the probation officer, contained in the latter's report to the trial judge, and denied by petitioner. The appeals court ruled that such an allegation must either be subject to a defendant's rights of confrontation and cross-examination or disregarded by the trial judge in sentencing.[35] And where the trial judge was either misinformed or confused about a defendant's criminal record and it affected sentencing, the judgment was vacated and a new hearing for obtaining the facts was ordered in *United States v. Malcolm*[36] by the Second Circuit.

Both the rationale supporting *Townsend* and the treatment given it by later federal cases strongly suggest that there is a constitutional right to the exclusion of misinformation disclosed by the trial judge in sentencing. No reasonable penal or social objective would be served by allowing a judge to rely upon disputed facts that are not even subject to the rules of evidence. While the question of whether or not a limited right of disclosure still exists, it is very unlikely that that which is disclosed and challenged for validity may be properly used for increasing a sentence.

IV. Challenging the Report: Degree and Burden of Proof

Aside from whether *Weston* actually stands for a limited right of disclosure in addition to the right to accuracy in a disclosed report, a more difficult question is presented when the validity of the report is actually challenged. Questions about a defendant's past criminal record can be resolved to the satisfaction of all parties involved by reference to the official sources of such information. But allegations involving reputation, character, and otherwise unverified extra-legal activity present far more serious problems. In fact, this was the essence of *Weston*, in which the defendant objected to all of the presentence report's assertions of extensive drug involvement and exhorbitant profits from the sale of drugs.[37] The defendant said that the report's description of her was without any factual basis, and her counsel told the court that he could not conceive of what kind of investigation he could make to disprove a statement by an unknown informer that his client was a large-scale heroin dealer.[38] The trial judge followed the accepted federal procedure in dealing with such a dispute and informed the defendant that the court had to assume the truth of the facts as stated in the presentence report in the absence of contrary factual information.[39] In effect, the court ascribed prima facie to the docu-

---

[33] *Id.* at 710.

[34] 417 F.2d 282 (3d Cir. 1969).

[35] *Id.* at 285.

[36] 432 F.2d 809 (2d Cir. 1970).

[37] 448 F.2d 626, 628 (9th Cir. 1971).

[38] *Id.* at 629.

[39] *Id.* It can reasonably be urged that the trial judge went to the limit of fairness under what he perceived as proper evidentiary rules in a sentencing hearing by reminding counsel of the availability of a motion for modification of sentence and volunteering to reduce the sentence on his own motion if unsatisfied with the report's conclusions after a personal inspection of the data used in its compilation. The appeals court seemed to acknowledge this by noting that, in fact,

ment validity and invited the defendant to accept the burden of disproving that which it contained. In other words, the burden was thrown upon the defendant to come forward with something other than a general denial to refute what the probation officer had asserted. If the defendant had done so, presumably the judge would either have disregarded the disputed information in his determination of the sentence or resolved the factual issue against one of the parties.

Weston changes two very fundamental aspects of this traditional burden and degree of proof procedure. First, the presentence report is no longer prima facie valid with the ordinary requirement of disproof by the defendant, but rather the burden of proof for any material fact that is challenged remains upon the prosecution. Thus an allegation of extensive drug dealing, if denied, is a fact for the prosecution to establish, not for the defense to disprove. Second, there is a degree of proof which the prosecution must satisfy with respect to the report. A judge "may not rely upon the information contained in the presentence report unless it is amplified by information such as to be persuasive of the validity of the charge there made."[40] It is difficult to translate the court's formulation into orthodox standards of proof, though it is reasonable to assume that it is something less than beyond a reasonable doubt and perhaps even less than a preponderance. What is clear is that it is something more than the unsworn memorandum of an FBI agent relating his conversations with an informant who implicated the defendant, as was the case in *Weston*,[41] and which was used as sole support for the charges made in the presentence report noted above.[42]

The court's reasoning with respect to placing the burden of proof upon the prosecution and requiring a standard of "persuasiveness" is grounded in due process. There can be no doubt of the intent of the court, as evidenced by its characterization of the traditional rule of requiring a defendant to disprove the report as "a great miscarriage of justice."[43] What is not convincingly demonstrated, however, is that the change brought about by *Weston* is constitutionally compelled. All of the precedent cited in the opinion is directed to the proposition that a sentence based on misinformation should be vacated, but no mention is made of burden or degree of proof. This is not unusual, though, since there is no conclusive right of disclosure, and consequently appellate courts have never considered the question. And when the report is disclosed, the defendant must still challenge it and show that, despite its questionable validity, the trial judge relied upon it for increasing the sentence imposed. As a result of this, *Weston* justifies the change by pointing out the inherent unfairness in using the unsworn statements of an unknown informer to increase the length of a sentence, as compared with the scrupulous care given to procedural and evidentiary rules in the trial itself.[44] As morally appeal-

---

the defendant could have spoken to the four alleged distributors named in the report, demonstrated that she had not made frequent trips to Mexico and Arizona for illegal purposes, and shown that her personal worth in no way supported the estimates of drug profits contained in the report.

[40] *Id.* at 634.

[41] *Id.* at 630.

[42] One ramification of the court's standard could be to require judges, whenever a presentence report is challenged, to examine all of the factual data that contributed to the report. Since reports are generally framed in a conclusory fashion, for example the defendant is a well known drug user, a judge would be compelled to examine whatever background material was used to reach that conclusion before he could be persuaded of the validity of such a charge.

[43] 448 F.2d at 634.

[44] *Id.*

ing as this may be,[45] it will survive only if accompanied by a showing that the procedure is sufficiently unfair so as to constitute a violation of due process of law.

The issue of burden and degree of proof may be sharpened by stating it in its alternative form, that is, whether or not it is unconstitutional to put the burden of proof upon the defendant in a criminal proceeding. Thus, it may be seen that questions of confrontation, cross-examination, and introduction of evidence are constitutionally distinct from whether the state may place the burden of proving something other than actual guilt upon the defendant.

The logical starting point for such a determination is *Leland v. Oregon*.[46] This case involved an Oregon statute which required a defendant who pleaded insanity as a defense to prove the fact of his insanity beyond a reasonable doubt. In upholding the power of a state to place the burden of proof of insanity upon the defendant, a divided Court said that the existence of a fairer or wiser method was immaterial and that they would not interfere with Oregon's policy because it did not violate "generally accepted concepts of basic standards of justice."[47] The case squarely holds that a defendant may be required to carry the burden of proof for elements other than guilt, and in this instance required proof beyond a reasonable doubt. Regarding this quantum of proof, the Court noted that while many states have a similar rule requiring only proof by a preponderance, they saw "no practical difference of such magnitude as to be significant in determining the constitutional question."[48] A somewhat analogous state practice which has not yet received Supreme Court consideration is a rule in about 15 states requiring proof of the elements of self defense by the defendant by a preponderance.[49] Again the concept of an affirmative defense is distinguishable from the elements of the crime which the state must prove beyond a reasonable doubt. The defense must be established by the defendant (who still carries a presumption of innocence) in order to be acquitted on the basis of the justifiable defense.

Support for *Weston*'s finding of unconstitutionality, aside from the policy argument mentioned, may be taken from some recent Supreme Court cases.[50] In *Specht v. Patterson*[51] a sentence under the Colorado Sex Offenders' Act[52] of indeterminate length was reversed because it was based on a conviction under an indecent liberties statute[53] that carried a maximum sentence of 10 years. The sentence was made without notice or full hearing, hence the defendant was essentially given a sentence under a statute for which no violation had been shown. The Court said

---

[45] The unfairness argument advanced by the court has been enlarged by commentators to include the unreasonableness of expecting probation officers who prepare the reports to be infallible, to be able to separate input data that is improperly prejudicial from that which is objective, and to avoid imparting some of their own bias into the report in all cases.

[46] 343 U.S. 790 (1952).

[47] *Id.* at 799.

[48] *Id.* at 798.

[49] This is oftentimes not a statutory procedure. *See, e.g.*, Ezell v. State, 119 Ohio St. 39, 162 N.E. 106 (1928); Szalkai v. State, 96 Ohio St. 36, 117 N.E. 12 (1916); Silvus v. State, 22 Ohio St 90 (1871).

[50] A recent New Jersey case, State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969), held that a defendant has a right to disclosure and that challenged information had to be verified, and a later case, State v. Horne, 56 N.J. 372, 267 A.2d 1 (1970), held that if the report was challenged, the state had the burden of introducing supporting evidence, but both cases rested on nonconstitutional grounds.

[51] 386 U.S. 605 (1967).

[52] COLO. REV. STAT. §§ 39-19-1 to 10 (1963).

[53] COLO. REV. STAT. § 40-2-32 (1963).

that to be sentenced under the second statute required "a new finding of fact that was not an ingredient of the offense charged,"[54] the charge being that the defendant either constituted a threat of bodily harm to the public or was an habitual offender and mentally ill. It would surely seem that *Weston* requires similar analysis, since the defendant was given a longer sentence based on a new finding of fact regarding extensive illegal drug dealing. Although the increased sentence did not come under a different statute, the net effect of increasing actual incarceration based on facts that were not a part of the proof required for the conviction is identical in each case. The remedy in each case is the same; have a hearing in which the facts that the state alleges justify the increased sentence be proven. It follows that the state would be compelled to carry the burden of proof (as indeed they were in *Specht*) with regard to such new facts.

In Re Winship,[55] a case which decided that juveniles were entitled to proof beyond a reasonable doubt in establishing guilt of the substantive offense charged, rather than by a preponderance, also provides some support for *Weston*. The court there quoted the dissent in *Leland* in reaffirming that "[i]t is the duty of the government to establish . . . guilt beyond a reasonable doubt."[56] That dissent, of course, stood for the proposition that it was unconstitutional to put the burden of proving insanity upon the defendant. The Court also refined the notion by adding that the proof could only be achieved through "evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with . . . [the beyond a reasonable doubt] standard."[57] Those rules of evidence have without exception reserved the burden of proof of material facts contributing to criminal punishment to the state. Further support may be inferred from *Lego v. Twomey*,[58] which held that proof by a preponderance is sufficient to warrant the admission of a confession which the defendant challenged as having been coerced. What is relevant to *Weston* is not the standard of proof required, but rather of whom it is required. The Court emphasized the role of the state in proving elements of a crime and avoiding unjust convictions.[59] But there is nothing less unjust about being given a longer sentence on the basis of unproven facts than being given any sentence at all based on unproven facts. The conspicuous absence of any reference to placing the burden upon the defendant for proving a confession to have been coerced suggests that compelling him to disprove a presentence report would be equally untenable.

The ultimate resolution of where the burden lies necessitates a choice between the precedent for state discretion and the logic of newer cases rejecting such discretion. The changing composition of the Supreme Court[60] will no doubt greatly influence the outcome of any case presenting this issue, should it reach that Court.

---

[54] 386 U.S. at 608.

[55] 397 U.S. 358 (1970).

[56] *Id.* at 362 *citing* Leland v. Oregon, 343 U.S. 790 (1952).

[57] 397 U.S. at 362 *citing* Brinegar v. United States, 338 U.S. 160 (1949).

[58] 40 U.S.L.W. 4135 (U.S. Jan. 12, 1972).

[59] The Court in *Lego* spoke only of the degrees of proof required of the state and did not mention the possibility of any state requiring the defendant to carry a burden of proof in a criminal case. This might imply that either the Court was unaware of the practice by any state, or it felt such a procedure to be unconstitutional, hence did not bother to discuss it. The latter interpretation would fully support the position of *Weston* condemning such a procedure with respect to presentence reports.

[60] It should be noted that *Lego* was a four to three decision, with the dissent holding for a higher standard of proof, and with Powell and Rhenquist, JJ., taking no part in the case.

It would seem, however, that the potential for injustice far outweighs any state interest that might obtain in shifting the burden of proof at any stage of the criminal process to the defendant. The recent cases discussed above have so held, and should be regarded as supporting what is surely the fairest approach, and which is also the one most consistent with our traditional system of criminal justice.

V. CONCLUSION

Weston contains some far reaching implications, and even a narrow reading of the opinion reveals substantial areas of change. Following *Lego*, if the burden of proof is properly placed upon the state, will "persuasiveness" be a proper standard, or will it have to be by a preponderance (as the *Lego* majority held) or even beyond a reasonable doubt (as the *Lego* dissent held)? Such a question would no doubt require litigation of its own to be satisfactorily answered. Another issue may be the extent to which the trial judge must examine data which supports the conclusions of the probation officer. *Weston* asserts that disputed facts must be found persuasively true before they can be relied upon, which implies that both the trial court and appellate courts must examine all the relevant underlying documentation before arriving at a determination of its veracity.

There are a few implications in *Weston* which could harm future defendants in similar circumstances. Judges who recognize controversial aspects in a presentence report might exercise their discretion and not disclose any of the report for fear of challenge and additional evidentiary procedures and delays. So long as disclosure remains discretionary, such a possibility will always exist. Also, a judge might conceal the fact that he is relying upon the report in sentencing or assert grounds other than the subjective portion of the report for imposing a longer than usual sentence. But, these dangers exist only because of the lack of a right of disclosure. The best counter-argument to them is the ability of the judge to disregard disputed elements of the report in determining the most appropriate sentence for a given defendant. Moreover, all things considered, these potential abuses detract little, if at all, from the ultimate benefit that *Weston* confers upon defendants who receive overly severe sentences because they are unable to disprove unsworn hearsay statements regarding collateral criminal activity or misconduct.

Regardless of what construction the courts ultimately give to *Weston*, it is doubtful that it alone can be relied upon to reach the fairest method for utilizing presentence reports. That procedure would be one in which the defendant was informed of and the record reflected all reasons underlying the imposition of a sentence greater than the statutory minimum. Only then will the dangers surrounding the use of presentence reports be reduced without derogating from the many useful functions they serve. The practical difficulties would be slight and the net effect would be to put the sentencing hearing on a level comparable to the trial itself with respect to procedural safeguards. Such a requirement clearly invokes the spirit, if not the letter, of due process and its emphasis upon guaranteeing fairness throughout the entire criminal process. *Weston* represents a significant step towards reducing the abuses of presentence reports insofar as they allege criminal activity. Recognition of a limited constitutional right to factual determination is long overdue yet still short of what true justice demands. No person should be able to compel the incarceration of another beyond what the legislature has determined is the minimum penalty for a given offense without being required to state reasons and facts that support the necessity for doing so.

Robert L. Beals

DAMAGES—JURY INSTRUCTION ON THE TAX-EXEMPT STATUS OF THE PERSONAL INJURY AWARD—*Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3d Cir. 1970), *cert. denied*, 404 U.S. 883 (1971).

The Internal Revenue Code provides that damages received in personal injury and wrongful death actions are not to be included in the gross income of the recipient.[1] Such damage awards come to the successful plaintiff tax-free, except for that portion, if any, which represents a prior tax deduction.[2]

If a jury in a personal injury case is not aware of this exclusion, it might properly compute the plaintiff's award according to the court's charge on the measure of damages and then mistakenly add a further amount to offset income taxes on the award, believing this necessary to compensate the plaintiff for his losses.[3] The larger the award, the more significant this increment for nonexistent taxes could become, assuming the jury is aware of the progressiveness of the tax rate structure. Fearing this possibility, defendants frequently request the court to inform the jury that the award is not, in fact, taxable.

Domeracki v. Humble Oil and Refining Co.,[4] a case presenting the issue of whether a court should instruct the jury that a personal injury award is not taxable, involved a personal injury claim by a longshoreman against a shipowner. A federal district court jury found liability and awarded damages in the amount of $270,982.[5] On appeal,[6] Humble argued, among other things, that the trial court had erred in refusing to instruct the jury as follows:

> I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of federal income taxes.[7]

Judge Aldisert, writing for a unanimous Third Circuit, analyzed the question in the following manner. (1) In a personal injury action, the plaintiff should be compensated for his losses. (2) This end is furthered when the trial court properly instructs the jury on the measure of damages, and the jury follows the instructions. (3) There is widespread public awareness that recipients of large sums of money, such as winners of sweepstakes and television contests, are required to pay income taxes on their winnings. (4) Few members of the general public are aware that personal injury awards are exempt from the federal income tax. (5) It is therefore

---

[1] INT. REV. CODE of 1954, § 104(a)(2). The exclusion applies to damages received in settlement of claims as well as to awards.

[2] *Id.* Punitive damages and interest on the judgment however, are, generally taxable. Cutler, *Taxation of the Proceeds of Litigation*, 57 COLUM. L. REV. 470 (1957).

This article is concerned with the ordinary elements of damages, such as past loss of earnings (between the time the injury was suffered and the time of trial), loss of future earning capacity, medical expenses, pain and suffering, and damages unique to wrongful death actions.

The applicable state and local income tax statutes may contain a similar exclusion.

[3] This problem does not, of course, arise in non-jury trials.

[4] 312 F. Supp. 374 (E.D. Pa. 1970), *aff'd*, 443 F.2d 1245 (3d Cir. 1970), *cert. denied*, 404 U.S. 883 (1971).

[5] 312 F. Supp. at 375, 376 n.1.

[6] Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245 (3d Cir. 1970), *cert. denied*, 404 U.S. 883 (1971).

[7] *Id.* at 1248-49.

logical to assume that there exists a widespread belief, among those who have reason to think about the issue, that personal injury awards are taxed. (6) It is possible that, after having computed the plaintiff's damages pursuant to the court's instructions, the jury, mistakenly believing that the award is taxable, might add a further amount to the award so that the plaintiff will retain the original amount after paying income tax on the award. (7) The instruction in question would dispel this mistaken belief and prevent the jury from improperly including in the award an amount for nonexistent taxes thereon. (8) To the extent that the cautionary instruction has its desired effect, the result is closer adherence to the court's charge on the measure of damages, and thus a more just compensation. (9) The objection, that such an instruction would inject into the trial complex income tax computations in determining the plaintiff's loss of past earnings or future earning capacity, arises from confusing two separate and distinct questions. The first is whether the defendant may properly introduce evidence of the income taxes which the plaintiff would have paid on his lost past earnings and future income had he not been injured. The second is whether the jury should be instructed that the award itself is not taxable. None of the arguments against the introduction of tax evidence during the trial is pertinent to the latter question. (10) Therefore, the district court should have given the requested instruction.[8] Thus the Third Circuit held that

> in personal injuries actions the trial courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award.[9]

The reasoning of the Third Circuit in *Domeracki* appears sound, perhaps even incontrovertible. Yet, as far as this writer can discover, of all the courts which have previously considered the issue, only the Supreme Court of Missouri has held that the trial judge must give a cautionary instruction on the tax-exempt nature of the personal injury award when requested to do so.[10] A few courts have held that it is not error to give such an instruction when requested by the defendant to do so.[11]

---

[8] *Id.* at 1249-51.

[9] *Id.* at 1251. Humble did not, however, reap the fruits of its victory, at least in this particular action, since the court made its holding prospective only and affirmed the judgment of the district court. The court gave two reasons for applying its holding only to future cases. First, there was no evidence that the jury in this case increased the award from a mistaken belief that it was taxable. Second, since the holding was without precedent in the federal courts, the trial court did not err in refusing to give the instruction when it was requested. *Id.* at 1252. Humble petitioned for, and was denied, a writ of certiorari on the issue of prospective application alone. Petitioner's Brief for Certiorari at 1, Domeracki v. Humble Oil & Ref. Co., 404 U.S. 883 (1971).

[10] Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952). There is dictum to this effect in Texas & N.O. Ry. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1954). No court has suggested, much less held, that trial courts must give such an instruction in cases in which the defendant has not requested it.

[11] Anderson v. United Air Lines, 183 F. Supp. 97, 97-98 (S.D. Cal. 1960); Stager v. Fla. E.C. Ry., 163 So.2d 15, 18 (Ct. App. Fla. 1964), *cert. denied*, 174 So. 2d 540 (Fla.), *cert. denied*, 382 U.S. 878 (1965); Poirier v. Shireman, 129 So.2d 439, 444-45 (Ct. App. Fla. 1961). In the *Anderson* case, the court pointed out that the instruction was particularly desirable in view of the circumstances. Among other things, the decedent had been in a high tax bracket, and the jurors were particularly sensitive to the subject of income taxes, since the period for filing tax returns had recently ended. Anderson v. United Air Lines, *supra* at 98. *Cf.* Gault v. Poor Sisters, 375 F.2d 539 (6th Cir. 1967), in which the jury, during deliberations had inquired of the trial judge whether the award would be taxable. The judge instructed the

The vast majority of courts have held, however, that refusal to give the instruction is not error.[12] A few of these courts have indicated that a trial court may properly give the instruction,[13] but many state that the instruction is never proper.[14]

Since the Third Circuit departed from considerable precedent, an examination

jury that the award would not be taxable, and the Court of Appeals for the Sixth Circuit held that the instruction in response to the inquiry was proper. *Id.* at 548.

[12] These courts include the United States Court of Appeals for the Second, Fifth and Sixth Circuits. Thus the *Domeracki* decision has created a division of the circuits on this issue. Greco v. Seaboard Coast Line R.R., 464 F.2d 496 (5th Cir. 1972) (post-*Domeracki*); Cunningham v. Bay Drilling Co., 421 F.2d 1398, 1399 (5th Cir. 1970); Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997, 998 (5th Cir. 1964); Payne v. Baltimore & O.R.R., 309 F.2d 546, 550 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963); McWeeney v. N.Y., N.H. & H.R.R., 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); N.Y.C.R.R. v. Delich, 252 F.2d 522, 527 (6th Cir. 1958) (involved a badly drawn, cryptic instruction); Altemus v. Pa. R.R., 32 F.R.D. 7, 8 (D. Del. 1963) (dictum); Moffa v. Perkins Trucking Co., 200 F. Supp. 183, 189 (D. Conn. 1961); Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750, 757 (N.D. Iowa 1955); Mitchell v. Emblade, 80 Ariz. 398, 405, 298 P.2d 1034, 1038 (1956) (obscurely phrased instruction); Henninger v. Southern P., 250 Cal. App. 2d 872, 879-80, 59 Cal. Rptr. 76, 81 (Ct. App. 1967); Atherly v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 589, 298 P.2d 700, 709 (Ct. App. 1956) (instruction evidently directed jury to decrease award because award was not taxable); Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 582, 271 A.2d 94, 97 (1970); Atlantic C.L.R.R. v. Braz. 182 So. 2d 491, 495 (Ct. App. Fla. 1966); Atlantic C.L.R.R. v. Brown, 93 Ga. App. 805, 807, 92 S.E.2d 874, 876 (Ct. App. 1956); Kawamoto v. Yasutake, 49 Hawaii 42, 51, 410 P.2d 976, 981 (1966); Hall v. Chicago & N.W. Ry., 5 Ill.2d 135, 151, 125 N.E.2d 77, 85-86 (1955) (defendant attempted to inform jury that award was tax-exempt in his closing argument rather than by instruction); Highshew v. Kushto, 235 Ind. 505, 507-08, 134 N.E.2d 555, 556 (1956); Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 353, 350 P.2d 18, 24 (1960); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844, 848 (Ky. 1958); Guerra v. W.J. Young Constr. Co., 165 So.2d 882, 887 (Ct. App. La.), *cert. denied*, 167 So.2d 676 (La. 1964); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 432, 80 N.W.2d 625, 636 (1957); Bowyer v. Te-Co, Inc., 310 S.W.2d 892, 897 (Mo. 1958) (variant instruction from that approved in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); Bracy v. Great N.R.R., 136 Mont. 65, 75, 343 P.2d 848, 853 (1959) (instruction would have also directed jury not to include in award an amount for court costs or attorney's fees); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 403, 13 N.W.2d 627, 632 (1944) (trial judge had refused to answer jury's question, which had arisen during deliberation, whether award was taxable); Maus v. New York, C. & L.R.R., 165 Ohio St. 281, 284-85, 135 N.E.2d 253, 255-56 (1956) (vaguely worded instruction); Chicago, R.I. & P.R.R. v. Kinsey, 372 P.2d 863, 866-67 (Okla. 1962); Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 627-28, 376 S.W.2d 745, 749 (Ct. App. 1963), *cert. denied*, 379 U.S. 878 (1964); Missouri-K.-T.R.R. v. McFerrin, 156 Tex. 69, 90, 291, S.W.2d 931, 945 (1956); Crum v. Ward, 146 W. Va. 421, 444, 122 S.E.2d 18, 31 (1961); Behringer v. State Farm Mut. Auto. Ins. Co., 6 Wis.2d 595, 603, 95 N.W.2d 249, 254 (1959) (arguably misleading instruction); Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 407-08, 94 N.W.2d 577, 583 (1959).

[13] McWeeney v. N.Y., N.H. & H.R.R., 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Atherly v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 589, 298 P.2d 700, 709 (Ct. App. 1956); Atlantic C.L.R.R. v. Braz, 182 So.2d 491, 495 (Ct. App. Fla. 1966); Behringer v. State Farm Mut. Auto. Ins. Co., 6 Wis.2d 595, 604, 95 N.W.2d 249, 254 (1959).

[14] Atlantic C.L.R.R. v. Brown, 93 Ga. App. 805, 807, 92 S.E.2d 874, 876 (Ct. App. 1956); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 150-52, 125 N.E.2d 77, 85-86 (1955); Highshew v. Kushto, 235 Ind. 505, 507-08, 134 N.E.2d 555, 556 (1956); Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 350-54, 350 P.2d 18, 22-25 (1960); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844, 848 (Ky. 1958); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 432, 80 N.W.2d 625, 636 (1957); Chicago, R.I. & P.R.R. v. Kinsey, 372 P.2d 863, 866-67 (Okla. 1962); Missouri-K.-T.R.R. v. McFerrin, 156 Tex. 69, 90, 291 S.W.2d 931, 945 (1956); Crum v. Ward, 146 W. Va. 421, 442-44, 122 S.E.2d 18, 30-31 (1961). As far as this writer can discover, only one court has held that a trial court committed reversible error in giving the instruction. Wagner v. Illinois C.R.R., 7 Ill. App. 2d 445, 447, 129 N.E.2d 771, 772 (Ct. App. 1955).

of the arguments rejected in *Domeracki* is necessary to a fair appraisal of this decision. The following analysis of the several arguments advanced by courts against the giving of the cautionary instruction will, it is submitted, demonstrate the soundness of the *Domeracki* rule. First, it is apparent that some courts[15] have disapproved the cautionary instruction because they have confused the issue of the admissibility of evidence concerning income taxes on the plaintiff's past lost earnings and hypothetical future earnings with the issue of whether the jury should be instructed that the *award itself* is non-taxable.[16] The Supreme Court of Indiana, in discussing a cautionary instruction, said that

> Inquiries at a trial into the incidents of taxation in damage suits of the character we have here, would open up broad and new matters not pertinent to the issues involved. Such subject matter would involve intricate instruction on tax and non-tax liabilities with all the regulations pertinent thereto. No court could, with any certainty, properly instruct a jury without a tax expert at its side. In our judgment such matters are not a proper subject for instruction or argument of counsel.[17]

As the court in *Domeracki* correctly points out, "the considerations relating to the former issue have no relevance to the second."[18]

Another common objection to the instruction has been stated as follows:

> It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how the defendant acquires the money with which to pay the award, is of no concern to the court or jury.[19]

To grant that it is immaterial to a jury that the plaintiff will not have to pay income tax on his award, however, is not to conclude that the jury should remain

---

[15] Henninger v. Southern P., 250 Cal. App. 2d 872, 879-80, 59 Cal. Rptr. 76, 81 (Ct. App. 1967); Highshew v. Kushto, 235 Ind. 505, 507-08, 134 N.E.2d 555, 556 (1956); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 432, 80 N.W.2d 625, 636 (1957); Bracy v. Great N.R.R., 136 Mont. 65, 74, 343 P.2d 848, 853 (1959); Dixie Feed & Seed Co., v. Byrd, 52 Tenn. App. 619, 627-28, 376 S.W.2d 745, 749 (Ct. App. 1963), *cert. denied*, 379 U.S. 878 (1964). *See* Cunningham v. Bay Drilling Co., 421 F.2d 1398, 1399 (5th Cir. 1970) (per curiam) (the court cites two cases on point, both with per curiam opinions, and an additional case which involved only the evidentiary issue); Missouri-K.-T.R.R. v. McFerrin, 156 Tex. 69, 90, 291 S.W.2d 931, 945 (1956).

[16] Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir. 1970), *cert. denied*, 404 U.S. 883 (1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.12 (1956, Supp. 1968); Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 231 (1958); Roettger, *The Cautionary Instruction on Income Taxes in Negligence Actions*, 18 WASH. & LEE L. REV. 1, 2 n.3. (1961).

[17] Highshew v. Kushto, 235 Ind. 505, 507-08, 134 N.E.2d 555, 556 (1956).

[18] 443 F.2d at 1250-51. The court continued:

> The instruction requested in this case would not require the introduction of any additional evidence. No reference to any IRS regulation or to any specific statute would be necessary. No tax expert would need be summoned as a witness. No tax tables would be hauled into the courtroom. No additional computation would be required. In brief, such an instruction would not open the trial to matters irrelevant to traditional issues in personal injury litigation, and thus would in no way complicate the case or confuse the jury.

Id. at 1251.

[19] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955); *accord*, Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 581, 271 A.2d 94, 97 (1970); Atlantic C.L.R.R. v. Brown, 93 Ga. App. 805, 807, 92 S.E.2d 874, 876 (Ct. App. 1956); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 431, 80 N.W.2d 625, 636 (1957); Crum v. Ward, 146 W. Va. 421, 442, 122 S.E.2d 18, 30 (1961).

unaware that this is so. The possibility exists that a jury may consider its mistaken belief on this point so material that it disregards, innocently or intentionally, the court's instructions on the proper measure of damages. When presented with a colorable argument that some juries may increase the damage award to enable the plaintiff to satisfy a nonexistent income tax liability, a court which replies that the taxability of the award is none of the jury's business is not helping to solve the problem, but only denying that a problem exists.

Courts have further reasoned that since the judge has already instructed the jury on the proper measurement of the plaintiff's damages, and since "by the very nature of the jury system this court cannot indulge the presumption that juries do not follow the instructions of the courts,"[20] an additional instruction to refrain from including in the award an amount for income taxes thereon is superfluous. In other words, the charge to the jury to measure the plaintiff's damages according to a certain formula contains by negative implication the instruction not to deviate from that formula by including in the award an amount for taxes thereon. This argument, appealing in its logic, would be unassailable if a computer sat in the jury box, for, being programmed to perform a certain operation, the computer would perform that operation and stop; it would not perform an additional step, since to do so would be inconsistent with its instructions. In contrast, it is entirely possible that human jurors, oblivious to the negative implication buried in the court's instruction, might disobey that instruction in the belief that they are following it. Although a court must, if the jury system is to make sense, presume that the jury will not *intentionally* deviate from the instructions on the measure of damages, a tax-conscious jury might, after properly computing an award, add an amount to offset supposed income taxes on the award, thereby deviating from the instructions in an attempt to comply with them by giving the plaintiff full compensation for his damages.[21] A court which ignores this possibility cannot be assured that

> some persuasive extrovert on the jury will not say: "Sure, I know, all these verdicts, you have to pay taxes, if we want this fellow to get $50,000, you got to give him $100,000." Some more reflective introvert might say, "I don't know, I am not sure, why not ask the judge for instruction?" This is, of course, possible, but it is equally probable that in the jury room just as in life on the outside, reflective minds are frequently brushed aside, and capitulate.
>
> The point need not be belabored further. The conclusion is obvious. Why have uncertainty when certainty can be so easily achieved?[22]

---

[20] Hall v. Chicago & N.W. Ry., 5 Ill.2d 135, 150, 125 N.E.2d 77, 85 (1955); *accord*, McWeeney v. N.Y., N.H. & H.R.R., 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Mitchell v. Emblade, 80 Ariz. 398, 405, 298 P.2d 1034, 1038 (1956); Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 581, 271 A.2d 94, 97 (1970); Atlantic C.L.R.R. v. Braz, 182 So.2d 491, 495 (Ct. App. Fla. 1966); Kawamoto v. Yasutake, 49 Hawaii 42, 51, 410 P.2d 976, 981 (1966); Guerra v. W.J. Young Constr. Co., 165 So.2d 882, 887 (Ct. App. La.), *cert. denied*, 167 So.2d 676 (La. 1964); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 431, 80 N.W.2d 625, 636 (1957); Bracy v. Great N.R.R., 136 Mont. 65, 75, 343 P.2d 848, 853 (1959); Chicago, R.I. & P.R.R. v. Kinsey, 372 P.2d 863, 866-67 (Okla. 1962); Missouri-K.-T.R.R. v. McFerrin, 279 S.W.2d 410, 419 (Tex. Civ. App. 1955), *rev'd on other grounds*, 156 Tex. 69, 291 S.W.2d 931 (1956); Crum v. Ward, 146 W. Va. 421, 443, 122 S.E.2d 18, 30-31 (1961).

[21] Comment, *Personal Injury Awards and the Nonexistent Income Tax—What Is a Proper Jury Charge?*, 26 FORDHAM L. REV. 98, 101-03 (1957).

[22] Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 318 (2d Cir. 1964) (Moore, J., dissenting) (an unusual dissent, since the issue of the cautionary instruction on income taxes was not involved in the case); *accord*, Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245,

That such colloquies occur frequently is apparent from the many reported cases in which juries have asked judges whether the award would be taxable.[23] Since jury deliberations are not reported, it is impossible to ascertain the number of verdicts which have been inflated to offset nonexistent taxes.

Still another objection to the instruction which was approved in *Domeracki* is that it might lead the jury to undercompensate the plaintiff. This objection is based on the argument that a jury which knows or believes that the amounts introduced into evidence representing the plaintiff's lost earnings have not been reduced by income taxes, and which is instructed that the award computed from these pre-tax amounts will itself not be taxed, might be unwilling to award the plaintiff more than he would have actually received in after-tax income had he not been injured. The jury might deduct from the properly computed award an amount which it estimates the plaintiff would have paid in taxes had he earned the money represented by the award.[24] This danger can be minimized with a well-drafted instruction such as the one approved in *Domeracki*.[25] The instruction should inform the jury that if an award is made, it is not subject to income taxes. It should direct the jury to measure the plaintiff's damages by the instructions already given, and to neither add to *nor subtract from* the award on account of federal income taxes.

As Professor Nordstrom points out,[26] the issue finally becomes a question of what goes on in the jury room. To the extent that, having received the cautionary instruction, the jury includes in its award an amount to cover nonexistent taxes, the

---

1251 (3d Cir. 1970), *cert. denied*, 404 U.S. 883 (1971); Payne v. Baltimore & O.R.R., 309 F.2d 546, 551-52 (6th Cir. 1962) (O'Sullivan, J., dissenting); McWeeney v. N.Y., N.H. & H.R.R., 282 F.2d 34, 40-41 (2d Cir. 1960) (Lumbard, C.J., dissenting); Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.12, at 1327-28 (1956); Nordstrom, *supra* note 16, at 236; Peck & Hopkins, *Economics and Impaired Earning Capacity in Personal Injury Cases*, 44 WASH. L. REV. 351, 369-70 (1969).

[23] *E.g.*, Laird v. Hudson Eng'r Corp., 449 F.2d 216 (5th Cir. 1971); Gault v. Poor Sisters, 375 F.2d 539 (6th Cir. 1967); Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 350 P.2d 18 (1960); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627 (1944); Osborne v. Miller, 38 App. Div. 2d 298, 328 N.Y.S.2d 769 (1972); Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S.2d 8 (1968). One writer reports that, "A judge of the Supreme Court of Ohio . . . stated that during his tenure as a Common Pleas Judge, five Foremen asked this specific question." Morris, *Should Juries in Personal Injury Cases Be Instructed That Plaintiff's Recoveries Are Not Income within the Meaning of Federal Tax Law?*, 3 DEFENSE L.J. 3, 12 (1958).

[24] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 85-86 (1955); Hardware Mut. Cas. Co., v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 405-08, 94 N.W.2d 577, 581-83 (1959); Crum v. Ward, 146 W. Va. 421, 443-44, 122 S.E.2d 18, 31 (1961). This argument makes sense in "gross income" jurisdictions, those in which the award is computed from evidence of the plaintiff's pretax earnings, but is not persuasive in "net income" jurisdictions, since the jury is instructed to deduct an amount for income taxes from the plaintiff's lost earnings and loss of future earning capacity in computing the award. *Cf.* Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957), in which the net income (minority) rule is established in Connecticut.

In several cases, courts have wisely upheld trial courts' refusals to give purported cautionary instructions so worded by the defendants that the juries could easily have interpreted them to require, or at least allow, a net income award. *E.g.*, Bowyer v. Te-Co, Inc., 310 S.W.2d 892 (Mo. 1958); Maus v. New York, C. & St. L.R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956); Behringer v. State Farm Mut. Auto. Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

[25] *See* text accompanying note 4 *supra*. 2 F. HARPER & F. JAMES, *supra* note 16; Nordstrom, *supra* note 16, at 234-35.

[26] Nordstrom, *supra* note 16.

plaintiff is overcompensated.[27] On the other hand, to the extent that, having received the instruction, the jury awards the plaintiff less than it would have had it not heard the charge, he is undercompensated.[28] In either case, the desideratum is that the court charge the jury in the manner most likely to result in fair compensation according to the rules of damages. The problem is that we do not know what goes on in jury rooms; courts can only guess, instruct and hope, but

> certainly the English language is both broad enough and precise enough to form the basis of an instruction that makes it clear that the jury should not add an amount to a verdict for the payment of nonexistent taxes and at the same time that it should not subtract an amount because the award comes to the plaintiff tax-free.[29]

A few courts have opposed the cautionary instruction on the ground that to allow it would pave the way for other instructions which are clearly improper. This argument grants that the cautionary instruction correctly states the law, but asks why, if the defendant is entitled to this instruction, the plaintiff should not be entitled to instructions which state the law just as correctly, such as that

> the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, that the defendant can deduct any award it pays from its income and excess profits tax return and that the . . . [defendant will not absorb the amount of the award, but will pass it on in the form of increased prices].[30]

The answer to this objection is that a plaintiff requests such instructions in the hope of receiving an increase in the award to which he is not entitled, while the defendant's purpose in requesting a properly phrased cautionary instruction on taxes is to prevent the plaintiff from receiving an added amount to which he is not entitled.[31] The likely effects on the jury of the two types of instructions are similarly distinguishable.

---

[27] "[This] would be improper regardless of whether the jurisdiction follows the gross or net rule with regard to earnings, and regardless of which elements of damages comprise the award." Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 279 (1966).

[28] "Is it worse that a jury, in disregard of instructions and presumptions, will reduce an award which in natural justice should have been reduced by taxes that would have been owed, or that the jury will compound an injustice, already present because gross earnings for damage purposes take no account of taxes, by adding still another windfall in the erroneous belief that no exemption exists for injury awards?" Burns, *A Compensation Award for Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell the Jury?*, 14 DEPAUL L. REV. 320, 331 (1965). This argument is directed to the equity of the gross income rule as a method of measuring damages, and ignores the fact that, for purposes of this article, any departure from the measure of damages deemed proper in a given jurisdiction is undesirable.

[29] Nordstrom, *supra* note 16, at 235.

[30] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955).

[31] "A more telling analogy may be made to the exclusionary rule concerning insurance. Defendant's counsel is not permitted to inform the jury that the defendant is uninsured despite the possibility that the jury might otherwise assume insurance and find liability or increased damages because of its notions of desirable risk distribution." Comment, *Propriety of Comment on non-Taxability of Personal Injury Verdict*, 21 U. CHI. L. REV. 156, 158 (1953). Although this point is well taken, a discussion of the merits of the exclusionary rule concerning insurance is beyond the scope of this article. Even if the rule is well-founded, that does not necessarily

Finally, refusal to give the instruction cannot be justified on the ground that, since personal injury awards do not, as a rule, overcompensate plaintiffs, it would be counterproductive to vary the mechanism which produces these awards. This argument (which for obvious reasons courts do not articulate) fails because "it assumes the correctness of the end product and then proves the end product by the assumption."[32] If personal injury awards are generally fair, then for reasons previously discussed, the tendency of the absence of the cautionary instruction to inflate awards above the level of fair compensation is being counterbalanced by some defect or defects in other elements of the equation. While it may or may not be that these two defects cancel each other in the totality of cases, there is no way of knowing whether they do so in a particular case.[33]

In conclusion, for whatever reason or reasons, courts in the past have generally viewed the cautionary instruction on the nontaxability of the award with disfavor. It is significant that the Court of Appeals for the Third Circuit in *Domeracki* has held, without precedent in the federal courts, that the trial courts in that circuit *must* give this instruction when so requested. The decision deserves careful study by the courts which will consider this issue in the future.

Harry M. Cochran, Jr.

LABOR LAW—RIGHT TO STRIKE IN THE ABSENCE OF A NO-STRIKE CLAUSE OR GRIEVANCE-ARBITRATION PROVISION—*Iodice v. Calabrese*, 345 F. Supp. 248 (S.D.N.Y. 1972).

I. INTRODUCTION

Although the right to strike has never been accorded unqualified constitutional protection,[1] the National Labor Relations Act (NLRA),[2] as amended, recognizes strike activity as a lawful economic weapon in labor disputes. Indeed, one of the central purposes of the NLRA is to facilitate the use of strikes and other forms of economic pressure by employees to achieve parity of bargaining power between management and labor.[3] Because the NLRA provides the primary statutory regulation of the right to strike, it is the logical starting point in determining whether strike activity is protected.

In *Iodice v. Calabrese*[4] a district court disregarded the NLRA in determining that the defendant union breached its collective bargaining agreement with its employer. Moreover, apparently straining to find a compensable ground, the court constructed a new theory of labor agreement law: even in the absence of a no-strike clause or

militate against the propriety of the cautionary instruction concerning the taxability of the award, since different considerations are involved.

[32] Nordstrom, *supra* note 16, at 236.

[33] "It is unsafe to assume that this other element which needs to be re-defined—whatever it may be—is balanced by the present status of what twelve people erroneously believe—and this could vary from case to case—about the impact of income taxes on the award they make." *Id.* at 237.

---

[1] THE DEVELOPING LABOR LAW 518 (C. Morris ed. 1971).

[2] 29 U.S.C. § 151 *et. seq.* (1970).

[3] Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951); *see* H.R. REP. NO. 1147, 74th Cong., 1st Sess. (1935).

[4] 345 F. Supp. 248 (S.D.N.Y. 1972).

grievance-arbitration provision, a strike breaches a collective bargaining agreement if it is not justified by a prior material breach by the employer.

II. Statement of Facts

In 1950 former Teamster member Anthony Iodice witnessed an assault by Peter Calabrese, a business agent for Teamsters Local 456. He later testified against Calabrese, who was convicted of criminal assault and subsequently served nearly nine months of a one-year sentence. Apparently in retaliation for his testimony against Calabrese, Iodice suffered continuing business interruptions resulting from harassment by Calabrese and the union.

In 1965 Iodice purchased Pelham Transportation Company, Inc. (Pelham) for Bart Ruggiero. Thereafter, Ruggiero owned Pelham, and Iodice served in a minor advisory capacity. Pelham signed a contract with Local 456. The Teamsters began a strike against Pelham on November 5, 1965. The strike lasted approximately two years and forced Pelham out of business. Pelham had failed over the months to make fringe benefit payments, a clear breach of the union contract. Even though Ruggiero tendered payment in an attempt to extinguish the debt and thereby resolve the dispute, Calabrese refused to accept the offer, claiming that back pay was due one of the union members who had not worked during the strike. As a consequence of this labor dispute, plaintiffs Iodice, Pelham and others brought this action against defendant Calabrese. This article will focus upon Pelham's claim under § 301 of the Labor Management Relations Act (LMRA)[5] that Local 456 breached the collective bargaining agreement by continuing the strike beyond the date on which payment was tendered.

III. Statutory Protection of the Right to Strike

The substantive law to be applied in suits under § 301 of the LMRA is federal law, which the courts are to construe in light of national labor policies.[6] Consequently, the NLRA, which expresses the national labor policy, is the starting point in determining whether the strike by Local 456 was a breach of the collective bargaining agreement.

Section 7 of the NLRA grants "[e]mployees . . . the *right* . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[7] Before a right to strike exists, three conditions must be met. First, only *employees* qualify for § 7 rights; hence, the definition of "employee" largely determines the scope of § 7 rights under the NLRA. An "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current *labor dispute* . . . and who has not obtained any other regular and substantially equivalent employment . . . ."[8] Consequently, the "employee" requirement is satisfied if there is a labor dispute between employees and their employer which precipitated the employees' activity. The NLRA broadly defines "labor dispute" as "any controversy concerning terms, tenure or conditions of employment . . . ."[9] Because Pelham failed to pay the required fringe benefits on time, the resulting strike involved a "controversy concerning terms . . . of em-

---

[5] 29 U.S.C. § 185 (1970).

[6] Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

[7] 29 U.S.C. § 157 (1970) (emphasis supplied).

[8] *Id.* § 152(3) (1970) (emphasis supplied).

[9] *Id.* § 152(9) (1970).

ployment," and thus the strike activity in the principal case qualifies as a labor dispute. Therefore, the strike satisfies the "employee" requirement.

The second requirement of § 7 which must be met in order for an activity to be protected is that it must be a *concerted activity*. The NLRA does not define "concerted activity," but the courts have construed nonviolent strikes to be concerted activities under the Act. For example, in *National Packing Co. v. NLRB*,[10] in which employees walked out in protest against the failure of their employer to come forward with an allegedly promised pay raise, the strike was deemed to be a form of concerted activity under the NLRA. Since Local 456's strike was a nonviolent strike, as was the strike in *National Packing*, it satisfies the "concerted activity" test.

The third and last of the § 7 requirements is that the *purpose* of the employees' concerted activity must be "collective bargaining or other mutual aid or protection."[11] Beyond this broadly stated requirement, the NLRA does not provide a test for determining whether Local 456's strike was for a protected objective. However, case law indicates that a strike in protest of a contract breach is protected. For example, in *San Juan Lumber Co.*,[12] despite a no-strike clause, employees were held to have the right to strike when an employer breached his basic obligation to pay wages on time.[13] The court noted in *Iodice* that fringe benefits are a form of compensation equal in importance to monetary wages, and that Pelham did materially breach its contractual obligation.[14] Applying the *San Juan* rationale, the strike following Pelham's failure to pay fringe benefits meets the "purpose" requirement under the Act.

Because all the requirements of the NLRA are satisfied, Local 456's strike was one by "[e]mployees . . . engage[d] in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[15] and therefore was entitled to protection under § 7.

The *Iodice* court, however, reached a different conclusion. In determining that Calabrese and his union breached the collective bargaining agreement, notwithstanding the material breach by Pelham, the court, without citing authority, concluded that the strike was a breach of contract because it

> became a pretext for the purpose of punishing Pelham; for the purpose of exacting from it a substantially larger sum of money than it rightfully owed; [and] for the purpose of demonstrating the power of his union over those with whom it did business.[16]

The court apparently disregarded the NLRA and prior case law in coming to its decision. As discussed above, a strike in protest of a breach of contract is a protected labor activity under the NLRA. In 1956 it was held that under the NLRA, as amended, courts are required to protect the right to strike except as specifically provided in the Act.[17] Congress specifically enumerated the activities *not* entitled to protection. Section 8(b) of the Act proscribes secondary boycotts, strikes to compel an employer to commit unfair labor practices, and jurisdictional strikes over

---

[10] 352 F.2d 482 (10th Cir. 1965).

[11] 29 U.S.C. § 157 (1970).

[12] 154 N.L.R.B. 1153, *enf'd*, 365 F.2d 397 (9th Cir. 1966).

[13] *Id.*

[14] 345 F. Supp. at 265.

[15] 29 U.S.C. § 157 (1970).

[16] 345 F. Supp. at 266-67.

[17] Douds v. Teamsters Local 976, 139 F. Supp. 702, 711 (S.D.N.Y. 1956).

work assignments.[18] Nowhere in the Act is there a proscription of the type of activity pursued by Local 456. Furthermore, § 13 of the Act provides a test for the construction of § 7 rights:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.[19]

It follows that since Congress did not specifically proscribe protests against a breach of contract, Local 456's strike should have been protected by § 7 of the NLRA.

IV. Waiver of the Right to Strike

Of more far-reaching significance than the court's holding is the basic assumption it made that even in the absence of a no-strike clause or grievance-arbitration provision, a strike may be a breach of contract. Without citing authority for this proposition, the court stated:

> Stripped of all but the essentials, a collective bargaining agreement represents a purchase by an employer of labor for his business, and the basic promise made by the union in *every* such agreement is that it will provide the employer with men to work. Any action by the union in derogation of this promise can only be justified by a breach by the employer of a significant obligation on his part.[20]

The court reasoned that by agreeing to work, employees impliedly waive the right to strike. This proposition does not withstand analysis. The right to strike may be waived by an *express* agreement not to strike,[21] and a no-strike provision will be implied as a quid pro quo to the extent that there is an operable agreement to arbitrate disputes arising under the contract.[22] However, in this case Local 456 did not expressly waive the right to strike, nor did it impliedly waive the right by agreeing to an arbitration provision.[23]

In *NLRB v. Lion Oil Co.*,[24] a case in which there was no express waiver of the right to strike, the Supreme Court held that a waiver of the right should never be assumed. In the *Lion Oil* case, the employees had refused to agree to the company's demand for a no-strike clause. Subsequently, when a strike occurred as the parties were bargaining over contract modifications, the court held that it was *not* within the contemplation of the parties that economic weapons *not* be used.[25]

The significance accorded the right to strike is further exemplified in *Mastro Plastics Corp. v. NLRB*.[26] There the Supreme Court held that notwithstanding a no-strike clause, it was not the intention of the employees to waive the right to strike in response to an unfair labor practice. The Court stated:

> In the absence of some contractual or statutory provision to the contrary,

---

[18] 29 U.S.C. § 158(b) (1970).

[19] *Id.* § 163 (1970).

[20] 345 F. Supp. at 265.

[21] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

[22] Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

[23] 345 F. Supp. at 265.

[24] 352 U.S. 282, 293 (1957).

[25] *Id.* at 293-94.

[26] 350 U.S. 270 (1956).

> petitioners' unfair labor practices provide adequate ground for the orderly strike that occurred here . . . . [W]e assume that the employees, by *explicit* contractual provision, could have waived their right to strike . . . .[27]

Lion Oil and *Mastro Plastics* suggest that the right to strike under § 7 is not to be treated cavalierly. The *Iodice* court's assertion that every collective bargaining agreement implies the promise not to strike is a dangerous doctrine lacking support in statutory or case law.

Moreover, the *Iodice* rationale is inconsistent with the basic contract law principle that the justifiable expectations of the parties are to be considered in interpreting an agreement.[28] The basic promise that a union can give *is* the promise not to strike. The court's analysis breaks down when it asserts that *every* such agreement includes this promise. It is common practice, for example, in the construction industry for an agreement merely to grant recognition to a union, establish a closed or union shop, and fix the wage scale and hours of work without waiving the right to strike.[29] Clearly, if a union wishes to give up the right to strike, it can do so by contract. However, for a court to alter the agreement of the parties as suggested by the *Iodice* decision is an unwarranted extension of judicial power.

V. Policy Considerations

Underlying the court's decision in *Iodice* seems to be a suspicion that the strike was only nominally concerned with fringe benefits, and was really a continuation of the harassment employed by the union over the years to avenge Calabrese's criminal conviction.[30] If this suspicion is correct and the court desired to punish the union for its deplorable conduct, a breach of contract suit under § 301 of the LMRA was not the proper device to punish the wrong.

When the other alleged causes of action failed to provide an adequate remedy, the court was faced with permitting the union's previous harassment to go without redress. Although failure to provide a remedy is an argument for exercising § 301 jurisdiction, the court had to strain to find a compensable ground under § 301, and did so at the considerable expense of the right to strike under § 7 of the NLRA. If, as the court asserts, the strike was intended to exact money not rightfully owed, such activity should be treated as extortion or a similar crime;[31] criminal justice ought not be done at the expense of the collective bargaining process.

Iodice involves a major departure in federal labor policy—assuming a no-strike clause is within every collective bargaining agreement—that should be made by Congress and interpreted by the National Labor Relations Board (NLRB). As stated in *Charles Dowd Box Co. v. Courtney*,[32] the purpose of § 301 is to "assur[e] the enforceability of such [collective bargaining] agreements."[33] However, in *Iodice* enforcement of the agreement is ficticious. The court merely phrased the issues in breach of contract terms in order to provide a remedy. By finding that Calabrese's concern with fringe benefits was only nominal, the court reached § 7

---

[27] *Id.* at 278-79 (emphasis supplied). Limitations on *Mastro Plastics* are discussed in Comment, *Statutory and Contractual Restrictions on the Right to Strike During the Term of a Collective Bargaining Agreement*, 70 YALE L.J. 1366, 1382 (1961).

[28] 1 A. CORBIN, CONTRACTS 1-3 (1950).

[29] Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 605 (1955).

[30] *See* text accompanying note 16 *supra.*

[31] *See* Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951 (1970).

[32] 368 U.S. 502 (1963).

[33] *Id.* at 509.

issues rather than contract issues. Furthermore, its interpretation of § 7 disturbed a defined federal labor policy that § 7 rights are not to be impaired except as specifically provided in the NLRA.

Congress confided primary interpretation and application of the NLRA to the NLRB because of the need for uniformity in administration of the Act.[34] Although § 301 represents a statutory exception to the exclusive jurisdiction of the NLRB in interpreting the NLRA, *Iodice* represents a special case in which the court should decline to exercise § 301 jurisdiction because the need for uniformity of interpretation of § 7 rights is more compelling than the need for judicial enforcement of agreements. Indeed, *Iodice* conflicts with the most important of our national labor laws, the NLRA, and the most significant of labor's economic weapons, the right to strike. This decision strains the collective bargaining process. Collective bargaining cannot withstand such tension, even though a court may desire to reach an equitable result.

VI. CONCLUSION

Under § 7 of the NLRA and decisions construing § 7 rights, a strike protesting a breach of contract is a protected activity. The *Iodice* court disregarded the NLRA in order to find Calabrese and his union in breach of contract, notwithstanding a prior breach by Pelham. Furthermore, the court made the far-reaching and dangerous assertion that a no-strike clause is to be assumed in every collective bargaining agreement.

Even if the court was correct in finding that the strike was really for vengeance rather than a protest of a contract breach, revision of the right-to-strike laws should be made by Congress and the NLRB, not by the courts. Reprehensible conduct should not go unredressed, but § 301 of the LMRA is not the proper source of remedy under these circumstances. For these reasons, *Iodice v. Calabrese* should not be followed.

James C. Warner

CRIMINAL LAW—THE RIGHT TO COUNSEL AT A PRE-INDICTMENT CONFRONTATION—*Kirby v. Illinois*, 406 U.S. 682 (1972).

Thomas Kirby and Ralph Bean were convicted of robbery based on a pre-indictment showup identification made at a police station while the two men were without benefit of counsel. On the day of their arrest, Kirby and Bean, while walking down Madison Street in Chicago, were stopped by two policemen and asked for identification. One of the policemen testified at trial that the men were stopped because Kirby resembled a wanted man whose picture was on a bulletin in the police car.[1] When Kirby opened his wallet, the policeman noted traveler's checks in the wallet made out to a "Willie Shard." When Kirby failed to produce a satisfactory explanation of his possession of such checks, Kirby and Bean were arrested and taken to police headquarters to be questioned. The policemen then learned that a man named Willie Shard had been robbed two days before. The police sent for Shard and when he entered the room where Kirby and Bean were being held, he identified them as the two men who had robbed him.[2] Besides the two suspects, only the policemen and

[34] Garner v. Teamsters Union, 346 U.S. 485 (1953).

[1] Kirby v. Illinois, 406 U.S. 682, 684 n.1 (1972).

[2] *Id.* at 684-85.

Shard were in the room at the time. At no time was either man advised of any right to counsel.[3] Kirby and Bean were subsequently tried and convicted of robbery after a pretrial motion to suppress Shard's identification had been denied. Kirby's conviction was upheld on appeal[4] while Bean's conviction was reversed.[5] Certiorari was granted by the Supreme Court on the question of whether or not there is a right to counsel at pre-indictment confrontations.[6] In *United States v. Wade*[7] and *Gilbert v. California*,[8] the Court had already decided that the right to counsel existed in post-indictment lineups and had established a per se exclusionary rule for identifications obtained when the suspect's lawyer was not present. Under this rule, eyewitness identifications at trial are not permitted if based upon any earlier lineup identification unless the accused had either been represented by counsel at the lineup or had knowledgeably waived his right to be represented.[9] In a five to four decision,[10] the Supreme Court refused to extend *Wade* to pre-indictment cases, holding that the sixth amendment[11] attaches only after the initiation of formal criminal proceedings by way of formal charge, arraignment, preliminary hearing, information or indictment.[12]

It was not easy to thus limit sixth amendment rights to a point after indictment in light of the policy considerations the Court had enuciated earlier in *United States v. Wade*. In that case, the Court held that a defendant should have the right to counsel at any "critical period" in the prosecution and defined that period as "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial."[13] The Court went on to hold, in an opinion by Justice Brennan, that a post-indictment lineup was such a critical stage because of the dangers of mistaken identity,[14] of improper suggestion by the police,[15] and of

---

[3] *Id.* at 685.

[4] People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970).

[5] People v .Bean, 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970).

[6] Certiorari was limited to the right to counsel question. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). The question of the constitutionality of the showup procedure itself was not argued in *Kirby*, however. "In view of our limited grant of certiorari, we do not consider whether there might have been a deprivation of due process in the particularized circumstances of this case." Kirby v. Illinois, 406 U.S. 682, 691 n.8 (1972).

[7] 388 U.S. 218 (1967).

[8] 388 U.S. 263 (1967).

[9] 388 U.S. 218, 240 (1967).

[10] Justices Blackman, Rehnquist, and Chief Justice Burger joined in Justice Stewart's opinion which announced the judgment of the Court. Justice Powell concurred in the result. Justice Brennan wrote a dissent joined by Justices Douglas and Marshall, while Justice White concurred separately.

[11] Fifth amendment rights against incrimination were not at issue here. The fifth amendment only concerns protecting a person from giving testimonial evidence against himself. Schmerber v. California, 384 U.S. 757 (1966). In *Wade*, it was held that forcing a person to exhibit himself in a lineup is similar to forcing a suspect to submit to a blood test in that neither was testimonial evidence and, therefore, neither is protected by the fifth amendment. 388 U.S. at 221.

[12] In a recent post-*Kirby* decision, the Missouri supreme court held that adversary judicial proceedings begin, and the right to counsel attaches, when a complaint is filed or a warrant is issued. Arnold v. State, 484 S.W.2d 248 (Mo. 1972).

[13] United States v. Wade, 388 U.S. 218, 226 (1967).

[14] *Id.* at 228. *See also* E. BORCHARD, CONVICTING THE INNOCENT (1932); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965).

[15] 388 U.S. 218.

lack of awareness by both witnesses and participants at lineups of any prejudicial occurrences.[16] Furthermore, Justice Brennan warned that once a person has made an identification at a lineup, he was not likely to go back on his word later and any protest as to the fairness of the lineup was "likely to be made in vain; the jury's choice is between the accused's unsupported version and that of the police officers present."[17] Finally, Justice Brennan suggested that although cross-examination was available to show what went on at a lineup or showup, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[18]

In addition to the policy considerations proclaimed by the Court in *Wade*, some of the language used by the Court to describe the scope of the sixth amendment makes it exceedingly difficult to see how that amendment can be limited to post-indictment situations:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel *for his defence.*" The plain meaning of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."[19]

Justice White, in his dissenting opinion in *Wade*, simply assumed that the decision was applicable to pre-indictment situations.[20] Justice White's dissent was joined by Justices Stewart and Harlan. In writing the plurality opinion in *Kirby*, Justice Stewart evidently changed his mind, though Justice White remained consistent and urged that *Wade* and *Gilbert* were controlling in the pre-indictment situation.[21] In fact, the five members of the Court who had heard argument in both *United States v. Wade* and *Kirby v. Illinois* voted four to one in *Kirby* that *Wade* was applicable to pre-indictment lineups.

In some ways, the situation in *Kirby* shows an even more compelling need for safeguards than the situation in *Wade*. In *Wade*, the suspect was put into a lineup with a number of other persons, and the witnesses were asked to pick out a single individual. In *Kirby*, the two suspects were shown by themselves and the victim was asked whether the suspects were the ones who had robbed him. A situation like this is certainly more laden with suggestion than a lineup, for in such a showup[22] the

---

[16] *Id.* at 230.

[17] *Id.* at 231.

[18] *Id.* at 235.

[19] *Id.* at 224-25 (Emphasis by the Court).

[20] *Id.* at 255.

[21] Kirby v. Illinois, 406 U.S. 682, 705 (1972) (White, J., dissenting).

[22] In a showup the suspect is sown by himself to a witness and the witness is asked of the suspect is the person who committed the crime. In a lineup the witness is asked to pick out the suspect from a number of people in the lineup.

witness is given the impression that the police believe this particular suspect is guilty.[23] Moreover, when two men are exhibited together in a showup, as they were in *Kirby*, possibilities for misidentification are even greater than in a showup with just one suspect. Assuming that just one of the two men is actually guilty of the crime in question, if a witness can identify the guilty suspect, there is an extremely strong suggestion made to the witness that the second man must be guilty also.

Justice Stewart's *Kirby* opinion also failed to adequately distinguish *Miranda v. Arizona*[24] and *Escobedo v. Illinois*.[25] *Miranda* involved a pre-indictment situation in which the accused was arrested at his home, taken into custody, and brought to the police station. The evidence, including a confession, obtained at his interrogation without benefit of counsel, was declared inadmissible because it was gathered in violation of his constitutional rights. *Miranda*, Justice Stewart claimed, has no applicability to a pre-indictment confrontation since it was limited to protection of fifth amendment rights against self-incrimination, an area not in dispute in *Kirby*.[26] In *Miranda* the purpose of having an attorney was to vindicate and insure that fifth amendment rights were protected.[27] In *Wade* the purpose of having an attorney was to insure that sixth amendment rights were protected. If a suspect does not have a right to counsel at a post-indictment lineup, his right to counsel at trial is meaningless, for the matter of his guilt will have been decided at a stage where he could have no attorney and when the most incriminating evidence was gathered.[28] *Miranda* was indeed a right to counsel case, and the purpose of that right, as in *Wade*, was to protect a right originally applicable only at trial,[29] but which, in light of extensive, early police investigation, needed to be applicable earlier. If a lineup is a "critical stage" in the prosecution of a suspect, to cut off the right to counsel simply because a formal adversary stance has not been taken contradicts *Miranda's* assurance that the right to counsel is protected whenever a right guaranteed at the trial stage would be cut off by lack of counsel at an earlier time, even if that time is before a formal indictment.

The opinion of the Court in *Kirby* also attempts to distinguish *Escobedo* by calling it a fifth amendment case.[30] However, since *Escobedo* was clearly framed in sixth amendment terms,[31] the majority in *Kirby* was undoubtedly wrong on this

---

[23] P. WALL, note 14 *supra*; Kirby v. Illinois 406 U.S. 682, 699-700 (1972) (Brennan, J., dissenting).

[24] 384 U.S. 436 (1966).

[25] 378 U.S. 478 (1964).

[26] Kirby v. Illinois, 406 U.S. 682, 687 (1972).

[27] "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." Miranda v. Arizona, 384 U.S. 436, 469 (1965).

[28] United States v. Wade, 388 U.S. 218, 226 (1967).

[29] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend V.

[30] "[T]he Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .'" Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[31] The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment" . . . .

Escobedo v. Illinois, 378 U.S. 478, 479 (1964).

point. The Court seems to argue in the alternative that even if *Escobedo* was a right to counsel case, it was limited to its own particular facts by *Johnson v. New Jersey*.[32] *Johnson*, however, held only that the *Escobedo* and *Miranda* decisions were not retroactive and were applicable only to cases in which the trial began after those decisions had been announced. Since *Johnson* and *Miranda* were being considered by the Court at the same time,[33] it is difficult to support a conclusion that in *Miranda* the Court expanded the right to counsel[34] and in *Johnson* it constricted that right, particularly since *Johnson* purported to deal only with the retroactivity of the *Escobedo* and *Miranda* decisions and not the right to counsel itself. The language in *Johnson* relied on by the *Kirby* majority is subject to more than one interpretation,[35] but since *Johnson* was decided so soon after *Miranda*, that language should be construed in light of the expansion of the right to counsel that *Miranda* announced. Finally, whatever limiting effect *Johnson* might have had on the substantive interpretation of *Escobedo* and *Miranda* was erased by the fact that *Wade*, which was decided a year after *Johnson*, relied heavily on *Escobedo* and *Miranda* as right to counsel cases.[36]

The Court in *Kirby*, as a final attempt to limit *Wade*, stated the tenuous proposition that a sentence in *Simmons v. United States*[37] further explained that *Wade* was limited to post-indictment lineups.[38] *Simmons*, however, was not a right to counsel case, but rather a due process case which held that the use of photographs at pretrial identifications did not violate a suspect's fourteenth amendment rights. Furthermore, the only mention of *Wade* in the *Simmons* opinion was a short statement that *Wade* was not applicable on the facts.[39]

As prior Supreme Court pronouncements on the right to counsel did not indicate that it should be limited to a post-indictment stage, lower court interpretations of *Wade* made before *Kirby* also generally concluded that there is a right to coun-

---

[32] 384 U.S. 719 (1966).

[33] *Miranda* was decided on June 13, 1966. *Johnson* was decided on June 20, 1966.

[34] *Escobedo* held only that a suspect being interrogated by the police could not be denied his right to counsel if he requested to speak with an attorney. *Miranda* went further and held that a suspect had a right to counsel at a police interrogation whether he requested one or not and that this right could only be given up by a knowledgeable waiver.

[35] *Apart from its broad implications*, the precise holding of *Escobedo* was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, "[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . ."
Johnson v. New Jersey, 384 U.S. 719, 733-34 (1966) (Emphasis supplied).

[36] Kirby v. Illinois, 406 U.S. 682, 692-95 (1972) (Brennan, J., dissenting).

[37] 390 U.S. 377 (1968).

[38] "The rationale of those [*Wade* and *Gilbert*] cases was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.' "
Id. at 382-83.

[39] Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. . . . Viewed in that context, we find the claim untenable.
Id. at 383.

sel at pre-indictment lineups. Many state courts[40] and all the federal courts of appeals[41] which had considered the issue had come to this conclusion about the meaning of *Wade*. In one of the best reasoned of the state court decisions, the California Supreme Court, after listing a number of reasons why *Wade* was applicable to pre-indictment situations, concluded with this rather cogent observation:

> [W]e think it clear that the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information. We cannot reasonably suppose that the high court, recognizing the same dangers of abuse and misidentification exist in *all* lineups, would announce a rule so susceptible of emasculation by avoidance.[42]

None of the state courts[43] which had restricted *Wade* to a post-indictment situation did so on the constitutional ground that the right to counsel did not extend to a pre-indictment situation. They simply found that the narrow holding of *Wade* did not require a right to counsel at pre-indictment lineups and they were unwilling to extend the Supreme Court's holding.

A few of the state courts which held that the right to counsel attached during the pre-indictment period did so by distinguishing the investigatory stage from the accusatory stage.[44] The Supreme Court did not recognize this distinction in *Kirby*, holding essentially that any pre-indictment stage is investigatory and not accusatory. On this point, an Ohio appellate court concluded as follows:

> Although some courts have restricted the *Wade* and *Gilbert* rules to post-indictment confrontations, . . . the better view, the one most responsive to the reasoning in the *Wade* and *Gilbert* cases . . . is that the *Wade* and *Gilbert* rules extend to any lineup conducted where the prosecutive process has shifted from the investigatory stage to the accusatory stage and focuses on the accused, except in emergency situations. . . . The rules would thus apply to most lineups because a suspect is not ordinarily placed in a lineup until, as here, the investigatory process has disclosed his probable implication in the crime.[45]

---

[40] *See* People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); Palmer v. State, 5 Md. App. 691, 294 A.2d 482 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); In re Holley, 268 A.2d 723 (R.I. 1970); Martinez v. State, 437 S.W.2d 842 (Tex. Ct. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

[41] Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Government of the Virgin Islands v. Callwood, 440 F.2d 1206 (3rd Cir. 1971); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1970); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).

[42] People v. Fowler, 1 Cal. 3d 335, 344, 461 P.2d 643, 650, 82 Cal. Rptr. 363 370 (1969).

[43] State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So.2d 382 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

[44] *See e.g.*, State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

[45] State v. Isaacs, 24 Ohio App. 2d 115, 117, 265 N.E.2d 327, 328-29 (1968).

Under this view, Kirby would have been entitled to counsel. When Kirby and Bean were discovered with traveler's checks and false identification, the investigatory process began. After it was discovered that similar items had been taken in a robbery two days before, the investigatory stage ended and the accusatory stage began. When Shard was asked to come to the police station in order to try to identify Kirby and Bean, the police were no longer conducting a general investigation, but had focused their accusations on these men.

If there was little precedent for the decisions in *Kirby* either at the Supreme Court, lower federal court, or state court level, there are, nevertheless, policy arguments with some merit for denying a right to counsel at pre-indictment lineups, though Justice Stewart's opinion failed to mention them. These considerations must have had some bearing on the Court's decision in light of the meager and dubious precedent the majority opinion relied upon.

These policy arguments essentially fall into two categories. First, the right to counsel does not attach in the case of photographic evidence[46] or on-the-scene identifications,[47] and a skeptic might ask what the practical difference is between an identification made at the scene of a crime or from a collection of photographs and a similar identification made at a lineup or showup at the police station two hours later. Essentially, the answer is that the difficulty of obtaining a lawyer for immediate on-the-scene identifications or upon the examination of photographs at the time a suspect is not in custody does not negate reasons for having a lawyer at lineups when the difficulty of obtaining counsel is much less. It is simply a balancing test and the difficulty of obtaining a lawyer at the later stages does not outweigh the advantages while the reverse is true at earlier stages. The weakness of this answer lies in the balancing test itself since one can just as easily reach the opposite conclusion. Simply because it may be easier to obtain an attorney at a lineup than at these other stages does not necessarily mean it is worth the effort, time or expense.

The claim that whatever dangers there are at lineups are not adequately eliminated by a lawyer's presence is the second major objection to the right to counsel attaching at that stage. The attorney present at a lineup is merely authorized to perform the passive role of witness and observer.[48] The lawyer can only hope that his presence will inhibit the police from making lineup conditions suggestive, for the police do not have to follow any of his recommendations. If the police lineup procedures are not so prejudicial as to violate due process, they can use whatever procedures they choose. If the police wish to coach witnesses in private, a lawyer's presence at a lineup cannot stop them. Furthermore, lawyers are not schooled as psychologists and are not necessarily aware of subtle influences that may be important in leading to misidentifications.[49] These objections to the right to counsel at the lineup stage assume bad faith among policemen. There can be no doubt that in some cities lawyers and policemen are adversaries, but *Wade* has had the result in other cities of encouraging cooperation between the police and attorneys in order to make lineup procedure fairer.[50] Not all of the dangers inherent in lineups are so subtle

[46] Simmons v. United States, 390 U.S. 377 (1968).

[47] Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Commonwealth v. Bumpus, 328 N.E.2d 343 (Mass. 1968). *But see* Rivers v. United States, 400 F.2d 935 (5th Cir. 1968) holding that on-the-scene identifications held long after the crime require counsel.

[48] United States v. Gholston, 437 F.2d 260, 263 (6th Cir. 1971).

[49] Read, *Lawyers at Lineups*, 17 U.C.L.A. L. REV. 339, 362-67 (1969).

[50] Comment, *Right to Counsel at Police Identification Proceedings*, 29 U. PITT. L. REV. 65, 82-84 (1967).

as to need psychologists to observe them. Some improper influences on witnesses will be noticed by lawyers which the police, involved in the routine of the procedure, will not readily observe, but which they may be willing to change. If the police are inclined to disregard the lawyer's recommendations and proceed with a lineup fraught with suggestibility, then the attorney, preferably after disassociating himself from the case as counsel, can testify as to the lineup conditions. Juries are more likely to believe the testimony of a reputable attorney than that of a criminal defendant.[51] Moreover, a defendant may be reticent to testify at all if he has any prior criminal convictions which can be used to impeach him during cross-examination.

As a further disadvantage, some police officials claim that having an attorney at the lineup makes witnesses reluctant to participate in the lineup procedure. These witnesses supposedly feel that the attorney will relate their names to the suspect or his friends and that this may lead to retaliatory measures against the witness.[52] This argument is somewhat specious, for when the case proceeds to trial the witness will become known to the accused anyway and the same fears of retaliation would make the witness reticent to testify.

The most legitimate criticism of requiring attorneys at lineups is that lineup observation is a time consuming task which requires few if any legal skills.[53] Proposed alternatives include photographic evidence of the lineup that could be examined later or shown to a jury, and the presence at lineups of a neutral magistrate.[54] Until such alternatives, which would be acceptable under *Wade*,[55] are put into practice, attorneys at the lineup seem a good method to insure fairness.

The majority in *Kirby* must have found the arguments of the critics of lawyers at lineups more persuasive than the arguments of the proponents, but more than just the above considerations may have influenced the Court's decision. The exclusionary rule of *Wade* and *Gilbert* not only prohibited introducing into evidence an identification made at a post-indictment lineup where the suspect did not have the benefit of counsel, but also did not permit any subsequent courtroom identification that could not be shown to have been made independently of the lineup identification. This was a very unpopular ruling. Congress passed and the President signed into law a measure the Senate Judiciary Committee stated was designed to "overrule" *Wade*.[56] Section 3502 of the Omnibus Crime Control and Safe Streets Act of 1968[57] provides as follows:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

This statute is of questionable constitutionality since Congress cannot pass a statute

---

[51] *Contra*, Read, *supra* note 49, at 366.

[52] *Id.* at 373-74.

[53] Note, *Right to Counsel at Pre-Trial Lineups*, 63 NW. U.L. REV. 251, 260 (1968).

[54] Read, *supra* note 49, at 388-93.

[55] United States v. Wade, 388 U.S. 218, 239 (1967).

[56] S. REP. NO. 1097, 90th Cong., 2d Sess. 224 (1968). *See also* Read *supra* note 49, at 358-62.

[57] 18 U.S.C. 3502 (1970).

overruling a Supreme Court interpretation of the Constitution,[58] but it nonetheless vividly illustrates the vehement official reaction to the *Wade* decision.

When the Supreme Court decided *Kirby*, it was faced with the *Wade* holding requiring the right to counsel at post-indictment lineups and substantial precedent for extending it to the pre-indictment situation. The *Wade* solutions to lineup misidentification of both requiring the accused to have counsel at the lineup and of using the exclusionary rule were being attacked as being of dubious merit in correcting the problem. Perhaps more importantly the judicial philosophy of the Court was also changing. Justice Stewart's minority view in early cases such as *Escobedo* that the right to counsel does not attach until after "formal prosecutorial proceedings"[59] became the majority view after President Nixon's appointees joined the Court. Chief Justice Burger, for example, disapproved of the *Wade* principle when he was a circuit judge. In a concurring opinion in the pre-*Wade* case of *Williams v. United States*,[60] Circuit Judge Burger characterized the defendant's claim that his right to counsel had been violated by the absence of an attorney at a police lineup as a "Disneyland" contention and he bemoaned the fact that such arguments were becoming commonplace.[61] He went on to say that he believed such ideas were being advanced because court-appointed lawyers were being maligned by indigent clients who felt that all available defenses were not raised in their behalf. Judge Burger urged that a lawyer should "be entirely free to withdraw rather than be compelled to advance absurd and nonsensical contentions on pain of a vicious attack from the jailhouse."[62]

The changing judicial philosophy of the Court, the negative Congressional reaction to Wade, and the view that attorneys could not prevent misidentifications at lineups, all go toward explaining the holding in *Kirby*. They do not go to explaining the dubious manner in which the holding was reached. Any attempt to elucidate this area must be speculative. Perhaps the most logical scenario is one in terms of the Court's historic aversion to overrule itself. If the *Kirby* decision was to be made in terms of the policy considerations, it would be almost impossible to distinguish from *Wade* and *Gilbert* and would therefore require an overruling of those cases. On the other hand, a decision made on constitutional grounds, as the actual decision was, allows the Court to reach the same practical result without having to disturb the *Wade* and *Gilbert* decisions. Since most lineups occur prior to indictment anyhow, lawyers are effectively eliminated from participation at police lineups by a means much more institutionally satisfying than overruling a case.

The immediate implications of the *Kirby* decision are not as drastic as may first appear. While it is true that the chances of misidentifications are increased somewhat, *Wade* had already been eroded by lower court rulings. When a *Wade* violation occurred, identifications were often admitted into evidence on grounds of independent courtroom identifications[63] or convictions were later affirmed on grounds that admission of such evidence was harmless error.[64] In essence, with the

---

[58] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958).

[59] Escobedo v. Illinois, 378 U.S. 478, 494 (1964) (Stewart, J., dissenting).

[60] 345 F.2d 733 (D.C. Cir. 1965).

[61] *Id.* at 736 (Burger, J., concurring).

[62] *Id.* at 737.

[63] Government of the Virgin Islands v. Callwood, 440 F.2d 1206 (3rd Cir. 1971); United States v. Ayers, 426 F.2d 524 (2nd Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969).

[64] Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972).

Kirby decision the standard for admission of lineup identifications has reverted to questioning whether any due process violations occurred rather than asking whether the accused was allowed counsel.[65]

The actual importance of *Kirby* is not so much its effective overruling of *Wade* as its indication of the present Supreme Court's narrow view of the right to counsel at early stages of police investigation and the extent to which the Justices may constrict the law in order to fit their own version of how law enforcement agencies should be allowed to proceed in trying to establish cases.[66]

Ira Bennett Sully

[65] Of course, all actions of the police in gathering testimony are subject to fifth amendment and fourteenth amendment due process limitations. In particular, this was held true for lineups. In Stovall v. Denno, 388 U.S. 293 (1967), the Court held that although *Wade* and *Gilbert* were not retroactive in their effect, any lineup that occurred before the *Wade* and *Gilbert* decision could still be challenged on due process grounds.

[66] *See* Harris v. New York, 401 U.S. 222 (1971), where it was held that although statements obtained in violation of *Miranda* safeguards were not admissable in a prosecution's case in chief, they could be used on cross-examination to impeach a defendant's testimony if he chose to testify in his own behalf.