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Kirby, Biggers, and *Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?

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TABLE OF CONTENTS

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*Joseph D. Grano**

All legal systems have made the mistake of suspecting and watching for voluntary errors in testimony, rather than for the involuntary ones. Yet it is comparatively rare in a civilised society for an innocent person to be put in peril of conviction by the lying testimony of the prosecution; the real danger is of mistaken evidence.†

I. INTRODUCTION

BARELY a decade after beginning a revolutionary expansion of the constitutional protections afforded the accused,[1] and just six years after first expressing constitutional concern about the dangers involved in eyewitness identifications,[2] the Supreme Court, in three recent opinions, virtually immunized most pretrial identification procedures from constitutional challenge. In *Kirby v. Illinois*[3] the Court refused to apply *United States v. Wade*[4] and *Gilbert v. California*[5] to a one-man station-house showup conducted before formal charges were filed against the accused. Four members of the Court concluded that the sixth amendment right to counsel, which *Wade* and *Gilbert* found applicable to postindictment lineups, did not apply before the start of formal judicial proceedings. Justice Powell, concurring separately, simply refused to extend the *Wade-Gilbert* per se exclusionary rule for violations of the right to counsel;[6] he did not discuss the sixth amendment issue.

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† G. WILLIAMS, THE PROOF OF GUILT 89 (3d ed. 1963).

1. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949), and applying the fourth amendment exclusionary rule to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942), and applying the sixth amendment right to counsel to state felony trials).

2. *See* Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

3. 406 U.S. 682 (1972).

4. 388 U.S. 218 (1967).

5. 388 U.S. 263 (1967).

6. *Gilbert* required exclusion of all testimony concerning the illegal out-of-court identification. *See* 388 U.S. at 273. *Wade* required the exclusion of the witness's in-court identification unless the prosecutor established, by clear and convincing evidence, the lack of taint from the out-of-court identification made without counsel. *See* 388 U.S. at 240-42. Although in *Kirby* Justices Stewart and Powell both spoke of the "per se exclusionary rule," it is not altogether clear that they meant to limit their opinions

Kirby left open the possibility of a due process challenge to one-man showups at the police station. In *Neil v. Biggers*,[7] however, the Court rejected such a challenge even though the police had not made a reasonable effort to conduct a lineup. The Court refused to adopt a per se rule invalidating unnecessarily suggestive procedures. Instead, it retained the approach of examining the facts for a substantial likelihood of misidentification. Considering all the facts, including the victim's opportunity to observe the defendant, the Court found no such danger in the challenged showup.

Most recently, in *United States v. Ash*,[8] the Court again refused to extend *Wade*, this time to photographic displays. Curiously, the Court seemed to recognize that photographic identifications often lack scientific precision and are difficult to reconstruct at trial,[9] the very evils that prompted *Wade* to require counsel at postindictment lineups. Nevertheless, the Court held that the sixth amendment right to counsel did not extend to procedures conducted in the defendant's absence. Justice Stewart, concurring separately in an opinion more consistent with *Wade*'s rationale, found photographic identifications less suggestive and more easily reconstructed than lineups.[10]

At first glance, the three new cases seem to emaciate the Court's earlier decisions and to curtail further constitutional development. For example, since most lineups probably occur before the defendant's initial arraignment,[11] *Wade*, though not overruled by *Kirby*, seems to retain little practical effect. Closer examination, however, suggests that *Wade* should not be precipitately inhumed. The Court's split in *Kirby* invites further inquiry into the critical-stage issue discussed in the plurality opinion. Specifically, the apparent inconsistency between an anti-*Kirby* "custody"[12] or "focus"[13] approach and the general view permitting prompt on-the-scene identifications

to testimony concerning the out-of-court identifications. *See* 406 U.S. at 685-86. *But see* People v. Anderson, 389 Mich. 155, 170-71, 205 N.W.2d 461, 467-68 (1973) (interpreting *Kirby* to limit merely the *Gilbert* per se rule).

7. 409 U.S. 188 (1972).

8. 413 U.S. 300 (1973).

9. 413 U.S. at 313-14 & n.8, 316.

10. 413 U.S. at 324.

11. N. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS 30 (1972); Comment, *Right To Counsel at Police Identification Procedures: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65, 78-79 n.82 (1967) (after *Wade* 58.8 per cent of robbery lineups in Pittsburgh preceded initial arraignment); Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 163 n.56 (1972).

12. *Cf.* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

13. *Cf.* Escobedo v. Illinois, 378 U.S. 478, 485, 490 (1964).

without counsel[14] should be considered. The threat to sound sixth amendment doctrine posed by this inconsistency may temper hasty criticism of *Kirby*. Further, *Wade*'s rationale may provide a constitutional basis, apart from the sixth amendment right to counsel, for an attorney's presence at *Kirby*-type identification procedures.[15] Such an approach might permit on-the-scene identifications in the absence of counsel—assuming such procedures are desirable—without strained constitutional analysis. In addition, more identifications may be brought under *Wade*'s umbrella by recognizing the increasing importance of prompt initial arraignments. The possibility of exhuming *Mallory v. United States*,[16] albeit in this different context, should also be considered.

Biggers, perhaps even more than *Kirby*, contains the seeds for a future constitutional harvest. The Court seemed to reject the defendant's proposed prophylactic approach to unnecessarily suggestive procedures because his showup and trial preceded *Stovall v. Denno*,[17] which first established a due process exclusionary rule for identification evidence. *Biggers*, therefore, may merely constitute another chapter in the Court's congeries of retroactivity decisions.[18] The constitutional door is thus sufficiently ajar to warrant continued examination of the various identification techniques used by the police. In addition, the possibility of using the due process clause to mandate certain procedures not presently provided should be considered. For example, the dangers of misidentification may warrant a due process right to in-court lineups before the trier of fact, or a right to the defendant's relocation among spectators.

Ash cautions against undue optimism in urging either non-sixth amendment bases for a right to counsel or an expanded due process approach. Like *Kirby*, *Ash* limited its discussion to the sixth amendment issue, but the opinion suggests the Court's insensitivity to the dangers of misidentification. In addition to discounting the general hazards that accompany photographic displays, the Court almost totally ignored the factual record, which manifested unnecessary suggestion, if not a due process violation.[19] Nevertheless, *Ash* demon-

14. *See, e.g.*, Russell v. United States, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969).

15. *See* Part III *infra*.

16. 354 U.S. 449 (1957).

17. 388 U.S. 293 (1967).

18. *See, e.g.*, Robinson v. Neil, 409 U.S. 505 (1973); United States v. United States Coin & Currency, 401 U.S. 715 (1971); Desist v. United States, 394 U.S. 244 (1969); Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

19. *See* Part IV *infra*.

strates the need for further inquiry and study. This need is particularly evident in Justice Stewart's concurring opinion, which failed to cite one scientific study to support his conclusion that photographic displays are less conducive than lineups to misidentification.

The apparent retreat in *Kirby, Biggers,* and *Ash* will not be mourned in many circles. Prior to *Kirby,* lower courts readily avoided reversing convictions by stretching, often beyond reason and logic, the doctrines of independent source and harmless error.[20] Part of this attitude undoubtedly stemmed from the straitjacket imposed on courts by the *Wade-Gilbert* exclusionary rules.[21] Had the earlier cases more carefully separated the questions of right and remedy, the courts might have been more receptive to procedural safeguards. Alternatives to the exclusionary rules, such as cautionary jury instructions, perhaps tailored to the facts of the particular cases, therefore merit consideration, especially by those urging an expanded constitutional approach in the identification area.

The change in judicial temperament reflected in the recent identification cases may have been inevitable, given the political climate and the sudden vacancies that developed on the Supreme Court.[22] Still, it is somewhat surprising that the Court chose the identification cases to mark the first major retreat in the criminal procedure area. Unlike the confession,[23] wiretapping,[24] and search and seizure cases,[25] which furthered societal values not usually related to guilt or innocence, the early identification cases explicitly sought to protect the innocent from wrongful conviction.[26] Certainly it cannot be argued that society's newly declared war against crime will benefit by increasing the risk that innocent persons will be convicted.[27]

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20. *See* Note, *Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball,* 55 MINN. L. REV. 779 (1971).

21. *See* note 6 *supra.*

22. For a recent account of the politics of crime, see F. GRAHAM, THE SELF-INFLICTED WOUND (1970), especially chapters one and two.

23. *E.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

24. *E.g.,* Berger v. New York, 388 U.S. 41 (1967).

25. *E.g.,* Mapp v. Ohio, 367 U.S. 643 (1961).

26. The *Wade* Court said: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials . . . .' " 388 U.S. at 228. "A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' " 388 U.S. at 228-29, *quoting* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).

27. *See* Rex v. Dwyer, [1925] 2 K.B. 799, 803 (Crim. App.): "It is the duty of the

Rather than reflecting indifference to the dangers of wrongful conviction, the Court's recent cases probably reflect a reappraisal of those dangers. While any assessment involves a large degree of speculation,[28] enough cases have surfaced to warrant the belief that wrongful conviction is more common than usually acknowledged.[29] Borchard's collection of sixty-five wrongful conviction cases still constitutes the best graphic study of the problem.[30] Borchard found that mistaken identification accounted for convictions in twenty-nine of the cases studied[31] and contributed to convictions in a number of others.[32] In many cases, several witnesses incorrectly identified the innocent defendant; in the most dramatic, seventeen witnesses wrongfully identified the accused.[33] Even more alarming, the real offender often bore little or no resemblance to the person wrongfully convicted.[34]

Nothing has occurred to indicate that Borchard's study is less timely today than it was four decades ago. While criminal procedure has drastically changed, eyewitness identification techniques have remained rather constant. In fact, as evidenced by the Supreme Court's recent cases, judicial imprimatur is being awarded to the very techniques that contributed to the faulty identifications in Borchard's cases.[35] The continuing timeliness of Borchard's study is

police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person." *But cf.* Hook, *Victims of Crime: A New Look At Their Rights*, STUDENT LAW., Oct. 1972, at 48, 51: "But it is not justice but only compassion that leads us to say that 'it is better that nine or 99 guilty men escape punishment for their crime than that one innocent man be convicted. . . .' For that is certainly not doing justice either to the nine or 99 guilty or to their potential victims." It has been argued that mere conviction, whether of someone guilty or innocent, contributes to the law's deterrent effect. For a discussion rejecting this view, see J. FRANK & B. FRANK, NOT GUILTY 37 (1957).

28. J. FRANK & B. FRANK, *supra* note 27, at 31-39.

29. *See, e.g.*, People v. Anderson, 389 Mich. 155, 197-202, 205 N.W.2d 461, 482-84 (1973). *But see* Hoover, *The Role of Identification in Law Enforcement: An Historical Adventure*, 46 ST. JOHN'S L. REV. 613, 613 n.1 (1972) (wrongful convictions based on mistaken identity are not common).

30. E. BORCHARD, CONVICTING THE INNOCENT (1932).

31. *Id.* at xiii. One of these misidentifications involved identification of handwriting rather than visual recognition. *Id.* at 29-32.

32. *Id.* at xv, xxv.

33. *Id.* at 1-3.

34. *Id.* at xiii.

35. For example, pretrial photographic displays and one-man showups played a prominent role in the case involving seventeen mistaken eyewitnesses. *Id.* at 1-3. An on-the-scene identification undoubtedly contributed to the wrongful conviction in another of Borchard's examples. In that case, police arrested four Mexicans shortly after a bank robbery. When the Mexicans did not adequately account for the five guns and two canvas sacks found in their car, the police took them to the bank, where bank employees promptly identified them. The men were convicted before further evidence disclosed their innocence. *Id.* at 74-77.

further demonstrated by the frequent reports of mistaken identifications that, fortunately, do not lead to wrongful convictions. For example, nonsuspect lineup participants, such as policemen and lawyers, often are identified by victims and witnesses.[36] Such continuing incidents prompted the British Law Revision Committee to remark recently that mistaken identification remains the greatest cause of wrongful conviction.[37]

Even recognizing the danger of misidentification, procedural safeguards, especially constitutional ones, are not readily apparent. Some judges, such as Justice Stewart, find less need for counsel at photographic displays than at lineups;[38] others find an equivalent or even greater need for counsel.[39] Some judges, in approving on-the-scene identifications without counsel, find a guarantee of accuracy in the short interval between the crime and the identification;[40] other judges decry such procedures and find them inherently suggestive.[41] The problem stems directly from the lack of scientific knowledge and inquiry.[42] Therefore, in analyzing the recent identi-

36. BRITISH CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT: EVIDENCE 120 (1972) [hereinafter BRITISH REPORT]; Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance*, 17 UCLA L. REV. 339, 369 n.89 (1969); Comment, *supra* note 11, at 79 n.86. *See also* TIME, April 2, 1973, at 59, describing the mistaken lineup identification of a young district attorney by several victims of sexual assaults.

37. BRITISH REPORT, *supra* note 36, at 116.

38. 413 U.S. at 324 (Stewart, J., concurring in *Ash*).

39. *See, e.g.*, People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), *cert. denied*, 407 U.S. 909 (1972) (contrary assessments made in majority and dissenting opinions). *See also* People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973).

40. *See, e.g.*, Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968) (Burger, J.).

41. *See, e.g.*, McPhearson v. State, 253 Ind. 254, 253 N.E.2d 226 (1970) (contrary assessments made in majority and concurring opinions).

42. The call for a scientific approach to legal problems is nothing new. Such inquiry cannot be expected, however, as long as the legal profession maintains its aloof distance from other disciplines. For example, early in the century, psychologists eagerly conducted so-called reality experiments, where actors simulated events before subjects, usually college students. The history of these early efforts is recited in Greer, *Anything But the Truth? The Reliability of Testimony in Criminal Trials*, 11 BRIT. J. CRIM. 131 (1971). The early findings concerning perception and recognition prompted many psychologists to challenge openly the law's method of ascertaining truth. Some observers optimistically foresaw psychologists serving as expert witnesses to comment on the perceptive and recognitive ability of lay witnesses. *See* Rouke, *Psychological Research on Problems of Testimony*, 13 J. SOC. ISSUES, No. 2, at 50 (1957); Stern, *The Psychology of Testimony*, 34 J. ABNORM. & SOC. PSYCH. 3 (1939). Perhaps understandably, the legal profession gave a cool reception to these ideas—and to the psychologists themselves. *See* J. WIGMORE, PRINCIPLES OF JUDICIAL PROOF 530-32 (1931). This quickly dissuaded further scientific inquiry.

Today experimental psychologists are expressing renewed interest in legal problems. To avoid repeating past mistakes, both professions must be willing to demonstrate more flexibility. Psychologists must recognize that even reality experiments often fail adequately to duplicate actual events and courtroom experiences. *See* Stern, *supra*, at 50. In addition, psychologists must realize that lawyers may reject some findings for

fication cases, this Article will draw upon experimental results that seriously challenge present methods; more importantly, it will seek to define those areas where further scientific inquiry is needed to replace judicial speculation.

II. The Right to Counsel: The Sixth Amendment

A. *Kirby, Wade, and the Sixth Amendment*

Chicago police officers arrested Thomas Kirby and a companion after discovering traveler's checks and a Social Security card bearing the name Willie Shard in their possession. After a subsequent record check disclosed that Shard had been robbed two days earlier, the police summoned him from his place of employment. When he arrived at the station, Shard positively identified both men, who were sitting at a table with two police officers. According to Shard's later testimony, a policeman immediately asked upon his arrival whether he could identify the two men. At trial, defense counsel unsuccessfully moved to suppress Shard's identification testimony, claiming, among other things, that admission of the testimony would violate the *Wade-Gilbert* sixth amendment exclusionary rules.[43] The Illinois appellate court affirmed Kirby's subsequent conviction,[44] and the United States Supreme Court granted certiorari to review this issue.[45]

Upon review, the Court's starting point was the sixth amendment, made applicable to the states through the fourteenth amendment, which grants "an accused" the right to the assistance of counsel "in all criminal prosecutions." Rejecting Kirby's sixth amendment argument, and thus refusing to apply *Wade* and *Gilbert*, Justice Stewart's plurality opinion concluded that a criminal prosecution does not begin until "the initiation of adversary judicial criminal proceedings —whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[46] To the plurality, this was no "mere formalism." The start of formal judicial proceedings, it contended, marks the point at which the government commits itself to prosecute; at that point the adverse positions of the defendant and the govern-

reasons unrelated to validity. For example, even if prompt on-the-scene identifications involve more risk of misidentification than subsequent lineups, the law may permit the former as a necessary tool of law enforcement. Lawyers, who often complain about the nonapplicability of abstract test results, must be willing to define precisely, and to place in an adequate legal perspective, those issues that merit scientific inquiry.

43. *See* note 6 *supra*.

44. People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970), *aff'd. sub nom.* Kirby v. Illinois, 406 U.S. 682 (1972).

45. 402 U.S. 995 (1971).

46. 406 U.S. at 689.

ment have solidified and the defendant finds himself "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[47]

The plurality's justification for refusing to apply—or, in its words, "extend"[48]—*Wade* and *Gilbert* is not persuasive. Although both cases involved postindictment lineups,[49] *Wade*'s rationale leaves little doubt that the postindictment language was merely descriptive. Pointing to the vagaries of eyewitness identification and to the suggestion inherent in identification procedures, *Wade* found lineups in the absence of counsel to be a serious threat to the fairness of the subsequent trial.[50] *Wade* also concluded that such lineups undermine the right of confrontation at trial since they are difficult to reconstruct either with direct evidence or on cross-examination.[51] The first reason has nothing to do with the defendant's immersion in legal intricacies. From the defendant's viewpoint, the lineup is virtually devoid of legal issues; at the police officer's discretion, the defendant can be required to participate, walk, talk, and wear certain clothing.[52] Of course, the proceeding must be fairly conducted, but this has little to do with the accused since his opinion or advice is rarely solicited or heeded. Even if the fairness requirement did confront the accused with legal intricacies, those intricacies are obviously the same whenever the lineup is conducted.

Wade's second reason for requiring counsel—to protect the right of confrontation—does relate to the intricacies of procedural criminal law, at least to some extent. Acute perception of all lineup conditions, including the reaction of witnesses,[53] is necessary for effective cross-examination at trial. Yet, the Court recognized in *Wade* that the perception of lineup conditions by most defendants is adversely affected by lack of training and emotional tension.[54] These difficulties are not at all dependent upon the lineup's sequential location in the criminal process. The defendant's inability to protect his constitutional right of confrontation remains constant throughout the proceedings against him.

Justice Stewart also erred in arguing that the adverse positions

47. 406 U.S. at 689.

48. 406 U.S. at 684.

49. *Wade* referred to that fact in both its statement of the issue and its holding. 388 U.S. at 219, 237.

50. 388 U.S. at 228-35.

51. 388 U.S. at 230-32.

52. 388 U.S. at 221-23. *See also* Gilbert v. California, 388 U.S. 263, 266-67 (1967).

53. *See* People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971) (counsel's presence required at identification immediately after lineup). *Contra*, United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970).

54. 388 U.S. at 230-31.

of the defendant and the government do not solidify before judicial proceedings are initiated. Presumably, the police do not arrest except on probable cause. True, probable cause may be sufficiently weak to necessitate a precharge identification procedure.[55] Nevertheless, it denies reality to describe the postcustody police attitude as neutral or merely investigative rather than accusatory.[56] In fact, the Court explicitly recognized in *Miranda v. Arizona* that the accusatory function begins very soon after the defendant is taken into custody.[57]

Justice Stewart was equally unconvincing in contending that the Court's earlier right-to-counsel precedent mandated *Kirby*'s result. *Powell v. Alabama*,[58] a landmark right-to-counsel case, and its pre-*Gideon v. Wainwright*[59] progeny[60] relied on the fourteenth amendment due process clause rather than on the sixth amendment. Since the protections under the fourteenth amendment are not limited to any particular stage of a criminal proceeding,[61] the fact that the defendants in these cases had already been charged is irrelevant.

The analysis in certain pre-*Miranda* due process confession cases also seems to belie the Court's reading of right-to-counsel precedent. In *Crooker v. California*,[62] for example, a unanimous Court, including Justices Frankfurter and Harlan, agreed that a state's denial of counsel violated due process "not only if the accused is deprived of counsel at trial on the merits . . . but also if he is deprived of counsel for *any part* of the pretrial proceedings," provided the denial sufficiently prejudices the subsequent trial.[63] The Court then examined the precharge interrogation session held without counsel and, splitting five to four, concluded that the denial of counsel under the

55. According to one commentator, in these cases the need for counsel is especially pressing, since the dangers of wrongful conviction are greatest when the nonidentification evidence is weakest. *See* N. SOBEL, *supra* note 11, at 11-12. For recent commentary urging the earliest possible screening and disposition of cases, and recommending new procedures for that purpose, see L. KATZ, L. LITWIN & R. BAMBERGER, JUSTICE IS THE CRIME (1972).

56. *See, e.g.*, F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967).

57. 384 U.S. 436, 477 (1966). *See also* Kirby v. Illinois, 406 U.S. 682, 698 n.6 (1972) (Brennan, J., dissenting).

58. 287 U.S. 45 (1932).

59. 372 U.S. 335 (1963).

60. *See, e.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961). *Cf.* Betts v. Brady, 316 U.S. 455 (1942).

61. In fact, the fourteenth amendment right to counsel is not even limited to criminal prosecutions. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (right to retained counsel at welfare termination hearings); *In re* Gault, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency proceedings).

62. 357 U.S. 433 (1958).

63. 357 U.S. at 439 (emphasis added).

particular circumstances did not offend due process. Despite its holding on the facts, *Crooker* clearly indicates that a due process right to counsel can sometimes exist at precharge stages of the criminal process.

Kirby fared no better with its treatment of post-*Gideon* sixth amendment precedent. Just eight years earlier, *Escobedo v. Illinois*[64] had found the sixth amendment right to counsel applicable to precharge custodial interrogation. On the facts before it, *Escobedo* concluded that the adversary process began in the police station where, "for all practical purposes," the police had charged the defendant with murder.[65] In fact, over Justice Stewart's strong dissent, the Court's opinion in *Escobedo* stated that "it would exalt form over substance" to make the right to counsel depend on the existence of formal charges.[66] In *Kirby*, however, Justice Stewart found *Escobedo* inapposite for two reasons. First, the Court in retrospect had realized that *Escobedo*'s primary purpose was to vindicate the fifth amendment privilege against self-incrimination, not the right to counsel as such.[67] Justice Stewart's argument stood on firmer ground here than his one citation to *Johnson v. New Jersey*[68] indicates. *Miranda v. Arizona*,[69] cited by *Kirby* in another context, concluded that *Escobedo* required counsel to dispel the coercive atmosphere of police interrogation.[70] In a remarkable and questionable reinterpretation, *Miranda* stated that the denial of counsel in *Escobedo* made the defendant's subsequent statements the product of compulsion.[71] The reinterpretation of *Escobedo*, however, does not lend support to Justice Stewart's holding in *Kirby*. *Wade*, like *Escobedo* in its new guise, did not vindicate the right to counsel as such, but rather vindicated the rights of cross-examination, confrontation, and fair trial. *Escobedo* still suggests that counsel must be provided at *any* pretrial stage when necessary to protect other constitutional rights.

Perhaps recognizing this, Justice Stewart found *Escobedo* inapposite for a second reason. Again citing *Johnson v. New Jersey*,[72] he concluded that the Court had already limited *Escobedo* to its

64. 378 U.S. 478 (1964).

65. 378 U.S. at 486.

66. 378 U.S. at 486.

67. 406 U.S. at 689.

68. 384 U.S. 719 (1966) (holding *Escobedo* and *Miranda* inapplicable to cases tried before their respective dates).

69. 384 U.S. 436 (1966).

70. 384 U.S. at 466.

71. 384 U.S. at 466.

72. 384 U.S. 719 (1966).

facts.[73] This citation is somewhat cryptic; by referring to the narrow holding in *Escobedo*,[74] *Johnson* merely justified, at least for retroactivity purposes, the failure of lower courts to anticipate the more expansive *Miranda* decision.[75] Nothing in *Johnson* even remotely suggests that *Escobedo*'s ramifications do not extend beyond its narrow holding. In fact, *Miranda*'s discussion of *Escobedo*, just one week before *Johnson*, made it quite clear that the denial of an attorney's request to see his client in the police station would, apart from any fifth amendment considerations, constitute a violation of the sixth amendment right to counsel.[76] Furthermore, *Wade*, which postdated *Johnson* by a full year, specifically relied on *Escobedo* to support the proposition that counsel must be provided at pretrial stages when that is necessary to protect the fairness of the subsequent trial.[77] Therefore, if *Escobedo* has been limited to its facts, *Kirby*, rather than some prior case, has accomplished the deed.

Justice Stewart's dismissal of *Miranda* as fifth amendment precedent entitled to no consideration[78] was also too hasty. *Miranda*, like *Escobedo*, granted a right to counsel during police interrogation but, as Justice Stewart correctly perceived in *Kirby*, carefully premised its holding on the fifth amendment; by finding counsel necessary to dissipate the compulsion inherent in custodial interrogation, *Miranda* created a fifth amendment right to counsel.[79] *Wade* cited *Miranda* to support its holding that counsel can be required at certain pretrial stages to protect other constitutional rights.[80] Therefore, *Kirby*'s abrupt dismissal of *Miranda* can only be justified by

73. 406 U.S. at 689.

74. Although *Escobedo*'s ramifications seemed broad, as *Miranda* subsequently verified, its holding was limited:

> [W]here . . . 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 interrogations 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, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . .

378 U.S. at 490-91.

75. 384 U.S. at 733-35.

76. 384 U.S. at 465 n.35.

77. 388 U.S. at 225-26.

78. 406 U.S. at 687-88.

79. 384 U.S. at 444, 469-73, 478-79. *See also* 384 U.S. at 536-37 (White, J., dissenting). *But cf.* Commonwealth v. Cooper, 356 Mass. 74, 248 N.E.2d 253 (1969) (*Miranda* invokes *sixth amendment* right to counsel to safeguard the fifth amendment privilege). For an excellent discussion of *Miranda*'s constitutional underpinnings, see LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 95-109 (1968).

80. 388 U.S. at 226-27.

regarding *Kirby* as a pure sixth amendment case and nothing more. The possibility of using *Miranda* or *Wade* to require counsel at all pretrial lineups on a non-sixth amendment basis remains open.[81]

Some considerations overlooked by Justice Stewart also support the thesis that *Kirby* created a new, and previously unsupported, limitation on the right to counsel. In *Schmerber v. California*,[82] the defendant claimed that he had a right to counsel at a precharge police-ordered blood test. The Court denied the claim not by simplistically referring to the stage of proceedings but instead by concluding that counsel could not provide any assistance since the defendant did not have the right to refuse the test.[83] In *Wade* and *Gilbert*, the government tried to equate lineups with blood tests and other preparatory steps, such as analysis of fingerprints, clothing, hair, and handwriting—which usually occur before adversary proceedings are initiated against the defendant. To the Court, however, significant differences justified not characterizing such procedures as critical for right-to-counsel purposes. Scientific knowledge concerning these law enforcement techniques, unlike that concerning lineups, is sufficiently available so that counsel can reconstruct and even correct the procedures at trial through cross-examination.[84] Nevertheless, the point is that, as in *Schmerber*, the Court avoided analysis based on the stage of proceedings.[85] Finally, *Stovall v. Denno*,[86] decided the same day as *Wade* and *Gilbert*, implied quite strongly that the right to counsel was not limited to postcharge stages. *Stovall* involved a precharge one-man hospital showup. Rather than concluding that *Wade* and *Gilbert* did not apply to precharge confrontations, the Court held that those decisions would not be applied retroactively.[87]

In short, the plurality opinion in *Kirby* seems wrong from every perspective. The opinion misreads precedent so badly that it appears intellectually dishonest. Before casting final judgment, however, the practical implications of an anti-*Kirby* sixth amendment approach should be explored.

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81. *See* Part III *infra*.

82. 384 U.S. 757 (1966).

83. 384 U.S. at 765-66.

84. Gilbert v. California, 388 U.S. 263, 267 (1967); United States v. Wade, 388 U.S. 218, 227-28 (1967).

85. *Gilbert*, however, did note that the handwriting exemplars were taken before the defendant's indictment. 388 U.S. at 267.

86. 388 U.S. 293 (1967).

87. 388 U.S. at 300. Perhaps, to use Justice Stewart's *Kirby* language, the government had already "committed itself to prosecute." Prior to the hospital showup, a judge had continued the arraignment to enable Stovall to retain counsel. 388 U.S. at 295.

B. *An Anti-Kirby "Focus" or "Custody" Analysis: The Problem of Street Confrontations*

The preceding analysis suggests that *Kirby* should have recognized a right to counsel at the defendant's station house showup. Such a result would still pose the problem of where, if at all, to draw the line for sixth amendment purposes. To solve this problem many pre-*Kirby* authorities, borrowing from the interrogation cases, suggested that the right to counsel should attach at all critical stages after the police take the defendant into custody.[88] This viewpoint was criticized for going too far and for not going far enough. On the one hand, a custody approach, without carefully delineated exceptions, would preclude prompt on-the-scene showups[89] and certain emergency identification procedures, such as the one conducted in *Stovall v. Denno*.[90] Many deemed this too high a price for law enforcement to pay. On the other hand, a custody approach would provide the police with loopholes for avoiding the counsel requirement. If the police desired, they could easily postpone the defendant's arrest and continue to conduct photographic displays without counsel.[91] In some cases, they could also arrange precustody confrontations, perhaps by driving the witness into the suspect's neighborhood.[92] These concerns prompted some authorities, who also drew from the interrogation cases, to recommend a right to counsel at all critical stages after the police first focus on the defendant.[93] A few others found even this approach, though perhaps appropriate in the interrogation context, insufficient for identification purposes.[94] Con-

88. *See, e.g.*, United States v. Zeiler, 427 F.2d 1305, 1308 (3d Cir. 1970); Comment, *Right To Counsel at Photographic Lineups—People v. Lawrence*, 1972 UTAH L. REV. 100, 104; Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967). *Cf.* Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases*, 42 COLO. L. REV. 135 (1970).

89. *See* note 100 *infra*.

90. 388 U.S. 293 (1967). *See* text accompanying notes 356-61 *infra*.

91. Note, *The Right to Counsel at Photographic Identifications*, 44 TEMP. L.Q. 434 (1971). After *Wade*, a similar concern prompted many to urge a right to counsel at postcustody photographic displays. *See, e.g.*, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969); Note, *Pretrial Photographic Identifications—A "Critical Stage" of Criminal Proceedings?*, 21 SYRACUSE L. REV. 1235 (1970).

92. United States v. Callahan, 439 F.2d 852, 865 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971), approved this strategy in dicta.

93. *See, e.g.*, People v. Cotton, 38 Mich. App. 763, 769, 197 N.W.2d 90, 93-94 (1972). *Cf.* Thompson v. State, 85 Nev. 134, 138, 451 P.2d 704, 706, *cert. denied*, 396 U.S. 893 (1969); Note, *United States v. Wade and On the Spot Identifications: Russell v. United States*, 30 U. PITT. L. REV. 517 (1969) (rejecting focus test but arguing that the right to counsel should attach whenever the police have probable cause to arrest).

94. *See, e.g.*, Quinn, *supra* note 88, at 145.

centrating on the dangers of misidentification, these critics found a need for counsel at most identification procedures, regardless of when they are conducted.[95]

Given its decision in *Massiah v. United States*,[96] it was perhaps inevitable that the Supreme Court would ultimately reject a focus approach to sixth amendment analysis. *Massiah* held that a post-indictment surreptitious "interrogation"[97] by a wired informant whom the defendant mistook for a friend violated the sixth amendment right to counsel. This perplexing decision, which curiously ignored the defendant's more persuasive fourth amendment challenge to the government's activity,[98] extended the sixth amendment into the previously immune world of police undercover activity. Coupled with the focus analysis that *Escobedo* suggested shortly thereafter, *Massiah* threatened to abrogate this technique of law enforcement. The apparent dilemma materialized just a few years later when James Hoffa, relying on *Massiah* and *Escobedo*, claimed that undercover surveillance, prior to his arrest and after the government's investigation had focused on him, violated his sixth amendment right to counsel. As might be expected, the Court—without dissent on this point—quickly retreated, labeling Hoffa's argument a "paradoxical constitutional doctrine" that, if accepted, would create a constitutional right to be arrested.[99]

At most, therefore, *Kirby*, if limited to pure sixth amendment analysis, might have adopted the custody approach. As suggested above, however, this approach would have posed a serious threat to the present police practice of conducting prompt on-the-scene identifications.[100] It can reasonably be assumed that the Supreme Court

95. *See, e.g.*, Note, 44 TEMP. L.Q. 434, *supra* note 91, at 439 (recommending standby counsel at the police station).

96. 377 U.S. 201 (1964).

97. Massiah's codefendant permitted federal agents to install a radio transmitter under the front seat of his car. The codefendant then invited Massiah into his car and induced him to discuss the pending charges. Both men were free on bail. 377 U.S. at 202-03.

98. Commentators have convincingly argued that *Massiah* should have found a fourth or fifth amendment violation instead of a violation under the sixth amendment. To these critics, *Massiah*'s facts, *see* note 97 *supra* and accompanying text, demonstrated not the need for counsel but the need for restraints on governmental deceit, electronic surveillance, and use of informants. *See* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 55-58 (1964). *But see* United States v. White, 401 U.S. 745 (1971) (holding, in effect, that for fourth amendment purposes one must assume the risk that friends are secretly recording or transmitting conversations for the government).

99. Hoffa v. United States, 385 U.S. 293, 310 (1966).

100. Prior to *Kirby*, the vast majority of cases exempted these identifications from the right-to-counsel requirement. *See, e.g.*, United States v. Gaines, 450 F.2d 186 (3d

was not prepared to deprive the police of this flexibility. *Kirby*'s reinterpretation of the sixth amendment may, therefore, have been dictated by the impractical consequences that would have followed a custody approach. This assumes, of course, the nonexistence of other means to differentiate on-the-scene and station-house custody for right-to-counsel purposes. The pre-*Kirby* cases advanced two analytical bases for drawing such a distinction. The first, which may be called the *Wade-Gilbert* rationale approach, used the critical stage analysis and found prompt street confrontations less conducive to misidentification than subsequent showups at the police station. The second, which may be called the balancing approach, found the right to counsel outweighed by considerations of law enforcement. Both approaches deserve attention.

1. *The Wade-Gilbert Rationale Approach*

Under the first approach, courts, emulating *Wade* and *Gilbert*, generally attempted to evaluate the hazards that attend on-the-scene showups. In *Russell v. United States*,[101] for example, the court of appeals first focused on the problem of suggestion:

> Whatever the police actually say to the viewer, it must be apparent to him that they think they have caught the villain. Doubtless a man seen in handcuffs or through the grill of a police wagon looks more like a crook than the same man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicions. And the viewer may have been emotionally unsettled by the experience of the fresh offense.[102]

The Court then turned to counterbalancing factors, including the danger that facial recall, which often escapes translation into

Cir. 1971), *cert. denied*, 405 U.S. 927 (1972); Russell v. United States, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969); McPhearson v. State, 253 Ind. 254, 253 N.E.2d 226 (1969); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968), *cert. denied*, 393 U.S. 1034 (1969); State v. DiMaggio, 49 Wis. 2d 565, 182 N.W.2d 466, *cert. denied*, 404 U.S. 838 (1971). *Contra*, Rivers v. United States, 400 F.2d 935 (5th Cir. 1968). As expressed by one court:

> Many different situations occur on our streets daily which, as a practical matter, warrant if not require the police to present a suspect to a complaining witness shortly following detention or arrest. Indeed, such confrontations often occur even without any special police effort to bring them about. Defense counsel cannot always be riding in police cruisers. If police are no longer able to get identification confrontation promptly while the complainant's recollection is fresh, a drastic change in police procedures must take place. The police need greater flexibility than an absolute application of the *Wade* ruling as presently drawn appears to portend.

United States v. Kinnard, 294 F. Supp. 286, 289 (D.D.C. 1968).

101. 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969). *See also* cases cited in note 100 *supra*.

102. 408 F.2d at 1284.

words, will diminish rapidly as time passes. During the interim caused by delay, the witness may attempt to translate his mental image into verbalized features, thus distorting the accurate image he once had. Finding these considerations of greater import than the inherent suggestion, *Russell* concluded that prompt on-the-scene identifications may actually "promote fairness by assuring reliability."[103]

Not everyone agreed with *Russell*'s assessment of the hazards of misidentification. One commentator, for example, described the one-man showup as "the most grossly suggestive identification procedure now or ever used by the police."[104] Unfortunately, neither side cited conclusive scientific data to support its position. Nevertheless, *Russell* is premised on three psychological assumptions that warrant, and should be susceptible of, empirical exploration: First, the victim or witness to a crime will form an accurate mental image of the offender; second, that image will be more accurate on the scene several minutes after the crime than at the police station several hours later; and, third, the suggestion inherent in one-man showups is not significant given the other factors.

The available evidence concerning the first assumption is inconclusive. Chief Justice Burger once likened on-the-scene identifications to the spontaneous utterances exception to the hearsay rule.[105] But this hearsay exception itself has not escaped criticism. Spontaneity may overcome the threat of falsehood, but the excitement that causes spontaneity may distort perception.[106] Although phychologists generally agree that this is true,[107] the impact of emotional experience has not been measured precisely. In one early experiment, a criminologist arranged for two students to quarrel in his classroom, with one student eventually drawing a gun. He then asked the other class members to describe the event in writing. The criminologist reported that the inaccuracies significantly increased as the student accounts moved from the first exchange of words to the later and more traumatic moments of the altercation.[108] It cannot be assumed, however, that this experiment applies to facial recognition, since

103. 408 F.2d at 1284. Like other cases, *Russell* also balanced the defendant's need for counsel against the needs of effective law enforcement. *See* Part II(B)(2) *infra*.

104. P. WALL, *supra* note 26, at 28. *See also* Quinn, *supra* note 88, at 145.

105. Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968).

106. *See* Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 439 (1928) ("[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation"). *But see* FED. R. EV. 803(2) & Advisory Comm. Notes (proposed Nov. 20, 1972).

107. *See* A. ANASTASI, FIELDS OF APPLIED PSYCHOLOGY 548 (1964).

108. This experiment is described in Stern, *supra* note 42, at 11.

faces are apparently easier to remember than other items.[109] More recently, experimenters showed short films depicting a gas station robbery to two groups of subjects. In one film, the robber merely shoved the gas station attendant; in the other film, the robber struck the attendant with a large gun and caused him to bleed profusely. In a later viewing of slides, the two subject groups did not differ significantly in their ability to identify the offender.[110] Unfortunately, the experimental method did not even begin to simulate the emotional experience of a real-life robbery. At most, therefore, these experiments only demonstrate the need for further study.

Russell's assumption of accurate perception may be subject to a broader challenge. Some evidence supports the thesis that perception can be quite unreliable in all circumstances. In one recent experiment, a psychologist showed a short film of a kidnapping to law students, police trainees, and settlement house residents. In subsequent descriptions of the film, each group exhibited an extremely high ratio of mistakes and inferences to facts correctly recalled.[111] In an earlier experiment more directly concerned with identification testimony, an experimenter had a workman walk into a classroom, tinker with the radiator, and quietly exit. Sixteen days later, the experimenter divided the students into groups and asked them to observe lineups. In the first group, twenty-three out of thirty legal psychology students, many of whom suspected a test from the outset,[112] correctly identified the workman; only two identified the wrong man. In the second group, forty-two of sixty-four college

109. *See* Zavala, *Literature Review*, in PERSONAL APPEARANCE IDENTIFICATION: PSYCHOLOGICAL STUDIES OF HUMAN IDENTIFICATION AND RECOGNITION PROCESSES, at II-3 to 9 (A. Zavala ed. 1970) (available from the National Technical Information Service, Dept. of Commerce, Springfield, Va. 22151) [hereinafter PSYCHOLOGICAL STUDIES].

110. Sussman & Sugarman, *The Effect of Certain Distractions on Identification by Witnesses*, in PSYCHOLOGICAL STUDIES, *supra* note 109, at X-1.

111. J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 42-52 (1966). Excluding inferences, the numbers of incorrectly recalled details as percentages of items correctly recalled were 19.8, 24.3, and 31.5, respectively. *Id.* at 51. Adding inferences to the items incorrectly recalled, the percentages became 75.6, 85.5, and 126.3. *Id.* at 52. *See also* Stern, *supra* note 42, at 11-12 (experimenter had a man walk into class, pick up a book, and carry it away; majority of class incorrectly stated that the man left the room without the book).

112. The effect of knowing that a subsequent identification will be required remains uncertain. One recent study found no significant relationship between prior knowledge and *correct* identifications. On the other hand, prior knowledge, at least in combination with other factors, significantly reduced the number of *incorrect* or mistaken identifications. *See* Alexander, *Search Factors Influencing Personal Appearance Identification*, in PSYCHOLOGICAL STUDIES, *supra* note 109, at III-1. It would be helpful to know whether witnesses to crimes generally attempt to observe the offender's features for subsequent identification purposes. *See* Russell v. United States, 408 F.2d 1280, 1284 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969) (court asserted that witness was "watching for the purpose of aiding law enforcement").

sophomores with no prior experience in psychological testing correctly identified the workman. More significantly, ten of sixteen sophomores in a third group identified a participant from a five-man lineup that did *not* include the workman.[113] This indicates that perception may be accurate enough to guarantee correct identification of the actual offender but insufficiently accurate to prevent misidentification of a nonoffender.[114] To the extent that procedural law is designed to protect the innocent from wrongful conviction, it must be concerned more with the latter data than the former. Unfortunately, the experimenter did not test the significance of the time variable.

Russell's second assumption can be divided into two components: First, on-the-scene identifications may be more accurate than those conducted elsewhere;[115] second, an identification minutes after the event is preferable to one some hours later. In a study concerning the first component, an experimenter showed a group of five picture postcards to college students. After a twenty-second interval, the experimenter again displayed the same cards, but he instructed the students to select those pictures not previously seen. The data disclosed a four per cent probability that the students would fail to identify any given card. With different students, the experimenter modified the test, this time replacing all but one card in the second showing. Forty-four per cent of the students failed to recognize the repeated card in its new environment.[116] Thus, it appeared that a picture re-observed in the new environment was eleven times more difficult to recognize than one re-observed in the old environment. From this the experimenter concluded that station-house identifica-

113. Brown, *An Experience in Identification Testimony*, 25 J. Amer. Inst. Crim. L. 621 (1935). In a fourth group, five of seventeen students, who did not even observe the original incident, identified a lineup participant.

114. Some studies have recorded remarkably high (87 per cent to 97 per cent) recognition rates. *See* Zavala, *supra* note 109, at II–7. For purposes of this Article, however, the number of mistaken identifications—indicating the danger of misidentification—are more important. For example, in one study, 128 subjects were shown 4 slides of a target and, after a short interval, asked to view for identification purposes another 150 slides, shown seriatim. Although 67 subjects (57 per cent) correctly identified the target, the entire group made 1,672 mistaken identifications, with 144 of the 149 decoys being identified at least once. Alexander, *supra* note 112, at III–20 to 21. Of course, the seriatim showing, the mistaken belief induced by the instructions that the target could appear more than once, and the subjects' willingness to guess to improve the "hit" score may have contributed to the large number of misidentifications.

Other factors, not discussed in the text, undoubtedly influence identification ability in a given case. For example, one study found that a target's eyeglasses adversely affected a subject's identification score. *Id.* at III–14 to 18. Racial factors may also play a role. *See* note 483 *infra*.

115. *Russell* did not isolate this component.

116. Feingold, *The Influence of Environment on Identification of Persons and Things*, 5 J. Crim. L. & Criminol. 39, 46-47 (1914).

tions, away from the crime situs, afford the criminal "altogether too much opportunity to escape identification."[117] Unfortunately, the experiment did not really justify the experimenter's enthusiasm for on-the-scene identifications. While the experiment did support the common sense notion that a person is more easily recognized in a familiar environment, it did not adequately measure the suggestive influence of one-man showups and the increased danger of identifying the wrong person.[118]

Russell was on sound psychological ground in recognizing the desirability of prompt identifications. Memory failure is directly related to the passage of time and to interference from occurrences between the original event and the subsequent attempt to remember.[119] Early experiments with nonsense syllables demonstrated a forty-two per cent memory loss in the first twenty minutes.[120] Of course, the speed of memory decay depends on the depth of learning and memorization in the first instance.[121] Aside from this, it cannot be assumed that test results with nonsense syllables can be transferred to facial recognition, although some evidence indicates equivalent rates of memory decay for words and pictures.[122] As yet, however, the thesis that an identification several minutes after the event is significantly more reliable than one a few hours later remains untested.

Russell's third assumption—that the suggestion involved in prompt one-man showups does not outweigh the advantages—is the most speculative. The experiment with the workman described earlier[123] indicated that strong suggestive influences, which could lead to mistaken identifications, are present whenever the witness is led to believe that the suspect is before him.[124] Presumably these influences are even stronger when the police present just one suspect to the witness. In addition, the influence of clothing and other readily described items is not sufficiently understood. In most cases, the witness has given a minimal description of the offender, enough, at least, to enable the police to stop a suspect and return him to the

117. *Id.* at 47.

118. Feingold did recognize this problem but did not regard it as significant. *See id.* at 49-51.

119. *See, e.g.*, Lane, *Effects of Pose Position on Identification*, in PSYCHOLOGICAL STUDIES, *supra* note 109, at IV–13.

120. *See* H. BURTT, LEGAL PSYCHOLOGY 88 (1931).

121. *Id.* at 88-89.

122. *See* Zavala, *supra* note 109, at II–6. *But cf. id.* at II–7.

123. *See* text accompanying notes 112-14 *supra*.

124. *See* text accompanying note 113 *supra*.

scene. If the suspect fits the given description, the witness may merely complete the picture in his mind and make a positive identification.[125] This was dramatically demonstrated years ago during the prosecution of a suspect for having illicit sexual relations with two young girls. One girl identified a man who had committed similar crimes in the past as her assailant, but only after a psychologist asked him to change into a black coat, similar to the one worn by the offender.[126]

This discussion demonstrates the need for further experimentation, simulating, to the extent possible, actual on-the-scene identifications. Such experimentation must be designed to measure statistically the interaction effect of the several variables involved in this identification technique. Tests must then follow that compare prompt on-the-scene confrontations with lineups occurring a few hours later. Until such tests are conducted, *Russell*'s evaluation of the hazards of street confrontations must be considered mere speculation. Therefore, if *Kirby* would have recognized custody as the crucial point for right-to-counsel purposes, the *Wade-Gilbert* rationale as developed in *Russell* could not provide a satisfactory basis, at least from a scientific viewpoint, for excluding prompt on-the-scene identifications from the critical-stage umbrella of the sixth amendment.

2. *The Balancing Approach*

Prior to *Kirby*, many courts expressed a second reason, usually in conjunction with the first, for excluding prompt on-the-scene confrontations from the sixth amendment right to counsel.[127] Even conceding the need for counsel under *Wade*'s rationale, these courts found countervailing considerations more important. Courts

125. Subjects often demonstrate this psychological need for completeness. In one experiment, for example, a subject, attempting to recall a previously seen picture of a family preparing to move, described a woman seated on a box. In fact, the picture portrayed a woman on a sofa outside a house. Unable to remember, the subject unconsciously and logically "completed" the missing detail in his mental image of the picture. *See* Stern, *supra* note 42, at 5-6.

126. *Id.* at 18-19.

127. McPhearson v. State, 253 Ind. 254, 253 N.E.2d 226 (1969), exemplifies this general approach:

> [T]he best interests of the suspect as well as that of efficient law enforcement are served when the identification takes place immediately, though it be without counsel for the suspected party. At this stage of the police's investigation an obvious need is apparent for making a speedy determination as to the suspect's identity. If the wrong man is apprehended, certainly the police must continue their search for the criminal. On the other hand, if the suspect is identified as the person who committed the alleged crime, the police might then see fit to curtail their activities as to that particular offense.
>
> . . . .
>
> As to the interests of the suspect, it would seem desirable to have an early

realized that the right to counsel at on-the-scene confrontations would virtually eliminate that commonly used police technique.[128] Unfortunately, most courts did not seriously consider whether prompt street identifications constitute an essential tool of law enforcement.

The need for prompt on-the-scene identifications depends to a large extent on the crime being investigated. For the vast majority of crimes, such as burglary and most property offenses,[129] eyewitness identification generally plays a minor role.[130] Crimes against the person, especially homicide, assault, and, to a lesser extent, rape, often involve familiar offenders;[131] prompt identification in such cases is unnecessary. Robbery, on the other hand, is usually committed by strangers[132] and therefore necessitates a different investigative response. Since physical and scientific evidence is generally lacking,[133] the police must immediately comb the area in search of a suspect. According to the accepted view, prompt identification procedures enable the police to resume their search in the event they

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determination made as to his identity. If the suspect is shown to be someone other than the perpetrator of the crime, his release can be immediate.

253 Ind. at 259-60, 253 N.E.2d at 229. *Accord*, People v. Fowler, 1 Cal. 3d 335, 344-45 n.16, 461 P.2d 643, 650-51 n.16, 82 Cal. Rptr. 363, 370-71 n.16 (1970); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968), *cert. denied*, 393 U.S. 1034 (1969). *But see* Rivers v. United States, 400 F.2d 935, 940 n.12 (5th Cir. 1968).

The concern for the suspect's interests is somewhat specious. Prompt identifications are in the suspect's best interests only if the danger of misidentification is minimal. *But cf.* Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (prompt hospital showup of black defendant surrounded by white officers permissible where white assault victim, in critical condition, was the only person who could exonerate him). If the danger is significant, the interest in prompt release must be balanced against the interest in avoiding misidentification. Under this rationale, one would expect the suspect's preference to govern. Not surprisingly, perhaps, no court has ever given the suspect that choice. *Cf.* Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of car upheld on theory that temporary detention of car to obtain warrant would invade the suspect's rights; suspect not permitted to choose which invasion, the search or the detention, he found less repugnant). The concern for law enforcement undoubtedly represents the critical factor.

128. *See* note 100 *supra*.

129. The approximately 2,345,000 burglaries in 1972 accounted for 40 per cent of the FBI's index of eight major crimes—murder, negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny of 50 dollars and over, and auto theft. FBI, 1972 UNIFORM CRIME REPORTS 18. Larceny and auto theft accounted for another 46 per cent of reported crime. *Id.* at 21, 25.

130. PRESIDENT'S COMMN. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 37-38 (1967) [hereinafter TASK FORCE REPORT]; FBI, *supra* note 129, at 21-22, 31. Eyewitness identification is most crucial in robbery. *See* N. SOBEL, *supra* note 11, at 4-5.

131. TASK FORCE REPORT, *supra* note 130, at 14; FBI, *supra* note 129, at 8-10, 14.

132. TASK FORCE REPORT, *supra* note 130, at 14, 37-38.

133. Street muggings, which account for more than half the robberies, undoubtedly provide little, if any, evidence aside from eyewitness accounts. For a percentage breakdown of robbery into categories, see FBI, *supra* note 129, at 17.

arrest the wrong person first.[134] This view, however, may not be warranted, since the probability of success has never been documented. Moreover, the likelihood of finding a second suspect must often be minimal. In some cases, the police will assume that they have captured the actual offender even though the witness cannot make an identification, especially where the stolen property has been recovered from the original suspect. In other cases, the time consumed in finding the first suspect and presenting him for identification will give the actual offender the opportunity to flee the immediate area. It is surprising that under an approach purporting to balance interests, courts have never attempted to determine the actual advantages gained by law enforcement from this identification technique.

The right-to-counsel issue would not be resolved even by assuming a law enforcement advantage from prompt identifications. A more fundamental question must be addressed, namely whether the sixth amendment right to counsel should be balanced against other societal interests. Some language in *Wade* suggests an affirmative answer:

> No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice to counsel would have prejudicially delayed the confrontations.[135]

Other language in the opinion suggests the opposite conclusion. In the sentence immediately following the foregoing quotation, the Court intimated that substitute counsel might suffice when necessary to avoid prejudicial delay.[136] This sentence, however, cuts both ways. On the one hand, it suggests that counsel cannot be dispensed with altogether;[137] on the other, it leaves the balancing issue unresolved where even substitute counsel would cause undue delay.[138] In succeeding language, an anti-balancing viewpoint seems more apparent.

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134. *See* note 127 *supra.*

135. 388 U.S. at 237.

136. 388 U.S. at 237.

137. *See* Russell v. United States, 408 F.2d 1280, 1283 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969).

138. *See* Russell v. United States, 408 F.2d 1280, 1283-84 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969).

Quoting *Miranda*, the Court answered the contention that counsel might obstruct identification procedures:

> [A]n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.[139]

Although *Wade* appears inconclusive, the better view would seem to support an absolute sixth amendment right to counsel that cannot be balanced away.[140] The sixth amendment states categorically that the accused *shall* have the right to counsel's assistance in all criminal prosecutions. Under traditional analysis, counsel is required not only at trial but at all critical stages of the prosecution—those stages where substantial rights of the accused may be affected.[141] The pre-*Kirby* advocates of the balancing approach conceded, in effect, that a street confrontation constitutes a critical stage, but they found other interests to be overriding. The danger is that this reasoning, which ignores the sixth amendment's mandate, would appear equally applicable to the trial stage. Indeed, it was argued in *Argersinger v. Hamlin*[142] that society could not afford to recognize an absolute right to counsel in misdemeanor trials.[143] Even if balancing would ultimately produce the "correct" result, this argument begs the question; the method of analysis rather than the result is at issue. Under the balancing approach, "shall" and "all" lose their etymological meanings. The sixth amendment is emaciated when the issue of its applicability is stated in terms of cost.[144] Arbitrary lines,

139. 388 U.S. at 238, *quoting* Miranda v. Arizona, 384 U.S. 436, 480-81 (1966).

140. *Cf.* Rivers v. United States, 400 F.2d 935, 940 n.12 (1968).

141. Mempa v. Rhay, 389 U.S. 128, 134 (1967).

142. 407 U.S. 25 (1972).

143. 407 U.S. at 59-61 (Powell, J., joined by Rhenquist, J., concurring). The majority rejected this argument and extended the right to appointed counsel to all cases as a prerequisite to imposition of imprisonment.

144. Justice Black criticized a slightly different application of the balancing approach, but his words are equally apropos here:

> The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel" . . . and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him.

Gilbert v. California, 388 U.S. 263, 279 (1967) (Black, J., dissenting in part). *Cf.* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (equal protection clause flatly prohibits, without balancing, the denial of effective appeals to indigent appellants).

like that drawn in *Kirby*, at least leave the sixth amendment with full vitality for those stages where it does apply.

In short, if *Kirby* would have adopted a custody or focus analysis for sixth amendment purposes, neither the balancing approach nor the *Wade-Gilbert* approach[145] could provide an acceptable basis for exempting on-the-scene confrontations from the right-to-counsel requirement.[146] Stated differently, *Kirby*'s withdrawal of the sixth amendment from precharge criminal procedure may be supported by practical considerations, assuming the desirability of maintaining prompt street confrontations as a law enforcement technique.[147] This does not necessarily mean, however, that the defendant in *Kirby* should not have been provided counsel before his station-house showup. What *Kirby* overlooked,[148] and what now merits consideration, is the possibility of using a more flexible constitutional basis, such as due process, to require counsel at the station house but not on the street.

III. The Right to Counsel: Alternate Constitutional Bases

A. *Due Process: Critically Important Procedures and Fundamental Fairness*

The due process clause of the fourteenth amendment has long been recognized as an independent source for the right to counsel. Prior to *Gideon v. Wainwright*,[149] due process constituted the only basis for asserting a federal right to counsel in state criminal cases.[150] To prevail, the defendant had to show that special circumstances made the denial of counsel in his particular case fundamentally unfair.[151] It soon become evident, however, that due process could re-

145. *See* Part II(B)(1) *supra*.

146. In his *Kirby* dissent, Justice Brennan found it unnecessary to consider the on-the-scene issue. 406 U.S. at 698 n.5. This is unfortunate since his dissent necessarily raises serious constitutional questions about on-the-scene confrontations.

147. *But cf.* text accompanying notes 129-34 *supra*. It is safe to assume that courts will place the burden of proof on those challenging the utility of this law enforcement technique.

148. *Kirby* referred to "the right to counsel contained in the Sixth and Fourteenth Amendments." 406 U.S. at 688. It is clear, however, that the Court cited the fourteenth amendment only to illustrate the vehicle through which the sixth became applicable to the states. First, the Court in a subsequent paragraph referred specifically and exclusively to the "all criminal prosecutions" language of the sixth amendment. 406 U.S. at 690 n.7. Second, the Court also referred to the "Fifth and Fourteenth Amendment privilege against compulsory self-incrimination." 406 U.S. at 688. Third, the Court never discussed the possibility of using due process as an independent source for the right to counsel. *See also* United States v. Ash, 413 U.S. 300, 303 n.3 (1973) (referring to *Kirby* as a sixth amendment case).

149. 372 U.S. 335 (1963).

150. *See, e.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

151. Betts v. Brady, 316 U.S. 455, 462 (1942).

quire a more expansive right to counsel, not tied to the facts of the particular case. In *Bute v. Illinois*[152] the Court spoke of an absolute fourteenth amendment right to counsel in all capital cases;[153] in subsequent noncapital cases before *Gideon*, the Court so readily found special circumstances that one could reasonably argue for the existence of an absolute right to counsel under the fourteenth amendment.[154]

Gideon added a sixth amendment basis for the right to counsel without undermining the independent due process doctrines. Post-*Gideon* cases continued to recognize the due process clause as a source of an absolute right to counsel in certain noncriminal contexts. For example, *Kent v. United States*[155] found it fundamentally unfair for a juvenile court to waive jurisdiction over an alleged delinquent without first granting him a hearing and the right to be represented by counsel. In language analogous to that used in its sixth amendment cases, the Court described the waiver issue as "critically important" to the juvenile.[156] One year later, *In re Gault*[157] established an absolute right to counsel in all juvenile delinquency trials. Both cases carefully and unavoidably premised their holdings on due process, not on the sixth amendment. The sixth amendment's language limits its application to criminal prosecutions,[158] and the Court, though generally eschewing labels, has refused to equate delinquency proceedings with adult criminal trials.[159]

More recently, courts have extended the due process right to counsel into areas less akin to criminal prosecutions. The slow movement in this direction started when the Supreme Court, in *Goldberg*

152. 333 U.S. 640 (1948).

153. 333 U.S. at 674, 676. *See also* Crooker v. California, 357 U.S. 433, 441 n.6 (1958); Hollman v. Manning, 262 F.2d 656, 659 (4th Cir. 1959). The Supreme Court's references to this right were always in dicta. *See* Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 227-28 n.74 (1959).

154. The Court found special circumstances in every case decided after 1950. *See* Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). In *Gideon*, Justice Harlan dissented from the view that the fourteenth amendment incorporates the sixth; nevertheless, he agreed that defendants in state criminal trials should have an absolute fourteenth amendment (due process) right to counsel.

155. 383 U.S. 541 (1966). *Kent* is really a fifth amendment due process case, since the fourteenth amendment is limited to *state* action. The due process clauses in the fifth and fourteenth amendments are otherwise identical.

156. 383 U.S. at 553, 560-61, 563.

157. 387 U.S. 1 (1967).

158. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

159. In addition to *Kent* and *Gault*, see McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (refusing to grant juveniles a right to trial by jury in delinquency proceedings). Adults being criminally prosecuted have a sixth amendment right to trial by jury in all cases where the punishment may exceed six months' imprisonment. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

v. Kelly,[160] prohibited the states from terminating welfare benefits without first affording the recipient a hearing, where he could be represented at least by retained counsel. Some lower courts, going even further, have granted an absolute due process right of appointed counsel to defendants in civil contempt proceedings,[161] to parents charged with neglect in proceedings to deprive them of custody of their children,[162] and, most recently, to defendants in divorce proceedings.[163] The continued vitality of the fourteenth amendment in this context suggests the possibility of finding a due process right to counsel in *Kirby*-type identification procedures where the sixth amendment does not apply.[164] It need only be shown that a given identification procedure is "critically important" to the maintenance of the fundamental fairness of the proceedings. At the outset, it should be recognized that the analysis required to resolve this issue is somewhat different from that involved in determining "critical stages" for sixth amendment purposes. While a balancing analysis is incongruous with the sixth amendment's language and spirit,[165] the more flexible due process standard *requires* that the court weigh the individual's interests against those of the state.[166] This balancing need not relate to the facts of each particular case, but, instead, as in *Goldberg*, may be undertaken with respect to a certain stage or pro-

160. 397 U.S. 254 (1970). *Goldberg* is the only civil case in which the Supreme Court has found an absolute due process right to counsel. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 80-84 (1972) (right to hearing in replevin cases; presumably retained counsel could represent defendant).

161. United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972).

162. Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me. 1973); *In re* B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968). *Contra*, Robinson v. Kaufman, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied*, 402 U.S. 964 (1971).

163. Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. 1973).

164. *Cf.* United States v. Bland, 472 F.2d 1329, 1345-47 (D.C. Cir. 1972) (Wright, J., dissenting), *cert. denied*, 412 U.S. 909 (1973); State v. Anderson, 8 Wash. App. 782, —, 509 P.2d 80, 82-83 (1973) (dictum) (*Kirby* does not preclude a fifth amendment right to counsel at psychiatric interviews). It should not be assumed that such a right will readily be found, since most courts have eagerly, and with little independent analysis, followed *Kirby*. *See, e.g.*, United States v. Abshire, 471 F.2d 116 (5th Cir. 1972); United States v. Savage, 470 F.2d 948 (3d Cir. 1972), *cert. denied*, 412 U.S. 930 (1973); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); Moore v. Eyman, 464 F.2d 559 (9th Cir. 1972); Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973) (abandoning prior contrary position); State v. Northrup, 303 A.2d 1 (Me. 1973); State v. Farrow, 61 N.J. 434, 294 A.2d 873 (1972), *cert. denied*, 410 U.S. 937 (1973). *Contra*, People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). Two state courts have urged the police to permit defense counsel to be present at all lineups. Baker v. State, — Nev. —, —, 498 P.2d 1310, 1312 n.2 (1972); Chandler v. State, 501 P.2d 512, 520 (Okla. Crim. App. 1972). *But cf.* Reed v. Warden, — Nev. —, 508 P.2d 2 (1973); Stewart v. State, 509 P.2d 1402 (Okla. Crim. App. 1973).

165. *See* text accompanying notes 135-44 *supra*.

166. Goldberg v. Kelly, 397 U.S. 254, 262-65 (1970).

cedure. For example, the individual's interest in having counsel's assistance to prevent unfairness may be outweighed by the needs of law enforcement to conduct prompt on-the-scene identifications.[167] On the other hand, the individual's interests may be predominant in station-house identifications where promptness is not a factor.[168]

United States v. Wade[169] is a suitable starting point for analysis of the defendant's interests. Although *Wade* recognized a sixth amendment right to counsel at postindictment lineups, its rationale included due process overtones.[170] Much as *Miranda* created a fifth amendment right to counsel to help dispell the compulsion inherent in custodial interrogation,[171] *Wade* required counsel to prevent, or at least to reduce, the suggestion inherent in identification procedures and to enhance the right to a fair trial.[172] Like *Miranda, Wade* seemed not to vindicate the right to counsel as such; instead, it viewed counsel as supportive of the defendant's other constitutional rights. The Court made this clear early in the opinion in the way it structured the issue for subsequent discussion:

> [T]he principle of *Powell v. Alabama*[173] and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[174]

In language rich with due process flavor, *Wade* then found identification procedures to be "peculiarly riddled with innumerable dangers and variable factors that might seriously, even crucially, derogate from a fair trial."[175] Foremost among these dangers was the

167. *Cf.* Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967). These cases balanced unfairness to the accused against the needs of law enforcement with respect to photographic displays and showups, respectively.

168. To use Justice Schaefer's words, due process "includes those procedures that are fair and feasible in the light of . . . existing values and capabilities." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956).

169. 388 U.S. 218 (1967).

170. *See* Gilligan, *Eyewitness Identification*, 58 MIL. L. REV. 183, 190 (1972); Quinn, *supra* note 88, at 145. *Cf.* Casenote, 6 IND. L. REV. 365, 371-72 (1972).

171. *See* text accompanying notes 79-80 *supra*.

172. 388 U.S. at 228-29.

173. It is worthwhile remembering that *Powell* is based on due process, not the sixth amendment. *See* text accompanying note 58 *supra*.

174. 388 U.S. at 227 (emphasis original). *See also* text accompanying notes 49-51 *supra*.

175. 388 U.S. at 228.

influence of improper suggestion, intentional or otherwise, upon the witness.[176] The harm from such suggestion could well be irreparable, since "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on . . . ."[177] The threat to a fair trial was further aggravated by the difficulty in detecting suggestion and in reconstructing the identification procedure at trial.[178] Bright lights often prevent the defendant from observing the witnesses and the police officers who conduct the lineup. The defendant's emotional tension and lack of training usually preclude his detection of improper influences.[179] The witnesses share the same handicaps, which reduce the likelihood of their being alert to prejudicial conditions.[180] To *Wade*, an attorney's presence at the initial identification would eliminate these dangers and help guarantee the defendant a fair trial. Counsel would be able to detect the suggestive influences, thus breaching the wall of secrecy.[181] Also, counsel's firsthand knowledge would help him effectively to cross-examine the witnesses at trial and would thus enhance the defendant's constitutional right to confront the witnesses against him.[182] Finally, and perhaps most important, counsel would often be able to avert the prejudicial suggestion in the first instance.[183] Since not everyone agreed with *Wade*'s conclusions,[184] however, the issue merits further examination.

The causes of mistaken identification include the innate deficiencies in human perception and memory and the general susceptibility of witnesses to suggestion.[185] While counsel cannot affect the former, he should be able to reduce the influence of the latter. In addition, the empirical studies reviewed earlier indicate that human perception may be even more deficient than is commonly acknowledged.[186] If so, witnesses are even more susceptible to improper suggestion, and the need for corrective safeguards is even greater. Some critics respond, however, that the police, if really bent on cheating,

176. 388 U.S. at 228-29.

177. 388 U.S. at 229, *quoting* Williams & Hammelmann, *Identification Parades —I*, 1963 CRIM. L. REV. (Eng.) 479, 482.

178. 388 U.S. at 230-32.

179. 388 U.S. at 230-32.

180. 388 U.S. at 231-32.

181. *See* 388 U.S. at 234-35.

182. 388 U.S. at 235-36.

183. 388 U.S. at 235-36.

184. *See* 388 U.S. at 254 (White, J., dissenting). *See also* Read, *supra* note 36, at 365-67.

185. P. WALL, *supra* note 26, at 8-9, 199.

186. *See* text accompanying notes 105-26 *supra*.

can accomplish their objective by approaching the witness before the identification procedure.[187] Even if this is possible, counsel will still be beneficial in those cases where the desire to cheat exists but is less fervent or where the suggestion is primarily unintentional.

Some critics have even minimized counsel's importance where the suggestion is unintentional.[188] According to their reading of *Wade*, the Court envisioned counsel in a passive role, one of observation but not participation. In their view, photographic devices would be more accurate than counsel in recording the identification procedure.[189] This criticism ignores *Wade*'s emphasis on preventing the suggestion in the first instance: ". . . [E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[190] The need for counsel to prevent unfairness warrants special emphasis since witnesses rarely retract earlier identifications. In psychological terms, the witness's mental image of the defendant formed after careful viewing at the identification procedure probably overshadows his or her earlier mental image of the actual offender.[191] The danger arises not because the witness chooses to lie, but rather because the witness sincerely believes that the new image portrays the actual offender. Therefore, if the witness has erred, cross-examination will frequently fail to reveal it. Nor will counsel adequately protect the innocent by attempting to counter a witness's positive identification with a jury argument concerning suggestive pretrial identification techniques.

Some will respond that the *Stovall-Simmons* rule,[192] which requires the exclusion of eyewitness testimony whenever the identification procedure is so impermissibly suggestive that it raises a substantial likelihood of irreparable misidentification, provides sufficient protection against wrongful conviction. Under this rule, however, the defendant is not protected against substantial suggestion that

187. Read, *supra* note 36, at 365.

188. *Id. See also* Note, *Lawyers and Lineups*, 77 YALE L.J. 390, 398 (1967).

189. *See* Read, *supra* note 36, at 365.

190. 388 U.S. at 235.

191. *Cf.* P. WALL, *supra* note 26, at 68; Williams & Hammelmann, *supra* note 177, at 484. English courts have long exhibited sensitivity to this matter. *See* Rex v. Dwyer, [1925] 2 K.B. 799 (Crim. App.). This is another area that warrants further empirical exploration.

192. *See* text accompanying notes 356-65, 384-89 *infra*.

does not quite amount to a due process violation. Therefore, despite the semantic difficulties, it can be argued that due process may require a right to counsel to prevent unfairness that itself may not violate the fourteenth amendment.[193] In other words, counsel may be necessary to prevent both unfairness that violates due process and other suggestion that, without denying due process, substantially and unnecessarily increases the risk of misidentification.[194]

The need for counsel to prevent suggestion is quite evident. The cases that demonstrate inappropriate suggestion that fell short, at least to the reviewing courts, of constituting a due process violation under *Stovall* and *Simmons* are legion. The techniques that continue to surface would exhaust the gamut of the most vivid imagination: having the accused, partially dressed in clothing similar to that worn by the offender, appear in a lineup with a police officer dressed in a business suit;[195] requiring each lineup participant to identify himself after the victim has learned the offender's name from another witness;[196] singling out the defendant from fellow prisoners in jail;[197] unnecessarily presenting the suspect alone, either in person or by picture;[198] conducting several confrontations before the same witness, with only the defendant common to each;[199] telling the robbery victim at a one-man showup that the robber has been caught;[200] presenting pictures of the defendants in color and of the nonsuspects in black and white.[201] While it may be technically correct to hold

193. *See* United States v. Wade, 388 U.S. 218, 232 (1967) (referring to "the potential" for prejudice in identification procedures); Miranda v. Arizona, 384 U.S. 436, 457 (1966) (counsel provided as a safeguard against the "potentiality" for compulsion). In Goldberg v. Kelly, 397 U.S. 254, 270 (1970), the Court said: "The right to be heard would be, *in many cases*, of little avail if it did not comprehend the right to be heard by counsel" (emphasis added). The Court did not say that every hearing without counsel would be fundamentally unfair. Moreover, the Court provided counsel even though the welfare recipient presumably could have challenged substantial unfairness on traditional due process grounds. *Cf.* Stovall v. Denno, 388 U.S. 293, 299 (1967) (*Wade* not retroactive because not all lineups without counsel are unfair).

194. *Cf.* Baker v. State, — Nev. —, 498 P.2d 1310, 1312 n.2 (1972). *See also* State v. Batchelor, 418 S.W.2d 929 (Mo. 1967) (defendant the only woman in lineup).

195. People v. Barge, 7 Ill. App. 3d 721, 288 N.E.2d 492 (1972).

196. State v. West, 484 S.W.2d 191 (Mo. 1972).

197. State v. Sheardon, 31 Ohio St. 2d 20, 285 N.E.2d 335 (1972).

198. *See, e.g.*, Neil v. Biggers, 409 U.S. 188 (1972); People v. Holiday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970). *Cf.* Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969) (finding a due process violation).

199. United States v. Williams, 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971). *Cf.* People v. Brunson, 1 Cal. App. 3d 226, 81 Cal. Rptr. 726 (1969) (showup after unsuccessful lineup).

200. People v. Gonzalez, 27 N.Y.2d 53, 261 N.E.2d 605, 313 N.Y.S.2d 673 (1970), *cert. denied*, 400 U.S. 996 (1971). *Cf.* Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969).

201. United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970).

that the defendants in these cases were not denied due process, the identification techniques used only increased the possibility of wrongful conviction. In each, an attorney could have significantly reduced this unnecessary and unacceptable risk.[202]

One critic has argued that counsel, much like the defendant and witnesses, may not be schooled adequately in detecting suggestive influences.[203] While it is difficult to believe that an astute attorney would not have detected the abuses listed above, suggestion may sometimes be sufficiently subtle to avoid easy detection. A recent Canadian experiment provides an example worthy of extended consideration.[204] Following a robbery, a department store cashier described the robber as neatly dressed and rather good looking. Although she could not remember any details concerning his facial or physical characteristics, she identified the defendant several days later at a twelve-man lineup, which the police photographed. Sometime later, researchers showed the lineup photograph to twenty female subjects and asked them to rate each lineup participant on an eleven point scale: (1) extremely good looking, (3) very good-looking, (5) somewhat good looking, (7) about average, (9) not good looking, (11) definitely not good looking. The defendant averaged 5.95, while the average of the other participants ranged from 7.20 to 9.40.[205] The researchers then compared each subject's rating of the defendant with her rating of each other lineup participant. In the 220 comparisons, the defendant was rated more attractive 179 times, the defendant and the compared participant were rated equally attractive 23 times, and the defendant was rated less attractive 18 times. In a second study, the researchers asked twenty-one different female subjects, informed only that the offender was rather good looking, to make an identification. Significantly defying chance probabilities, eleven women chose the defendant, and four picked him as their second choice.[206]

Admittedly, the suggestion revealed by the experiment would have been difficult for an attorney to detect; this problem will recur

202. These are but a few of the available examples. A sense of the dimensions of the problem can be quickly developed by skimming through the reporters. *See* Note, *supra* note 20; Annot., 39 A.L.R.3d 791 (1971).

203. Read, *supra* note 36, at 366.

204. Doob & Kirshenbaum, *Bias in Police Lineups—Partial Remembering*, 1 J. POLICE SCI. & ADMIN. 287 (1973).

205. This difference was statistically significant. *Id.* at 291.

206. The researchers argued that a nonwitness at a completely unbiased lineup should have a $1/n$ probability of picking the defendant, where n is the number of people in the lineup. By chance, therefore, the defendant should have been chosen less than twice ($1/12 \times 21$). *Id.* at 290, 292.

whenever the characteristics remembered by the witness are not physically measurable. However, this does not prove the foolhardiness of requiring counsel; on the contrary, it dramatizes the importance of additional safeguards to guarantee counsel's effectiveness. Prior to the identification procedure, counsel should be given the witness's complete description of the offender.[207] It may even be wise to permit counsel to interview the witness before the identification. For example, an attorney in the Canadian case, armed with the cashier's prior description, would have known what to observe and, like the subjects in the experiment, might have noticed the defendant's relative attractiveness. Counsel should also be permitted to propose changes in the identification procedure.[208] By granting counsel an active role, the goal of preventing mistaken identifications can be more nearly realized.

The available scientific evidence clearly indicates that *Wade* correctly perceived the defendant's substantial need for counsel's assistance in pretrial identification procedures. The remaining question under due process analysis is whether society has more substantial countervailing interests in not providing counsel. It has been argued, for example, that counsel will convert the confrontation into a discovery proceeding, thereby increasing the risk that witnesses will be intimidated.[209] This argument is not persuasive. Many state statutes already grant the defendant a pretrial right to the names of witnesses who will testify against him.[210] Reflecting the trend toward broader discovery, the American Bar Association recently recommended pretrial disclosure of the names and addresses of prospective witnesses, together with their relevant statements.[211] According to the attached commentary, such discovery "not only facilitates plea discussions and agreements but also goes to the heart of the general proposition that defense counsel must be permitted to prepare adequately to cross-examine the witnesses . . . ."[212] While a substantial risk of witness intimidation may sometimes exist, special safeguards can be provided. As *Wade* recognized, masking or other procedures can be employed to prevent recognition.[213] Of course, defense coun-

207. United States v. Allen, 408 F.2d 1287, 1289 (D.C. Cir. 1969). *See also* Sanford, *Eye Witness Identification in Criminal Cases*, 46 FLA. B.J. 412, 414 (1972).

208. *See id.* at 414.

209. Read, *supra* note 36, at 373-75.

210. A list of statutes can be found in ABA PROJECT ON STANDARDS OF CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, Commentary at 57 (1970) [hereinafter ABA STANDARDS].

211. *Id.* § 2.1(a)(i).

212. *Id.*, Commentary at 56.

213. 338 U.S. at 238 n.28.

sel may discover the inability of some witnesses to identify the defendant. This provides no windfall, however, since the state has a constitutional duty to disclose all favorable evidence that is material to the defendant's case.[214]

Another argument is that counsel will urge the defendant to alter his appearance to make identification difficult.[215] There are several answers to this argument. First, such conduct raises serious ethical questions that can best be remedied outside the context of criminal procedure. The American Bar Association's response to the unethical-counsel hobgoblin, which long impeded reform in pretrial discovery, is apropos: "[T]he answer to the alleged untrustworthiness of counsel is not the denial of procedures beneficial to the process but improvement in the definition of standards for lawyers' conduct and more effective discipline."[216] In any event, counsel need not actually attend the identification procedure to make such suggestions. Moreover, if the opportunity to modify appearance, such as by having a haircut or shaving a beard, exists, most defendants will not require counsel's advice to take such action.

Economic burdens may sometimes be a significant factor in a due process balancing analysis.[217] However, society's interest in protecting the innocent from wrongful conviction seems to outweigh the financial burden placed on the state.[218] Further, one must doubt the significance of the economic argument. Since most defendants will either retain or be appointed counsel before the final disposition of their cases, the financial cost of providing counsel somewhat earlier should be minimal.

The one argument with some conceivable merit is that a due process right to counsel would, like its sixth amendment counterpart, abrogate certain necessary law enforcement techniques, primarily prompt on-the-scene identifications. At present, it is difficult to balance the need for this law enforcement technique against the defendant's interest in avoiding mistaken identification. As previously discussed,[219] empirical research has not yet measured, either in iso-

214. *See* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Quinn, 357 F. Supp. 1348 (N.D. Ga. 1973).

215. Read, *supra* note 36, at 374-75.

216. ABA STANDARDS, *supra* note 210, Commentary at 39.

217. *See* note 168 *supra*.

218. For example, in Mayer v. City of Chicago, 404 U.S. 189 (1971), the city contended that economic considerations outweighed the interests of an indigent misdemeanant, whose sentence did not include incarceration, in obtaining a free transcript for appellate purposes. The Court, however, refused even to consider the economic burden as an element of analysis. 404 U.S. at 196-97. *Cf.* Argersinger v. Hamlin, 407 U.S. 25 (1972).

219. *See* text accompanying notes 105-26 *supra*.

lation or comparatively, the risks that attend this identification procedure. On the other hand, previous discussion also suggested that prompt on-the-scene identifications may not be essential to effective law enforcement.[220] Further empirical evidence is required to weigh the interests with confidence. Nevertheless, courts should be especially cautious in evaluating arguments based on the need for promptness. For example, the longer the interval between the crime and the suspect's arrest, the less convincing the need for prompt identification. Once substantial time has elapsed, the police should return the suspect to the station and provide him with counsel for the identification.[221]

Counsel should always be required for station-house identifications. The need for promptness will rarely, if ever, be evident when the police have already consumed time in bringing both the suspect and witness to the station. In *Kirby*, for example, the showup occurred two days after the crime;[222] a few hours delay simply could not have mattered. When promptness is not a factor, no countervailing considerations outweigh the defendant's need for counsel's assistance.

In summary, a due process right to counsel can apply to critically important stages of the criminal process even though the sixth amendment does not. Unlike the sixth amendment, due process requires a balancing analysis, which enhances flexibility. At least with respect to station-house identification procedures, the need for counsel far outweighs any conceivable countervailing interest. Therefore, just as the sixth amendment under *Wade* and *Kirby* provides counsel for postcharge identifications, due process should require counsel in all precharge station-house confrontations. More evidence is needed to balance the interests with respect to prompt on-the-scene identifications. Until that evidence is garnered, due process provides the flexibility to maintain the status quo.

B. *Due Process: Special Circumstances in a Given Case*

A second, even more flexible due process analysis should also be considered. Rather than broadly focusing on particular police procedures, the analysis can be limited to the facts in a given case. In *Betts v. Brady*,[223] where this approach originated, the Supreme

220. *See* text accompanying notes 129-34 *supra*.

221. *Compare* McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969) (four hours) *with* United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971) (one and one-half hours).

222. 406 U.S. at 684.

223. 316 U.S. 455 (1942).

Court, though refusing to apply the sixth amendment to the states, held that special circumstances could make the denial of counsel fundamentally unfair in a particular case.[224] *Betts* continues to be a viable and important case even though *Gideon* overruled its sixth amendment holding.[225] Quite recently, in *Gagnon v. Scarpelli*,[226] the Court held that, for sixth amendment purposes, probation and parole revocation hearings could not be considered criminal prosecutions. Citing *Betts*, however, the Court provided a due process right to counsel for those probationers and parolees incapable of effectively presenting and arguing their cases to the fact finder.[227] Without referring to *Goldberg v. Kelly*,[228] the Court found due process "not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed."[229]

These "significant interests" may underlie the distinction between *Goldberg*'s critical procedure approach and *Gagnon*'s case-by-case approach. In revocation hearings, the need for counsel varies, since "in most cases" the probationer or parolee has either been convicted of a new offense or admitted the alleged violations.[230] In such cases counsel has little to investigate or argue. Second, counsel would significantly change the revocation proceeding by making the fact finder, who should have a "predictive and discretionary" role, more akin to a trial judge.[231] In his new quasi-judicial role, the fact finder conceivably would become less tolerant of marginally deviant behavior;[232] according to the Court at least, an absolute right to counsel might adversely affect the probationer's or parolee's interests. Third, an absolute right to counsel would impose a substantial financial

224. For a cogent criticism of *Betts*, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

225. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

226. 411 U.S. 778 (1973). *See also* Morrisey v. Brewer, 408 U.S. 471 (1972). *Gagnon* may be considered *Kirby*'s counterpart on the other end of the sixth amendment's right-to-counsel spectrum.

227. 411 U.S. at 788.

228. 397 U.S. 254 (1970). *See* text accompanying notes 160, 166 *supra*.

229. 411 U.S. at 788. Some lower courts have recognized a special-circumstances right to counsel in quasi-criminal and civil proceedings. *See, e.g.*, Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968) (petitioner seeking declaratory judgment that he was subjected to cruel and unusual punishment in prison); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964) (habeas corpus); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (motion to vacate sentence under what is now 28 U.S.C. § 2255 (1970)). *See also* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1075 (1969).

230. 411 U.S. at 787.

231. 411 U.S. at 787.

232. 411 U.S. at 788.

cost on the state.[233] These considerations prompted the Court to conclude that the need for counsel at revocation proceedings "derives not from invariable attributes of those hearings, but rather from the peculiarities of particular cases."[234]

While this more limited due process right would be preferable to none at all, the differences between revocation hearings and pretrial identifications suggest that a more generalized due process approach would be appropriate. The need for counsel at pretrial identifications derives from the invariable attributes of those procedures. The vagaries of eyewitness identification and the general susceptibility of witnesses to improper suggestion[235] always make the presence of counsel highly desirable. Also, the interests of the state are reasonably fixed. If the analysis in the preceding section is correct, the state's interest in effective law enforcement might be adversely affected only by imposing the right to counsel at prompt on-the-scene identifications. Finally, as noted previously,[236] the costs of providing counsel at pretrial identifications would be negligible both in an absolute sense and when weighed against the need to prevent wrongful convictions.

A case-by-case approach would be inappropriate for a more practical reason. As witnessed by the flood of cases reaching the Supreme Court after *Betts*, the special-circumstances test is particularly difficult to administer.[237] It requires the fact finder to make a decision before all the complexities of the case and the full extent of the defendant's incapabilities become apparent.[238] The test increases ap-

233. 411 U.S. at 788. The Court estimated the number of revocation hearings at about 130,000 per year. 411 U.S. at 788 n.11.

234. 411 U.S. at 789.

235. According to *Wade*, the potential for such suggestion, intentional or otherwise, is inherent in such procedures. *See* 388 U.S. at 228-29, 233, 236.

236. *See* text accompanying note 218 *supra*.

237. *See* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1199-200, 1203-04 (1970); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

238. This problem should readily become apparent as appellate courts wrestle with *Gagnon*. The Court assumed that a simple issue, not usually requiring counsel, is presented when the parolee has been convicted of a subsequent offense. *See* text accompanying note 230 *supra*. Suppose, however, that a counselless misdemeanor conviction, which resulted merely in a fine, constitutes the basis of parole revocation. Under Argersinger v. Hamlin, 407 U.S. 25 (1972), a misdemeanant has a right to trial counsel only if his conviction would actually result in a sentence of imprisonment. Standing alone, the conviction seems constitutionally permissible, but the troublesome issue is whether it can be used to justify parole revocation and thus indirectly result in a sentence of imprisonment. To detect and argue that issue, it can be presumed that most parolees would need counsel at the revocation hearing. It may also be questionable whether the fact finder at the revocation hearing would recognize the issue and the concomitant need for counsel. *See generally* J. GRANO, PROBLEMS IN CRIMINAL PROCEDURE 6, No. 7 (1974).

pellate litigation, with the issue quite often not resolved until the case reaches the Supreme Court.[239] The difficulties would only be aggravated by requiring the police, instead of a judge, to guess at their hazard whether due process in a given case prohibits denial of counsel. Nothing can be gained by seeking to protect the innocent with rules that will only hamper and confuse the police.[240] Therefore, once it is recognized that due process can sometimes require counsel, simplicity of administration would suggest extending the right to all cases.

If a special-circumstances test were adopted, courts would be forced to provide guidelines for the police in case-by-case appellate review. Presumably, the more extreme the improper suggestion, the greater the risk of convicting the innocent and the greater the need for counsel's assistance.[241] While prevention of improper suggestion should constitute the primary consideration, courts would also have to consider the defendant's capacity to detect the suggestion and the possibility that counsel could remedy some of the harm with cross-examination at trial. Of course, this task would require judicial speculation that, given current knowledge, simply could not be supported with scientific evidence.

C. *The Rights of Confrontation and Effective Assistance of Counsel*

Two other sixth amendment rights conceivably could support a counsel requirement at precharge identification procedures: the right to confront one's accusers and the right to have the "effective" assistance of counsel.[242] *Wade* referred to both these rights by framing its discussion in terms of whether counsel was "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[243] Later in the

239. For an example of the unfortunate results sometimes reached with this test, see Kamisar, *supra* note 224, at 6 n.23.

240. *Cf.* Hammelmann & Williams, *Identification Parades—II*, 1963 CRIM. L. REV. (Eng.) 545, 547.

241. The suggestive techniques described above, *see* text accompanying notes 195-201 *supra*, should at least establish a prima facie need for counsel's assistance.

242. The sixth amendment provides only for the "Assistance of Counsel." The Supreme Court first spoke of effective assistance in Powell v. Alabama, 287 U.S. 45, 53, 71 (1932), a due process, not a sixth amendment, case. Since *Gideon*, it has been assumed that the sixth amendment also requires effective assistance. *See generally* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964); Comment, *Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings*, 20 SW. L.J. 136 (1966).

243. 388 U.S. at 227.

opinion, *Wade* specifically invoked the right of confrontation: "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."[244]

At first glance, it appears that *Kirby* precludes using these rights as a source for counsel in precharge identification cases. Both rights are prefaced by the "criminal prosecution" language of the sixth amendment,[245] and *Kirby*'s plurality held that a criminal prosecution does not commence until the start of formal judicial proceedings.[246] Closer examination suggests a contrary conclusion. The issue in *Kirby* was whether the sixth amendment right to counsel as such could apply before the start of judicial proceedings. In *Wade*, on the other hand, the Court spoke of protecting the rights of confrontation and counsel *at trial.* In other words, the sixth amendment rights of confrontation and counsel at trial require certain pretrial safeguards to guarantee their effectiveness. In the absence of equally adequate alternatives,[247] the Court in *Wade* provided counsel's assistance as the primary safeguard.

The use of counsel as a pretrial safeguard for the right of confrontation was nothing new. *Pointer v. Texas*[248] first extended the sixth amendment confrontation clause to the states. Applying this clause, *Pointer* also prohibited the trial use of preliminary hearing testimony given in the absence of defense counsel. *Pointer* indicated, however, that a different case would have arisen if defense counsel had been present at the preliminary hearing with a "complete and adequate opportunity to cross-examine" the witness.[249] In effect, therefore, *Pointer* established a limited pretrial right to counsel as a procedural safeguard for the right of confrontation. Not until six years later did the Court actually apply the right to counsel as such to preliminary hearings.[250]

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244. 388 U.S. at 235.

245. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

246. 406 U.S. at 689.

247. 388 U.S. at 238-39. In suggesting that other safeguards might obviate the need for counsel, *Wade* drew support from similar language in Miranda v. Arizona, 384 U.S. 436, 467 (1966). This again indicates that *Wade*'s concern was not the sixth amendment right to counsel as such.

248. 380 U.S. 400 (1965).

249. 380 U.S. at 407. *Cf.* California v. Green, 399 U.S. 149, 153-64 (1970).

250. Coleman v. Alabama, 399 U.S. 1 (1970).

To the extent that *Wade* relied on the confrontation clause,[251] it must be regarded as an extension of *Pointer*. Unlike the preliminary hearing witness in *Pointer*, the lineup witnesses in *Wade* testified at trial and were submitted to extensive cross-examination. In *Wade*'s view, such cross-examination could not be effective without counsel's presence at the previous lineup. *Wade* concluded that eyewitnesses generally fail to detect subtle suggestion[252] and rarely retract previous identifications.[253] With these pre-existing handicaps, uninformed cross-examination could not effectively reconstruct the identification procedure or correct the result of improper suggestion.

This rationale, however, may have been recently undermined. In *California v. Green*,[254] the Supreme Court rejected prior California decisions and held that the prosecution could introduce a witness's prior inconsistent statement given in the absence of defense counsel[255] as substantive evidence against the accused. According to the California decisions, belated cross-examination at trial violated the confrontation clause because it could not adequately substitute for cross-examintion contemporaneous with the original, inconsistent statement. In reasoning remarkably similar to *Wade*'s, the California court had concluded, in an earlier case, that such testimony, if false, was "apt to harden and become unyielding to the blows of truth in proportion [to the witness's] opportunity for reconsideration and influence by the suggestions of others."[256] The

251. As the preceding text indicates, *Wade* somewhat ambiguously referred to the due process right to a fair trial, the sixth amendment trial rights of confrontation and effective assistance of counsel, and the sixth amendment right to counsel at certain pretrial critical stages. Only meager authority has interpreted *Wade* as a confrontation case. *See, e.g.*, People v. Fowler, 1 Cal. 3d 335, 342-43, 461 P.2d 643, 649, 82 Cal. Rptr. 363, 369 (1969); Commonwealth v. Cooper, 356 Mass. 74, 82, 248 N.E.2d 253, 259 (1969). *See also* Gilligan, *supra* note 170, at 198; Quinn, *supra* note 88, at 140 (commenting that *Wade* recognized the interdependence of constitutional rights); Comment, *supra* note 11, at 66 n.7.

252. 388 U.S. at 230.

253. 388 U.S. at 229.

254. 399 U.S. 149 (1970), *revg.* 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

255. In fact, the critical prior statements in *Green* were made in the presence of defendant's counsel, with full opportunity to cross-examine at a preliminary hearing. 399 U.S. at 151. The Court concluded that this fact would have made the statements admissible even had the witness been unavailable at the trial. 399 U.S. at 165. However, the Court's discussion leaves little doubt that *Green* should not be limited to circumstances where there was opportunity for cross-examination at the time of the prior statement: "[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of critical significance as long as the defendant is assured of full and effective cross-examination at the time of trial." 399 U.S. at 159.

256. People v. Johnson, 68 Cal. 2d 646, 656, 441 P.2d 111, 118, 68 Cal. Rptr. 599, 606 (1968), *cert. denied*, 393 U.S. 1051 (1969), *quoting* State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). *Accord*, People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *revd.*, 399 U.S. 149 (1970).

Supreme Court disagreed on at least two grounds. First, the danger of recalcitrance obviously does not exist when the witness repudiates his prior statement.[257] Second, and perhaps more crucial, the defendant usually can expect favorable cross-examination when the out-of-court statement is inconsistent with the witness's trial testimony. The witness, presumably now hostile to the state, should be more than willing to give an explanation for the "inaccuracy" of his prior statement.[258]

If limited to prior inconsistent statements, *Green* would have little effect on *Wade*'s rationale. Cross-examination of a friendly witness about a prior inconsistent statement is, of course, distinguishable from cross-examination of a recalcitrant witness about a prior, consistent, out-of-court identification. *Green* would have a more devastating effect, however, if extended to prior consistent statements.[259] An argument could then be made that, for purposes of adequate cross-examination at trial, a prior consistent statement cannot be distinguished from a prior consistent identification. Some language in *Green* indicates that the Court would not have differentiated between prior consistent and inconsistent statements. The Court commented, for example, that it had never excluded out-of-court statements of a witness subject to cross-examination at trial.[260] Additionally, the Court interpreted the confrontation clause as guaranteeing testimony under oath, cross-examination at trial, and an opportunity for the jury to view the witness's demeanor.[261] Prior consistent statements introduced as substantive evidence no more thwart these functions than prior inconsistent statements. Under oath and subject to cross-examination, the witness must still affirm, deny, or explain the prior statement.

Even if *Green* is extended to justify the substantive use of prior consistent statements, an argument could be made that eyewitness testimony is sui generis, requiring special confrontation safeguards. *Wade* adequately demonstrated that the suggestion inherent in identification procedures differs, both in kind and degree, from that involved in other pretrial contacts with witnesses. Moreover, with the

257. 399 U.S. at 159.

258. 399 U.S. at 160.

259. CAL. EVID. CODE § 1236 (West 1966), permits prior consistent statements to be used as substantive evidence if the defendant opens the door by introducing a prior inconsistent statement or evidence of the witness's bias or other improper motive. *See also* FED. R. EV. 801(d)(1)(B) & Advisory Comm. Notes (proposed Nov. 20, 1972).

260. 399 U.S. at 161. *But cf.* United States v. Wade, 388 U.S. 218 (1967).

261. 399 U.S. at 158. On the other hand, the Court refused to decide whether a prior inconsistent statement could be admitted when the witness no longer remembered the event in question. 399 U.S. at 168-70.

possible exception of confessions, eyewitness identification testimony constitutes the most decisive evidence in a criminal case. A mistake in this testimony, as Borchard trenchantly documented,[262] creates the greatest risk of convicting the innocent.[263] Nevertheless, discretion should caution against undue reliance on the confrontation clause as an independent source for a precharge right to counsel. The due process clause, previously discussed, holds more promise.[264] The due process approach lacks the uncertainty associated with confrontation analysis and, more importantly, focuses on preventing, not merely detecting, improper suggestion that leads to wrongful convictions.

The confrontation and effective assistance of counsel arguments are inextricably entwined: When counsel is denied meaningful cross-examination, the defendant is denied the effective assistance of counsel. The weaknesses in the former argument inevitably affect the latter. In addition, the effective-assistance argument must hurdle even more formidable obstacles. Most courts still refuse to label representation as ineffective unless counsel reduces the trial to a farce or a mockery of justice.[265] Not surprisingly, few defendants prevail on appeal in challenging trial counsel's representation. While some courts have recently begun to retreat from this rigid position,[266] it is reasonable to predict that most will avoid liberalizing this already fertile issue in appellate and postconviction proceedings. Without liberalization, the ineffective-assistance argument lacks the potency to protect the right to counsel at trial, let alone to create a precharge right to counsel.

IV. The Right to Counsel: Photographic Displays

A. *Ash*[267] *and the Sixth Amendment*

In August 1965, two men in stocking masks robbed a Washington, D.C., bank. Following the three or four minute robbery, the witnesses could not describe the robbers' characteristics; they did,

262. *See* text accompanying notes 30-34 *supra*.

263. *See* Hammelmann & Williams, *supra* note 240, at 550: "Unfortunately, and this is perhaps the crux of the matter, there seems to be an inclination not only among the police but among judges and juries to accept the positive result of an identification parade more or less uncritically."

264. *But cf.* Note, *Confrontation, Cross-Examination, and the Right To Prepare a Defense*, 56 Geo L.J. 939, 941-55 (1968).

265. *See* Grano, *supra* note 237, at 1240-45; Waltz, *supra* note 242.

266. *See, e.g.*, West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973). *See also* ABA Project on Standards of Criminal Justice, Standards Relating to the Defense Function (1971).

267. United States v. Ash, 413 U.S. 300 (1973), *revg.* 461 F.2d 92 (D.C. Cir. 1972).

however, describe the gunman as a tall, slim, young black. Five months later, an FBI agent showed five black and white mug shots to four witnesses, including two cashiers who had not observed the robbers' faces; a customer who viewed the gunman a few seconds before he donned his mask; and a woman who, seated in an automobile outside the bank, had had a "fleeting glimpse" of the escaping robbers without their masks. All four witnesses, expressing some uncertainty, identified the defendant Ash as the gunman; one witness also identified a codefendant, Bailey. Although a grand jury indicted the defendants shortly thereafter, trial did not begin until May 1968. On the day preceding trial, the prosecutor and an FBI agent displayed five color photographs to three of the witnesses in the absence of defense counsel. All three identified Ash but none identified Bailey. On the morning of trial, the agent showed the same pictures to the fourth witness, who did not identify either defendant. The government did not conduct a pretrial lineup.[268]

After conducting a pretrial suppression hearing, the trial judge permitted the witnesses to make in-court identifications of the defendants. During the hearing, the government revealed that it could not account for three of the five black and white mug shots originally shown the witnesses. Only the defendants appeared full length in the five color photographs; they were pictured next to a pole, possibly a height marker, with police identification numbers. None of the remaining color photographs bore identification numbers; one ended at the subject's thigh, a second at the waist, and the third at the lower chest. To the court of appeals on subsequent review, the tall and slender defendants contrasted with the stocky men in the other pictures.[269]

The government's case consisted of an informant, who implicated Ash in the robbery,[270] and the four eyewitnesses. While conceding uncertainty caused by the stocking masks, both cashiers identified the defendant Ash as resembling the gunman. The customer testified that the defendant looked "sort of like" the gunman. The last witness, the woman outside the bank, identified both defendants. When Bailey's counsel on cross-examination demonstrated that this witness

268. 461 F.2d at 95-96. After making a tentative identification from the black and white photos, one witness had asked to see the suspect in person. 461 F.2d at 95, 97.

269. 461 F.2d at 96-98.

270. The informant had an extensive criminal record and had appeared before a grand jury with regard to five separate offenses, including a bank robbery. The United States Attorney arranged to have the informant transferred from a District of Columbia jail to one in Rockville, Maryland, and helped the informant's wife to move to an apartment near a parochial school for her children. 461 F.2d at 97 n.7. *Cf.* Hoffa v. United States, 385 U.S. 293, 313 (1966) (Warren, C.J., dissenting).

had previously failed to identify Bailey from the color photographs, the prosecutor, over Ash's objection, introduced the photographs to show that the witness had identified Ash.[271] The jury convicted Ash but failed to reach a verdict on Bailey.[272] Ash appealed, arguing that the postindictment photographic identification in the absence of counsel violated his sixth amendment rights.

Splitting five to four, and rejecting the great weight of authority,[273] the Court of Appeals for the District of Columbia Circuit held en banc that the defendant had a sixth amendment right to counsel at the postcustody photographic display. Relying on *Wade*'s rationale, the court reasoned that photographic displays present the same hazards, and therefore the same need for counsel's assistance, as lineups.[274] After granting certiorari, the Supreme Court reversed, limiting its discussion, as had the court of appeals, to the right-to-counsel issue.[275]

Although the Court remarked, apparently as an afterthought, that photographic displays are not sufficiently "pernicious" to require extraordinary safeguards,[276] it did not otherwise attempt to refute the lower court's discussion concerning the need for counsel. Rather, the Court ruled that "lack of scientific precision and inability to reconstruct an event are not the tests for requiring counsel in the first instance."[277] The threshold question, the Court added, is not whether counsel can help to guarantee a fair trial but whether the defendant required counsel's assistance in a *confrontation* with the procedural system or a skilled adversary.[278] Since the defendant's presence is a *sine qua non* of confrontations, the sixth amendment

271. 461 F.2d at 95-96.

272. 461 F.2d at 94-95.

273. *See* 413 U.S. at 301 & n.2. *See, e.g.*, United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972), *overruling* United States v. Zeiler, 427 F.2d 1035 (3d Cir. 1970); United States v. Serio, 440 F.2d 827 (6th Cir.), *cert. denied*, 404 U.S. 838 (1971); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), *cert. denied*, 407 U.S. 909 (1972). *But cf.* Cox v. State, 219 S.2d 762 (Fla. Ct. App. 1969); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969).

274. 461 F.2d at 99-105.

275. Both courts refused to decide whether the photographic display was so suggestive as to violate due process. 461 F.2d at 97-98, 413 U.S. at 321.

276. 413 U.S. at 321. The Court added this comment toward the end of its opinion, after arguing at length that the sixth amendment applies only to personal confrontations between the accused and the state. *See* text accompanying notes 280-89 *infra*. Without analysis, the Court found photographic procedures "hardly unique" in offering the prosecutor possibilities to subvert the trial. 413 U.S. at 320.

277. 413 U.S. at 316.

278. 413 U.S. at 315-17.

right to counsel does not extend to procedures, such as photographic displays, that do not personally involve the defendant.[279]

Like *Kirby*, *Ash* turned to history and precedent to support its formalistic and simplistic sixth amendment analysis. From history, the Court gleaned that the primary purpose of the sixth amendment, adopted in reaction to English common law procedures, was to provide counsel "at trial," when the accused "was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[280] As the criminal justice system became sophisticated, emerging procedures forced the accused into pretrial confrontations with his adversary. In response to these developments, *Ash* explained, the Court extended the sixth amendment into certain aspects of pretrial procedure. In *Hamilton v. Alabama*[281] and *White v. Maryland*,[282] the Court extended the right to counsel to certain arraignments and preliminary hearings, where the "accused was confronted with the procedural system and was required, with definite consequences, to enter a plea."[283] In *Massiah v. United States*,[284] the Court extended the right to counsel to postindictment, surreptitious interrogation by an informant in a wired automobile while the defendant was free on bail. In *Ash*'s view, counsel in *Massiah* could have advised the defendant of his fifth amendment rights and sheltered him from governmental overreaching.[285]

Ash had no trouble with *Coleman v. Alabama*,[286] which extended the right to counsel to all preliminary hearings. Surely the prelimin-

279. 413 U.S. at 317.

280. 413 U.S. at 309. The common law did not recognize a right to counsel's assistance during felony trials. For accounts of common law procedures, see W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-12 (1955); J. GRANT, OUR COMMON LAW CONSTITUTION 2-9 (1960); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 319-427 (1883).

281. 368 U.S. 52 (1961). *Hamilton* provided counsel under the due process clause, not the sixth amendment. *Cf.* Chessman v. Teets, 354 U.S. 156 (1957) (due process right to be represented in person *or* by counsel at a hearing to settle the trial record for a subsequent appeal).

282. 373 U.S. 59 (1963).

283. 413 U.S. at 311.

284. 377 U.S. 201 (1964).

285. 413 U.S. at 311. This, of course, is rather absurd. The defendant in *Massiah* did not require fifth amendment protection since the informant did not compel him to speak. Moreover, counsel's presence would not have assured assistance for the confrontation; rather, it would have prevented the confrontation from occurring. The defendant would not have participated in the conversation had he known the actual role of the government informant. Nevertheless, *Ash* cannot be faulted too severely for its reading of *Massiah*. As previously discussed, *see* text accompanying notes 96-98 *supra*, *Massiah* is an inexplicable case that probably should not have been decided on right-to-counsel grounds.

286. 399 U.S. 1 (1970).

ary hearing can be characterized as a confrontation between the defendant and his more expertly skilled adversary. *United States v. Wade*,[287] on the other hand, presented a substantial challenge. *Ash* found little difficulty, however, in casting a new mold for *Wade*:

> The function of counsel in rendering "Assistance" continued at the lineup under consideration in *Wade* and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial. Counsel present at [the] lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial.[288]

Some paragraphs later, with the malleable *Wade* decision no longer an obstacle, the Court turned to photographic displays:

> A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present . . . no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.[289]

In *Ash*'s favor, the Court did correctly note the defendant's presence at all stages where the right to counsel had previously been extended. Beyond that, not much can be said in support of *Ash*'s analysis—or, more accurately, lack of analysis. The crucial question, not really addressed by *Ash*, is *why* the defendant's presence should matter. To say that the framers intended the sixth amendment to guarantee counsel's assistance at trial does not provide a satisfactory answer. The Court arguably moved beyond the framers' literal in-

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287. 388 U.S. 218 (1967).

288. 413 U.S. at 312. A few paragraphs later, the Court added:

> Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confontation, requiring the "Assistance of Counsel" to preserve the adversary process by compensating for advantages of the prosecuting authorities. . . . The similarity to trial was apparent, and counsel was needed to render "Assistance" in counterbalancing any "overreaching" by the prosecution.

413 U.S. at 313.

289. 413 U.S. at 317.

tent by recognizing the sixth amendment as a source of appointed counsel for indigents[290] and, as *Ash* acknowledged, by extending the sixth amendment into pretrial stages. *Ash* itself recognized that the evolution of criminal procedure from its embryonic, eighteenth-century prototype made doctrinal modifications necessary to prevent the sixth amendment from becoming an empty formalism, a result certainly not intended by the framers. Rather than ignoring original purposes, the Court demonstrated its commitment to the spirit of the sixth amendment by applying the right to counsel to pretrial stages that could "well settle the accused's fate and reduce the trial itself to a mere formality."[291] Having already charted a path to preserve the sixth amendment's effectiveness from the force of modern developments, it is anomalous now to rely on historical facts that bear little relation to the core purposes of the right to counsel. In *Wade*'s view, the plain wording of the sixth amendment encompassed counsel's assistance "*whenever* necessary to assure a meaningful 'defense' "[292] or a fair trial. With the issue so stated, the accused's presence should be no more crucial than the "at trial" limitation of an earlier day. This should be especially so with respect to police photographic procedures, which developed long after the sixth amendment's adoption.

Ash overlooked some considerations that clearly suggest that the Court erred in imposing a personal-confrontation limitation on the sixth amendment. Voluntary absence[293] or contumacious conduct[294] can cause a defendant to lose his right to be present at trial, yet no one has suggested that such a defendant also loses his right to counsel.[295] Since counsel invariably continues to represent the absent defendant, the issue has not received appellate attention. Nevertheless, appellate decisions can be interpreted as recognizing *sub silentio* the continuing right to counsel.[296] Indeed, the point needs little

290. Johnson v. Zerbst, 304 U.S. 458 (1938), first recognized a sixth amendment right to appointed counsel. For an argument that *Johnson* ignored history, see W. BEANEY, *supra* note 280, at 27-36.

291. United States v. Wade, 388 U.S. 218, 224 (1967).

292. 388 U.S. at 225 (emphasis added).

293. Taylor v. United States, 414 U.S. 17 (1973); Diaz v. United States, 223 U.S. 442 (1912).

294. Illinois v. Allen, 397 U.S. 337 (1970).

295. Since the common law did not permit representation by counsel, the defendant's presence was necessary to guarantee at least the semblance of a fair trial. While some authorities at first questioned whether the defendant could waive the right to attend trial, most soon recognized that counsel could adequately protect the absent defendant's rights. *See* Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18 (1916).

296. *Cf.* Goitia v. United States, 409 F.2d 524 (1st Cir. 1969), *cert. denied*, 397 U.S.

elaboration; it would be unthinkable to prohibit the defendant's attorney from proceeding with the defense.[297] Of course, advocates of *Ash* might argue that due process, rather than the sixth amendment, guarantees the absent defendant the continued assistance of counsel, but nothing could be cited to support what would have to be deemed a rather novel assertion. Further, such a contention would immediately lead to a due process argument for the assistance of counsel in photographic displays.

The defendant in *Ash*, as noted by the Court, did not assert the right to attend the photographic display.[298] This might appear to provide an adequate sixth amendment basis for distinguishing photographic displays from trials for absent defendants, who can re-establish the right to be present by terminating their absence or misbehavior. However, the right to counsel sometimes exists when the defendant does not have the right to be personally present. Some courts, for example, have attempted to protect the skyjacker profile by excluding the defendant, but not his counsel, from segments of pretrial suppression hearings.[299] More importantly, defendants on appeal have the right to counsel[300] but very clearly do not have the right to be personally present.[301]

Whether the sixth amendment constitutes the source—or, more accurately, one of the sources—for the right to appellate counsel is not altogther clear. In *Johnson v. United States*,[302] a per curiam opinion, the Court unanimously ruled that an indigent should be provided appointed counsel to appeal a district court's certification of lack of good faith, which precluded him from appealing in forma

906 (1970) (voluntary absence cost the defendant the right to change attorneys). *See also In re* Hunt, 276 F. Supp. 112 (E.D. Mich. 1967), *vacated sub nom.* Hunt v. Arizona, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969).

297. *Cf.* Illinois v. Allen, 397 U.S. 337, 351 (1970) (Brennan, J., concurring): "[W]hen a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney . . . ." *See also* Murray, *The Power To Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 U. COLO. L. REV. 171, 175 (1964).

298. 413 U.S. at 317.

299. *See, e.g.*, United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). *Cf.* Snyder v. Massachusetts, 291 U.S. 97 (1934) (defendant, but not counsel, excluded from jury view of crime scene).

300. *See* text accompanying notes 302-12 *infra*.

301. Dowdell v. United States, 221 U.S. 325 (1911); Schwab v. Berggren, 143 U.S. 442 (1892). *See also* Donnelly v. State, 26 N.J.L. 463, 472 (1857): "If a writ of error be sued out and returned to this court in a case *where the prisoner had no counsel* . . . he would have a right to appear personally in court, to have counsel assigned, or to assign errors, and argue them in person. In such [a] case his presence would be clearly a legal right." (Emphasis added.)

302. 352 U.S. 565 (1957).

pauperis.[303] *Johnson* specifically relied on *Johnson v. Zerbst*,[304] a case squarely premised on the sixth amendment. Some years later, *Douglas v. California*,[305] using an equal protection analysis, granted state defendants the absolute right to appointed counsel on appeal. *Douglas*'s reference to *Johnson v. United States* as a federal right-to-counsel case [306] is rather inexplicable, since *Gideon*,[307] decided the same day as *Douglas*, made the sixth amendment right to counsel fully applicable to the states. If *Johnson* relied on the sixth amendment, [308] it and *Gideon* should have guaranteed state indigents the right to appointed counsel on appeal, and *Douglas* should not have found it necessary to open Pandora's box with an equal protection analysis.[309] Shortly thereafter, the Court, in *Anders v. California*,[310] which restricted appellate counsel's ability to withdraw from an appointment,[311] added to the confusion by again suggesting a sixth amendment basis for *Johnson*. *Anders* expressly adhered to the principle of *Johnson*, described as a federal, appellate right-to-counsel case, and *Gideon*, described as the case that applied the sixth amendment to the states.[312] While *Anders* thus suggests that *Gideon* extended *Johnson* to state appeals, the Court obfuscated the matter with an extensive equal protection analysis.

If the sixth amendment can ever apply without a confrontation between the defendant and the state, then *Ash* is dead wrong: Such a confrontation simply cannot constitute a necessary antecedent for right-to-counsel analysis. Of course, *Ash*'s proponents may argue that

303. Under 28 U.S.C. § 1915 (1970), a convicted defendant can appeal in forma pauperis only if the trial court certifies that the appeal is taken in good faith. If the trial court issues a bad-faith certificate, the indigent can appeal to the court of appeals to overturn the certificate. Prior to *Johnson*, the indigent had to appeal without counsel or a trial transcript. *See generally* Comment, *Appellate Review for Indigent Criminal Defendants*, 26 U. CHI. L. REV. 454 (1959).

304. 304 U.S. 458 (1937) (sixth amendment requires appointment of trial counsel for indigents in federal cases).

305. 372 U.S. 353 (1963).

306. 372 U.S. at 357.

307. Gideon v. Wainwright, 372 U.S. 335 (1963).

308. Substantial pre-*Gideon* authority interpreted *Johnson* as a sixth amendment case. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 786-87 (1961) (predicting *Johnson*'s extension to state appeals); Comment, *supra* note 303, at 458 (listing cases but taking a contrary view).

309. The broad ramifications of *Douglas* are analyzed in Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963).

310. 386 U.S. 738 (1967).

311. *Anders* required appointed counsel to accompany his request to withdraw with a brief referring to anything in the record that might arguably support the appeal. 386 U.S. at 744-45.

312. 386 U.S. at 741-42.

the confrontation characteristic depends on the nature of the particular procedure, not on the defendant's presence, but this gambit would also result in their checkmate. If the nature of the proceeding is determinative, *Ash* erred in chastising the lower court for asserting the need for counsel in photographic displays. Once the defendant's presence is disregarded, the right to counsel should follow a fortiori from *Wade*, unless photographic displays are inherently different from lineups.

Justice Stewart repudiated the majority's reasoning; in a concurring opinion that used *Wade*'s mode of analysis, he found counsel unnecessary to protect the defendant's right to a fair trial.[313] Justice Stewart argued that photographic displays lack the dynamic qualities that make lineups particularly vulnerable to improper suggestion.[314] He then asserted that photographic displays are less difficult than lineups to reconstruct at trial through cross-examination.[315] Last, Justice Stewart commented in passing that a photographic display is "far less indelible in its effect" upon a witness than a lineup[316]—that is, a witness is more apt to retract an incorrect photographic identification than an incorrect lineup identification.

Justice Stewart's distinctions are all subject to challenge. First, the potential for harmful suggestion in photographic displays should not be underestimated. *Ash* itself is a poignant example: The witnesses described the robbers as tall and slim, yet only the defendants appeared full length, with police identification numbers, in the photographic display. While overt, this improper suggestion on the eve of trial conceivably could have induced the uncertain witnesses to identify the defendant.[317] Moreover, Justice Stewart underestimated the myriad possibilities of subtle suggestion. The

313. 413 U.S. at 321-25.

314. The accused is there in the flesh, three-dimensional and always full-length. Further, he isn't merely there, he acts. He walks on stage, he blinks in the glare of the lights, he turns and twists, often muttering aside to those sharing the spotlight. He can be required to utter significant words, to turn a profile or back, to walk back and forth, to doff one costume and don another. All the while the potentially identifying witness is watching, a prosecuting attorney and a police detective at his elbow, ready to record the witness' every word and reaction.

413 U.S. at 323, *quoting* United States v. Ash, 461 F.2d 92, 108 (1972) (Wilkey, J., dissenting). *See also* People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), *cert. denied*, 407 U.S. 909 (1972).

315. 413 U.S. at 324-25. *See also* United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972).

316. 413 U.S. at 325, *quoting* United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972).

317. The photographs may be particularly suggestive if the defendant's appearance has changed. *See* United States v. Collins, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970) (defendant lost seventy-five pounds between taking of photographs and trial).

Canadian experiment, described earlier,[318] in which the defendant's relative good looks biased the lineup, should admonish those who disclaim belief in hidden persuaders. Obviously, a photographic display of the men in the lineup would have been equally suggestive. Aside from the photographs themselves, the manner of their presentation may be suggestive. As Justice Brennan stated in dissent, "the prosecutor's inflection, facial expressions, physical motions, and myriad other almost imperceptible means of communication might tend, intentionally or unintentionally, to compromise the witness' objectivity."[319]

Second, photographic identifications are more difficult to reconstruct at trial than Justice Stewart assumed. Unlike lineups, the photographs may be produced at trial, but this will not disclose the suggestion in their presentation. In this respect, the photographs are no more helpful than a still photograph of a lineup without counsel.[320] Moreover, it cannot be assumed that the witness in a photographic identification will be superior to his lineup counterpart in detecting subtle suggestion. The defendant's absence, of course, further decreases the likelihood of reproduction at trial.

Justice Stewart's analysis is most deficient on what should have been the crux of the matter: the risk that the identification technique will contribute to the conviction of innocent defendants. This risk depends, first, on the accuracy of the identification technique and, second, on the likelihood that a witness will retract a previous mistaken identification. Without attempting to measure these factors, Justice Stewart merely assumed that photographic displays are more reliable than lineups. While empirical data is generally lacking, a recent experiment[321] casts doubt on this assumption. In the experiment college students viewed a movie depicting a department store customer cashing a check. One hour later, the subjects, divided into three groups, were asked to identify the customer. One group viewed monochromatic video tape sequences in which thirty-three males walked, turned, repeated their names, counted to ten,

318. *See* text accompanying notes 204-06 *supra*.

319. 413 U.S. at 334.

320. *But cf.* People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), *cert. denied*, 407 U.S. 909 (1972) (police admitted showing photograph of simulated lineup to avoid the *Wade* counsel requirement; held, no right to counsel because, among other things, photographic displays can adequately be reconstructed at trial). *See also* United States v. Collins, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970) (witnesses identified defendant from photographs of lineup conducted in presence of counsel for defendant).

321. Sussman, Sugarman & Zavala, *A Comparison of Three Media Used in Identification Procedures*, in PSYCHOLOGICAL STUDIES, *supra* note 109, at XI-1.

and recited the months of the year. A second group viewed monochromatic slides depicting a full-length front view and a profile of thirty-three males. The third group viewed similar slides, but in color. The experimenters found that the subjects using the color slides achieved significantly higher scores than those using the monochromatic slides. No significant difference was found between the subjects viewing the color slides and those using the monochromatic video tape.[322] The experimenters' comments warrant special emphasis:

> The implication is that even though the video was in black and white, the dynamic cues offered by video improved identification as much over black and white still photography as does [sic] color still photography. In other words about an equal improvement in identification was obtained by use of color as by use of dynamic imagery. *This result is important because it suggests strongly that color video may well yield additional improvement over still color photography or even over black and white video.*[323]

If dynamic cues enhance correct identifications, live, three-dimensional lineups may be preferable to color video sequences. At a minimum, the experiment indicates that lineups, being more dynamic, should be regarded as a more accurate identification technique than photographic displays.[324] Interestingly, Justice Stewart pointed to the dynamic nature of lineups as a particular cause of misidentifications.[325] Since *Wade* and the available evidence amply demonstrate the need for counsel at lineups, the need for counsel at photographic displays should follow a fortiori, unless witnesses in photographic identifications are more likely than lineup witnesses to retract their previous mistakes.

While no scientific evidence could be found concerning the "freezing effect" of photographic identifications, many writers have assumed, contrary to Justice Stewart, that witnesses are unlikely to retract earlier photographic identifications.[326] Neither side is con-

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322. *Id.* at XI-6.

323. *Id.* at XI-7 (emphasis added). *But cf.* Laughery, *Photograph Type and Cross Racial Factors in Facial Identification*, in PSYCHOLOGICAL STUDIES, *supra* note 109, at V-1.

324. *Accord*, Comment, *supra* note 88, at 104.

325. 413 U.S. at 323.

326. Simmons v. United States, 390 U.S. 377, 383-84 (1968); N. SOBEL, *supra* note 11, at 90; Williams & Hammelmann, *supra* note 177, at 484 ("[s]ubsequent identification of the accused . . . shows nothing except that the picture was a good likeness"); Comment, *Photographic Identification: The Hidden Persuader*, 56 IOWA L. REV. 408 (1970); Comment, *supra* note 88, at 104.

Half a decade ago, the British Court of Criminal Appeals expressed sensitivity to this danger:

vincing without supportive empirical data. Nevertheless, since *Wade* concluded that eyewitnesses rarely retract earlier lineup identifications,[327] the burden of proof should be on those seeking to distinguish photographic displays. In the absence of such proof, counsel should be required at photographic displays in order to prevent improper suggestion that unnecessarily increases the risk of wrongful conviction.[328]

Both the majority and concurring opinions in *Ash* implied that the right to counsel at photographic displays would ultimately result in the sixth amendment's extension to all pretrial interviews of prospective witnesses.[329] However, these situations can be easily distinguished. First, the trend is to recognize a special hearsay exception for testimony referring to pretrial identifications.[330] This testimony obviously reinforces any in-court identification, thus compounding the risk of wrongful conviction in the event of mistake.[331] Except for impeachment purposes, most jurisdictions exclude testimony concerning pretrial nonidentification interviews.[332] Second, empirically confirmed deficiencies in human perception suggest the need for special safeguards with respect to eyewitness identification testimony.[333] Third, the probative effect of identification testimony warrants precautionary measures to guarantee, to the extent possible, its reliability. Mistakes in circum-

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> And where that process [photographic identification] has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted in relation to a photograph is not a useful witness for the purpose of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph.

Rex v. Dwyer, [1925] 2 K.B. 799, 803 (Crim. App.). More recently, British courts have modified *Dwyer's* inflexible position. *See* Rex v. Hinds, [1932] 2 K.B. 644, 647 (Crim. App.); Rex v. Seiga, 45 Crim. App. 220 (1961), *criticized in* Williams & Hammelmann, *supra*, at 485-86. The Canadian cases take conflicting positions with respect to photographic identifications. *Compare* Rex v. Bagley, [1926] 3 D.L.R. 717 (B.C. Ct. App.) (refusing to follow *Dwyer* literally) *with* Regina v. Sutton, [1970] 2 Ont. 358 (Ont. Ct. App.) (following *Dwyer* and distinguishing *Seiga*).

327. 388 U.S. at 229, *quoting* Williams & Hammelmann, *supra* note 177, at 482.

328. As previously discussed with respect to lineups, counsel is needed to prevent unnecessary suggestion that may not violate due process under the *Stovall* test. *See* text accompanying notes 195-202 *supra*. For a recent case refusing to follow *Ash* and providing counsel as a matter of state law, see People v. Jackson, No. 54539 (Mich., April 16, 1974).

329. 413 U.S. at 317-18 (Blackmun, J.), 325 (Stewart, J., concurring).

330. *See* Gilbert v. California, 388 U.S. 263, 272 n.3 (1967).

331. 461 F.2d at 101.

332. McCormick's Handbook of the Law of Evidence 601 (2d ed. Cleary 1972). *But see* Fed. R. Ev. 801(d)(1) (proposed Nov. 20, 1972).

333. *See* text accompanying notes 105-26 *supra*.

stantial evidence, though harmful, will usually be less decisive than mistakes in identification testimony by a good-faith eyewitness.

In short, both the majority and concurring opinions in *Ash* erred in every respect. Accepting *Kirby*'s limitation, the sixth amendment right to counsel should apply to all photographic displays conducted after formal judicial proceedings commence.

B. *Postcustody Photographic Displays*

Under *Kirby*, the sixth amendment cannot apply to photographic displays conducted before the defendant is formally charged. The possibility remains, however, that due process may require counsel's presence at precharge photographic identifications just as due process may require counsel's presence at lineups.[334] To resolve the due process issue, the defendant's need for counsel must be balanced against society's interests in proceeding without counsel.[335] Since the preceeding discussion concerning lineups and photographic displays has demonstrated the defendant's rather substantial need for counsel's assistance, it only remains to consider the counterbalancing factors.

The state's interests in not providing counsel are most substantial in precustody identifications. In *Simmons v. United States*,[336] the Supreme Court stamped its imprimatur on photographic displays as an investigative tool of law enforcement. Quite often, in fact, photo and mug shot identifications provide police with their only investigative leads.[337] A counsel requirement in these cases would be most impractical, since representation would have to be afforded each person whose picture is displayed.[338] One lawyer could conceivably be appointed to represent all the potential suspects, but if he did not know whose interests to protect, the lawyer's effectiveness would be minimal at best.[339]

In some cases,[340] circumstantial evidence points to the defendant,

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334. *See* Parts III(A)-(B) *supra*.

335. *See* text accompanying notes 166-68 *supra*.

336. 390 U.S. 377 (1968). The defendant in *Simmons* did not raise a right-to-counsel issue, but instead challenged the photographic display as unnecessarily suggestive. While recognizing the hazards of mistaken identification, the Court refused to prohibit the use of photographic displays in police work. 390 U.S. at 384. *See* Part V *infra*.

337. *See* Comment, *supra* note 88, at 104.

338. *See* Quinn, *supra* note 88, at 147-48.

339. *See* Comment, *supra* note 88, at 106, n.54: "In time, the representation of anonymous suspects could become routine and less than adequate."

340. In *Simmons* itself the police traced a suspect car to the defendant's sister-in-law, who claimed that she had loaned the car to her brother, a codefendant. 390 U.S. at 380.

but the police need an identification to establish probable cause to arrest. While an argument for counsel appears more persuasive in these "focus" cases, the state's interests in withholding counsel probably still predominate. First, the delay caused by providing counsel could enable the suspect to escape the jurisdiction.[341] Second, when the police have several suspects, representation would be necessary for each. Third, problems of logistics and resources would accompany any effort to provide counsel for suspects not yet arrested. Even nonindigents would require appointed counsel, since the police obviously could not afford to notify the suspect or his family. Finally, a focus approach would force the police to guess at their peril which precustody cases require counsel.

The scales tip differently after the defendant is taken into custody. In fact, a case can be made for prohibiting photographic displays altogether when lineup procedures are feasible.[342] Nevertheless, some authorities have defended both the postcustody use of photographic displays and the absence of counsel at such identifications. They have argued that, when the defendant's place of custody is far removed from potential witnesses, it would be unduly burdensome to bring the witnesses to the defendant or to require defense counsel to travel with the police from one location to another.[343] The burden would be especially great where the police attempt to connect the defendant with unsolved crimes.

Although these arguments are well taken, they are not altogether persuasive. *Wade* itself recognized that substitute counsel might sometimes be adequate to protect the defendant's interests.[344] Moreover, due process provides sufficient flexibility to avoid strait-

341. *Simmons* recognized this factor: "It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities." 390 U.S. at 385.

342. *See* Part V *infra*. The pre-*Ash* cases that recognized a right to counsel at photographic displays usually chastised the police for failing to conduct a lineup. *See, e.g.*, People v. Anderson, 389 Mich. 155, 188, 205 N.W.2d 461, 476 (1973).

343. *See, e.g.*, United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 744-45 (3d Cir. 1972). *Cf.* United States v. Ballard, 423 F.2d 127 (5th Cir. 1970) (robbery in Mississippi, arrest in Florida, photographic display at Tennessee service station). *But cf.* Rex v. Bagley, [1926] 3 D.L.R. 717, 719 (B.C. Ct. App.) (MacDonald, C.J.A., dissenting) (these factors outweighed by need to guarantee the defendant a fair trial).

344. 388 U.S. at 237 & n.27. As Judge Hastie recently argued, "In these days when criminal defender organizations abound and the bar generally is increasingly sensitive to its obligation to assist in the defense of persons charged with crime, the recruitment and assignment of substitute counsel for this limited purpose will rarely be difficult or burdensome." United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 752 (3d Cir. 1972) (dissenting opinion). The need for substitute counsel was amply demonstrated in United States v. Ballard, 423 F.2d 127 (5th Cir. 1970), described in note 343 *supra*. One of three defendants appeared twice in the photo spread. Additionally, "Florida" appeared on the front of the defendants' pictures.

jacketing the police. For example, a procedure could be established requiring judicial approval of postcustody photographic displays without counsel. Such authorization would serve primarily to assure the necessity for proceeding in counsel's absence.[345] Judicial authorization would also provide an opportunity to review the photographs for improper suggestion before their use.

To summarize, *Ash* erred both in its sixth amendment analysis and in its evaluation of the risks that attend photographic displays. The sixth amendment should provide a right to counsel at all postcharge photographic identifications. A due process analysis should be applied to all other cases. While such an analysis would permit precustody photographic displays without counsel, it would require counsel in postcustody cases. To avoid rigidity, postcustody procedures without counsel may ocasionally be used, but, in order to protect adequately the interest in avoiding mistaken identifications, such procedures should require prior judicial authorization.

V. Due Process: Prohibiting Unnecessary Suggestive Procedures

A. *Neil v. Biggers*:[346] *A New Retroactivity Doctrine?*

On January 22, 1965, a young man with a butcher knife grabbed Mrs. Beamer in her kitchen doorway, which was illuminated only by light emanating from a nearby bedroom. After threatening to kill Mrs. Beamer and her twelve year old daughter, the assailant walked his victim at knifepoint two blocks to a moonlit wooded area and raped her. The entire incident occurred within fifteen minutes to half an hour. According to trial testimony, Mrs. Beamer described the assailant as "fat and flabby with smooth skin, bushy hair and a youthful voice"; according to subsequent habeas corpus testimony, she also described the assailant as sixteen to eighteen years old, close to two hundred pounds, and six feet tall. During the seven months following the rape, Mrs. Beamer viewed several lineups, showups, and photographic displays without identifying anyone.[347] On August 17, the police summoned her to the station to "look at

345. Some commentators have recommended that the police limit photographic identifications to the fewest possible witnesses even before the defendant's arrest. Hammelmann & Williams, *supra* note 240, at 553. Quite often the prosecutor's needs can be satisfied by contacting just some of the potential witnesses; with respect to the others, the prosecutor frequently can afford to wait until an identification procedure with counsel becomes convenient. *See* Simmons v. United States, 390 U.S. 377, 386 n.6 (1968).

346. 409 U.S. 188 (1972), *revg.* 448 F.2d 91 (6th Cir. 1971).

347. 409 U.S. at 194-95.

a suspect."[348] When she arrived, two detectives, in the presence of three other police officers,[349] paraded the defendant by her and directed him to say "[s]hut up or I'll kill you." Mrs. Beamer identified the defendant as the rapist, but the record left doubt as to whether she waited for him to speak.[350]

The defendant's subsequent conviction, based almost exclusively on Mrs. Beamer's identification, was affirmed by the Tennessee Supreme Court.[351] After granting certiorari, the Supreme Court affirmed by an equally divided vote, with Justice Douglas arguing in the only expressed opinion that the showup violated due process.[352] Thereafter, the defendant petitioned for federal habeas corpus relief; after holding an evidentiary hearing, the district court found the showup unnecessarily suggestive and ordered the defendant's retrial or release.[353] The Sixth Circuit affirmed, concluding that the district court's findings were not clearly erroneous.[354] The Supreme Court again granted certiorari and, after argument, reversed the two lower federal courts.[355]

The showup and trial in *Biggers* preceded the Supreme Court's decision in *Stovall v. Denno*.[356] Like *Biggers*, *Stovall* involved a one-man showup. Five police officers and two prosecutors, all white, brought the handcuffed defendant, a black, into a hospital room to be viewed by a white doctor who had just undergone major surgery for multiple stab wounds suffered during an unsuccessful attempt to rescue her husband from a fatal assault. The doctor identified the defendant at the hospital and again during the subsequent trial, at which defendant was convicted.[357] The New York Court of

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348. 448 F.2d at 93.

349. 448 F.2d at 106 (Brooks, J., dissenting).

350. 409 U.S. at 195.

351. Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696 (1967).

352. Biggers v. Tennessee, 390 U.S. 404 (1968).

353. The opinion of the court of appeals contains substantial portions of the unreported district court opinion. 448 F.2d at 93-96.

354. 448 F.2d at 95.

355. The Supreme Court first held that its prior affirmance by an equally divided vote did not preclude subsequent habeas corpus relief on the same issue. 409 U.S. at 193. *See generally* Casenote, 6 IND. L. REV. 840 (1973). The Court next declined the invitation to avoid the merits because of the "two-court" rule. According to the dissent, the majority departed from the "long-established practice" of not reversing fact-findings of two lower courts unless clearly erroneous. *See* 409 U.S. at 201-04 (Brennan, J., joined by Stewart & Douglas, JJ., dissenting). For commentary on this aspect of the opinion, see Casenote, 73 COLUM. L. REV. 1168, 1175-77 (1973).

356. 388 U.S. 293 (1967).

357. 388 U.S. at 295.

Appeals affirmed without opinion.[358] The Supreme Court granted certiorari following the denial of habeas corpus relief. The Court first denied retroactively to the *Wade-Gilbert* right-to-counsel rules.[359] But, establishing a new constitutional challenge to identification evidence, the Court also considered whether the showup "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[360] Appraising the totality of the circumstances, including the need for a prompt identification because of doubts concerning the doctor's survival, the Court found no constitutional infirmity.[361]

One year later, *Simmons v. United States*[362] provided further insight into the analysis required by *Stovall's* due process test. In *Simmons*, FBI agents displayed six snapshots, mainly group photographs of the defendant, a codefendant, and others, to five bank employees the day after a robbery. Since the photo display preceded *Wade* and *Gilbert*, the defendant limited his argument to a due process challenge.[363] Because the FBI agents had not yet apprehended the robbers when they conducted the display, the Court found the need for a prompt identification "hardly less compelling" than the justification for the showup in *Stovall*.[364] While recognizing that the particular display fell "short of the ideal," the Court also found little danger of misidentification: The witnesses had observed the robbers in a well-lit bank, had viewed the snapshots individually, and had not recognized the codefendant, who appeared equally prominent in the pictures. The Court did recognize that the police may abuse photographic displays, but it refused to prohibit such displays altogether, either under its supervisory power or as a matter of constitutional law.[365]

358. 13 N.Y.2d 1178, 197 N.E.2d 543, 248 N.Y.S.2d 56 (1964).

359. 388 U.S. at 296.

360. 388 U.S. at 301-02.

361. "Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that [the doctor] could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question." 388 U.S. at 302.

362. 390 U.S. 377 (1968). *See also* Foster v. California, 394 U.S. 440 (1969) (the only Supreme Court case to find a *Stovall* violation); Coleman v. Alabama, 399 U.S. 1 (1970).

363. The Court first rephrased the test by stating the issue as whether the display "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384. Compare the *Stovall* test set out in text accompanying note 360 *supra*.

364. 390 U.S. at 385.

365. 390 U.S. at 384-86.

The federal district court in *Biggers* distinguished *Stovall* and *Simmons*. Finding neither a death-bed emergency nor other reasons for an immediate showup, the district court rebuked the police for not conducting a lineup:

> True, it may have been more convenient for the police to have a show-up. However, in matters of constitutional due process where police convenience is balanced against the need to extend basic fairness to the suspect in a criminal case, the latter should always outweigh the former. In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected.[366]

The Supreme Court disagreed. From its reading of precedent, the Court viewed the likelihood of misidentification as the primary concern of the due process challenge.[367] It faulted the district court for focusing unduly on the relative reliability of lineups and showups instead of examining the totality of circumstances for the likelihood of misidentification. Rather bewilderingly, the Court then added a paragraph that will only rekindle the hopes of those who champion the district court's more expansive due process analysis:

> The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process . . . . Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno* . . . when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.[368]

This language carries the distinct flavor of the Court's retroactivity decisions[369] and suggests that the district court may have erred only in applying its analysis to a pre-*Stovall* fact situation.[370] If this interpretation is accurate, the paragraph raises some intriguing questions. In the typical retroactivity case, the Court decides whether a specific constitutional decision can be used to

366. 448 F.2d at 94-95 (quoting unreported district court opinion).

367. 409 U.S. at 198. In fact, the Court added, *Stovall* explicitly indicated that a one-man showup does not in itself violate due process. 409 U.S. at 198.

368. 409 U.S. at 199.

369. *See* cases cited in note 18 *supra*.

370. *See* Smith v. Coiner, 473 F.2d 877 (4th Cir. 1973) (alternative holding). *But cf.* Stanley v. Cox, 486 F.2d 48 (4th Cir. 1973); United States v. Evans, 484 F.2d 1178 (2d Cir. 1973).

invalidate prior convictions. In *Biggers*, however, the Court was not concerned with *Stovall*'s retroactivity; *Stovall* itself had settled that issue by holding that the due process clause is the exclusive constitutional safeguard for defendants whose lineups or showups preceded the nonretroactive *Wade* and *Gilbert* decisions. *Biggers* instead implied that the *Stovall* principle, although retroactive, should be interpreted one way with respect to pre-*Stovall* confrontations and quite another way thereafter. This must be viewed as a new chapter in retroactivity law.

The novelty of this doctrine can better be appreciated by comparing the Court's retroactivity approach in the confession area. In *Johnson v. New Jersey*,[371] the Court refused to give retroactive application to *Escobedo* and *Miranda*. Like *Stovall*, *Johnson* attempted to make its decision more palatable by emphasizing the availability of a due process challenge for pre-*Escobedo* and *Miranda* defendants. Unlike *Biggers*, however, *Johnson* expressly indicated that the most recent due process refinement would apply to any defendant, regardless of when he was convicted.[372] For example, any defendant could invoke the *Escobedo* and *Miranda* safeguards as factors tending to show the involuntariness of his confession.

Why different retroactivity approaches should govern these respective areas is not altogether clear. Generally, retroactivity depends upon three factors: (1) the effect of the new rule on the reliability or integrity of the fact-finding process, (2) the extent of law enforcement reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.[373] The second and third factors are important when the first is not decisive. The due process confession cases were not primarily concerned with the reliability of confessions. Even before *Escobedo* and *Miranda*, the confession's reliability had ceased to be a relevant consideration under due process analysis.[374] In contrast, unnecessarily suggestive

371. 384 U.S. 719 (1966).

372. 384 U.S. at 730. *But cf.* Michigan v. Payne, 412 U.S. 47, 50-57 (1973), decided after *Biggers*, denying retroactive application to a prophylactic due process rule requiring a judge to state reasons for imposing a heavier sentence after a retrial following a successful appeal.

373. *See, e.g.*, Desist v. United States, 394 U.S. 244, 249 (1969); Stovall v. Denno, 388 U.S. 293 (1967). The three-pronged test does not apply in all situations. *See* Robinson v. Neil, 409 U.S. 505, 507-09 (1973) (three-pronged test not applicable regarding retroactivity of double jeopardy decision).

374. Haynes v. Washington, 373 U.S. 503, 518 (1963); Rogers v. Richmond, 365 U.S. 534, 541 (1961); Gallegos v. Nebraska, 342 U.S. 55, 64-68 (1951). *See also*, Kamisar, *What Is an "Involuntary Confession": Some Reflections on Inbau and Reid's "Criminal Interrogation and Confessions,"* 17 RUTGERS L. REV. 728 (1963); Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process*

identification procedures do add to the risk of wrongful convictions, as the district court in *Biggers* observed. Moreover, law enforcement officials certainly no more anticipated the expansive due process confession rulings in the 1950's and 1960's than the *Stovall* rule in 1967.[375]

Nevertheless, the different retroactivity approaches can be defended. Due process analysis has generally focused on the fairness of trial,[376] but *Stovall* directed its concern at the identification procedure in isolation.[377] This represented an important shift in emphasis, for at least some critics would argue that a defendant can receive a fair trial even though some unreliable identification evidence is admitted.[378] Prior to *Stovall,* however, only one Court had

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Clause of Time and Law, 79 HARV. L. REV. 56 (1965); Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin,* 33 U. CHI. L. REV. 719, 725-27 (1966).

375. *See* L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 607 (3d ed. 1969).

376. Clemons v. United States, 408 F.2d 1230, 1250-51 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 694 (1969) (Leventhal, J., concurring). *Cf.* Rochin v. California, 342 U.S. 165, 169 (1952) (Court must examine "the whole course of the proceedings"); Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

377. Of course, the harmless-error rule would preclude reversal in some cases. *See* Clemons v. United States, 408 F.2d 1230, 1250-51 n.1 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 694 (1969) (Leventhal, J., concurring).

378. Clemons v. United States, 408 F.2d 1230, 1250 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 694 (1969). In rebuttal, some may note that the due process confession cases focused on the interrogation process rather than on the fairness or reliability of trial. While this is true, the two areas are not really analogous. The privilege against self-incrimination constitutes a rich part of our common law heritage. Although it took almost two centuries to extend the fifth amendment to the states and into the police station, *see* Malloy v. Hogan, 378 U.S. 1 (1964), fifth amendment notions always influenced due process analysis in confession cases. The concern with preserving an accusatorial procedure as the mainstay of our criminal justice system and the general abhorrence of coerced confessions (which quickly conjure up memories of the rack and screw), *see, e.g.,* Culombe v. Connecticut, 376 U.S. 568, 581-82 (1961), make the retroactive application of the confession cases easier to comprehend. Moreover, law enforcement officials have long been aware that due process, whether interpreted liberally or not, precludes the use of involuntary confessions, for such confessions had been a ground for reversal of a state conviction as early as 1936. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

This does not fully explain the retroactivity of the confession cases. *Miranda,* a fifth amendment confession case, was not applied retroactively. *See* text accompanying notes 371-72 *supra.* Moreover, in Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), the Court denied retroactivity to Griffin v. California, 380 U.S. 609 (1965), which precluded comment on the accused's failure to testify at trial. Perhaps, however, the denial of retroactivity to *Miranda* and *Griffin* reflects some doubt about the seriousness of the fifth amendment concerns in those cases. The "compulsion" from failing to give constitutional warnings is far different from the compulsion found in the earlier confession cases. To a large extent, *Miranda* can be viewed as establishing prophylactic safeguards against the possibility of compulsion. *See* Michigan v. Payne, 412 U.S. 47 (1973). Moreover, not everyone would agree that comment on the failure to testify should be equated with compulsion. *See* Griffin v. California, 380 U.S. 609, 617-23 (1965) (Stewart, J., joined by White, J., dissenting); S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT (1957). The Court has never clearly articulated a reason for the

suggested a due process exclusionary rule for identification evidence.[379] Since the police had no reason to anticipate the invalidity of one-man showups, the retroactive application of an expanded *Stovall* rule could result in the release of untold prisoners. This might be considered an unreasonably high price to pay for an unknown quantum of improvement in fact-finding reliability.

Putting aside these general retroactivity considerations, the Supreme Court did not adequately consider whether the district court, in fact, expanded the *Stovall-Simmons* due process test. Once again, conflicting viewpoints are possible. *Stovall* suggested a preference for lineups over showups, except in emergency situations,[380] and *Simmons* condoned precustody photographic displays, despite the risks of improper suggestion, partly because of their usefulness to law enforcement.[381] Therefore, neither case provides much support for a one-man showup seven months after the crime. Such an identification procedure can readily be described as "unnecessarily" or "impermissibly" suggestive. Nevertheless, both the Court's factual analysis and its restatement of the due process test in *Simmons*[382] stressed the substantial likelihood of irreparable misidentification as a crucial factor. While the district court referred to this factor in passing, it directed the primary thrust of its opinion at the failure to hold a lineup. If permitted to stand, the district court's decision would have established, in effect, a per se rule excluding identification evidence whenever the police unnecessarily substitute a showup for a lineup.

In summary, the Supreme Court did not clearly err either in assessing the practical import of the district court's opinion or in fashioning a new "retroactivity" doctrine. What remains is to consider whether the district court's more expansive due process approach would be appropriate in post-*Stovall*, or at least post-*Biggers*,[383] cases.

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retroactivity of its due process confession cases. *Compare* Linkletter v. Walker, 381 U.S. 618, 638 (1965) *with* Desist v. United States, 394 U.S. 244, 250 & n.15 (1969). *See also* Schwartz, *supra* note 374, at 747-52.

379. Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). *Cf.* Michigan v. Payne, 412 U.S. 47, 56-57 (1973) (lower courts had no reason to anticipate prophylactic due process rule concerning increased sentences on retrial after appeal).

380. *See* text accompanying notes 360-61 *supra*.

381. *See* text accompanying note 365 *supra*.

382. *See* note 363 *supra*.

383. Arguably, *Biggers* is the first Supreme Court case even to suggest a per se prophylactic approach. If so, retroactivity would more appropriately be measured from *Biggers*, not *Stovall*. For a discussion of the problem in determining the "newness" of a constitutional ruling, see Desist v. United States, 394 U.S. 244, 263-68 (1969) (Harlan, J., dissenting).

B. *Prohibiting Unnecessarily Suggestive Procedures*

The *Stovall-Simmons* totality-of-circumstances test requires a case-by-case evaluation of identification procedures. This approach has several shortcomings. First, it leaves the police with too much discretion. The lack of guiding rules or standards[384] not only fails adequately to protect the innocent from improper suggestion, but also works, ultimately, to impede confident and effective law enforcement. Under the current approach, courts often reverse convictions because of suggestive identification techniques without providing a simple, intelligible rule to guide future police conduct.[385] Such unresponsive court action inevitably undermines police morale by reinforcing the already popular notion that law enforcement is constantly being hampered by rules designed only to protect the guilty.[386] Second, the *Stovall-Simmons* test manifests an unrealistic and naïve faith in the willingness of trial and appellate courts to rectify errors in identification procedures.[387] This criticism implies no disrespect for the judiciary; it merely suggests that our rules should comport with psychological realities. Those closely associated with prosecutors and appellate courts must be aware of the potent, almost indomitable psychological pressure to find means for preserving convictions, particularly in ugly cases.[388] Because that pressure is so compelling, the Supreme Court should have anticipated that courts generally would use every conceivable method to avoid finding due process violations except in the most outrageous situations.[389]

Biggers demonstrates the unsoundness of the present approach. Within half an hour, the victim was assaulted from behind in a dimly lit hallway, wrestled to the floor, forced to walk two blocks —the rapist behind her—and raped in a moonlit woods.[390] The vic-

384. *See* Comment, *Regulation and Enforcement of Pre-Trial Identification Procedures*, 69 COLUM. L. REV. 1296, 1299-300 (1969).

385. For similar problems with respect to search and seizure law, see LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1002-08 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule* (pts. 1-2), 30 MO. L. REV. 391, 566 (1965).

386. *See* J. SKOLNICK, JUSTICE WITHOUT TRIAL 214 (1966).

387. *See* Comment, *supra* note 384, at 1300; Note, *supra* note 20.

388. *Cf.* Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 410-11 (1971) (discussing the psychological pressure on police to commit perjury and on prosecutors to distort facts in "prep" sessions with witnesses).

389. *See* Note, *supra* note 20, at 818; Note, *Mandatory Exclusion of Identifications Resulting From Suggestive Confrontations: A Conceptual Alternative to the Independent Basis Test*, 53 B.U. L. REV. 433, 442 (1973).

390. *See* text accompanying notes 346-50.

tim's twelve year old daughter, who also observed the rapist in the hallway, could not identify the defendant. To the district court, these facts proved the victim "did not get an opportunity to obtain a good view of the suspect during the commission of the crime,"[391] but, to the Supreme Court, the same facts disclosed two opportunities to face the rapist "directly and intimately" under "adequate artificial light" and a "full moon."[392] Relying on trial testimony, the district court concluded that the victim had not provided the police with a "good physical description" of the assailant;[393] relying on habeas corpus testimony four years after trial, the Supreme Court characterized the victim's description as "more than ordinarily thorough."[394] Influenced in part by the seven-month delay, the district court ruled the one-man showup "so suggestive as to enhance the chance of misidentification";[395] "[w]eighing all the factors," the Supreme Court found "no substantial likelihood of misidentification."[396] Although the court of appeals upheld the district court's fact findings,[397] the Supreme Court found them "clearly erroneous."[398]

Biggers at least partially reflects the psychological pressure to affirm convictions. The Court commented that a rape victim, typically the only available witness, "often has a limited opportunity of observation."[399] This statement, combined with the Court's somewhat strained factual analysis, suggests that the interest in obtaining and preserving convictions justifies less than rigorous after-the-fact review of pretrial identification techniques. Unfortunately, *Biggers* also reflects the degree of inconsistency in lower court decisions since *Stovall.*[400]

Quite obviously, the chaotic due process decisions neither sufficiently protect against mistaken identifications nor adequately develop guidelines for law enforcement. An approach yielding concrete standards would be preferable from everyone's perspective.[401]

391. Biggers v. Neil, 448 F.2d 91, 94 (6th Cir. 1971), *revd.*, 409 U.S. 188 (1972) (quoting unreported district court opinion).

392. 402 U.S. at 200 (1972). *See also* Casenote, *supra* note 355, at 1178.

393. 448 F.2d at 94.

394. 409 U.S. at 200. *See also* Casenote, *supra* note 355, at 1178-79.

395. 448 F.2d at 95.

396. 409 U.S. at 201.

397. 448 F.2d at 95.

398. 409 U.S. at 200.

399. 409 U.S. at 201.

400. *See generally* Note, *supra* note 20; Annot., 39 A.L.R.3d 791 (1971).

401. At the outset, however, the questions of right and remedy should be divorced. Dependence upon the exclusionary rule as the exclusive remedy understandably induces

Development of concrete standards is facilitated by focusing on the identification technique, rather than on the likelihood of mistaken identification in a given case. *Biggers* actually provides the rationale for a prophylactic approach directed at the identification procedure: "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[402] This sentence concisely states the whole argument. While reasonable men may disagree over the degree of prejudice, all must concede that the showup in *Biggers* somewhat increased the risk of wrongful conviction. The increased risk, as even the Supreme Court agreed, was totally unnecessary and "gratuitous." Surely a system historically dedicated to protecting the innocent from wrongful conviction cannot tolerate such gratuitous risks.

An expanded, prophylactic due process approach, therefore, builds on the premise that the police must always employ the more reliable of two available identification techniques. The less reliable method must be prohibited because it gratuitously increases the risk of misidentification. From this it follows, as the district court in *Biggers* observed, that lineups, when feasible, should always be preferred over one-man showups. The presentation of a single suspect to a witness or victim undoubtedly constitutes the most suggestive identification procedure available to the police.[403] Typically, as in *Kirby* and *Biggers*, the witness's knowledge that a suspect has been apprehended aggravates the risk of improper suggestion. Since the technique itself is inherently suggestive, even counsel's assistance would generally be of little avail.[404] Unlike lineups, showups fail to provide independent verification of the witness's ability to identify the offender. A yes-no procedure is much more conducive to unchecked guessing than a procedure that requires the witness to choose from several potential defendants.[405]

The practice of conducting prompt on-the-scene identifications

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reluctance to adopt more rigid substantive standards. The present discussion, therefore, will concentrate only on the development of substantive safeguards, postponing the remedy question to a subsequent section. *See* Part VII *infra*. This should permit reflection and evaluation without the negative bias occasioned by the exclusionary rule.

402. 409 U.S. at 198. *Cf.* North Carolina v. Pearce, 395 U.S. 711 (1969) (due process prophylactic procedure adopted as safeguard against unfair resentencing on retrial after a successful appeal).

403. P. WALL, *supra* note 26, at 27-40.

404. Of course, counsel could prevent other abuses that increase the suggestion inherent in showups. For a description of these abuses, see *id.* at 29-33.

405. *See* Casenote, *supra* note 355, at 1180.

makes some one-man showups inevitable. These showups, however, are justified only by the apparently overriding law-enforcement need to maintain this investigative procedure. Once the need for promptness evaporates, no interest can justify the failure to conduct an in-person lineup.[406] If a prophylactic rule generally prohibiting one-man showups is adopted, the promptness issue will continue to arise, perhaps with greater frequency, in trial and appellate litigation. Nevertheless, stringent, inflexible time limitations are unwise given the myriad fact situations that occur on the street. Each jurisdiction, either judicially, legislatively, or, preferably, administratively, should promulgate rules and regulations to fill the constitutional interstices.[407] Police conduct that conforms to reasonable, publicized regulations consistent with broad constitutional guidelines should generally receive favorable judicial review.

The use of photographic displays in place of lineups raises several issues. As previously discussed, empirical research indicates that lineups assure more reliable identification than photographic displays.[408] Unlike lineups, two-dimensional photographs do not reveal mannerisms, demeanor, or speech. Moreover, the frozen image presented by a photograph may differ significantly from the live, moving subject.[409] Since a witness usually has a greater opportunity to study photographs than to observe the offender during the crime, the danger subsequently arises that he or she, whether at a corporeal lineup or at trial, may identify the person previously chosen rather than the actual offender.[410] In view of these deficiencies, postcustody photographic displays should generally be prohibited. The need for a prophylactic rule is especially apparent now that *Ash*, by denying

406. *See* text accompanying notes 129-34, 219-22 *supra*.

407. Rule-making is gradually being recognized as an acceptable method of filling constitutional interstices. *See, e.g.*, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § A5.09 (Study Draft No. 1, 1968) (proposing statutory standards and complementary local regulations, to be issued by law enforcement agencies). *Cf.* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, pt. II (Official Draft No. 1, 1972) (proposing search and seizure standards); ARIZONA STATE UNIVERSITY COLLEGE OF LAW, PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, MODEL RULES: WARRANTLESS SEARCHES OF PERSONS AND PLACES (1973). *See generally* Goldstein, *Police Policy Formation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972). The Supreme Court could perhaps require the adoption of local regulations. *Cf.* Jackson v. Denno, 378 U.S. 368 (1964) (requiring states to adopt certain procedures to evaluate the voluntariness of confessions).

408. *See, e.g.*, text accompanying notes 321-24 *supra*.

409. *See* text accompanying notes 321-24 *supra*. *See also* People v. Lawrence, 4 Cal. 3d 273, 283-84, 481 P.2d 212, 219-20, 93 Cal. Rptr. 204, 211-12 (1971) (Sullivan, J., dissenting), *cert. denied*, 407 U.S. 909 (1972); N. SOBEL, *supra* note 11, at 7; P. WALL, *supra* note 26, at 70; Comment, *supra* note 88, at 104.

410. *See* N. SOBEL, *supra* note 11, at 7; P. WALL, *supra* note 26, at 70; Williams & Hammelmann, *supra* note 177, at 484; Comment, *supra* note 88, at 104.

the right to counsel at photographic displays, has given the police a further incentive to avoid postcharge lineups, where *Wade*'s counsel requirement still applies.[411] A prohibition on postcustody photographic displays will have the additional salutary effect of precluding attempts to "freeze" or shore up previous uncertain identifications or to prompt witnesses immediately before trial.[412] An exception to the general prohibitionary rule will be necessary for those occasions when a lineup is impractical—for example, where witnesses are ill or far removed from the defendant's place of custody or where suitable nonsuspect lineup participants are not available.[413] In these rare cases, the previously advocated reconsideration of *Ash*[414] would help to minimize the risk.

As *Simmons* recognized,[415] precustody photographic displays are essential to law enforcement despite their dangers. Even here, some limitations may be warranted. Probable cause to arrest does not require that each potential witness identify the offender; quite often the police can wait until the defendant's arrest to obtain identifications from most of the witnesses.[416] Again, however, the great potential for variant factual complexities cautions against inflexible constitutional rules that might hamper the police.[417] Each jurisdiction should instead ensure informed police judgment by adopting administrative regulations.

Each jurisdiction should also promulgate rules to govern the conduct of identification procedures.[418] These rules, for example, would require a minimum number of nonsuspect lineup participants to minimize the possibility of chance identification. These rules might also preclude the supervising officers and nonsuspect participants from

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411. *See* State v. Wallace, 285 S.2d 796, 800 (La. 1973) (because of *Ash*, courts should be vigilant that police are not using photographic displays to avoid the counsel requirement). *See also* People v. Jackson, No. 54539 (Mich., April 16, 1974).

412. N. SOBEL, *supra* note 11, at 90-92. While the prosecutor has the right "to prepare" witnesses, he or she should not be permitted "to prompt" testimony or identifications that might otherwise not be given. *See* State v. Wallace, 285 S.2d 796, 801 (La. 1973).

413. *See* Comment, *supra* note 88, at 104-05.

414. *See* Part IV *supra*.

415. *See* Simmons v. United States, 390 U.S. 377 (1968), discussed in text accompanying notes 362-65 *supra*.

416. Simmons v. United States, 390 U.S. 377, 386 n.6 (1968).

417. Hammelmann & Williams, *supra* note 240, at 553, recommended that photographic displays be limited to one witness. This, however, could often result in pursuit of the wrong person. When other clues are lacking, the police should have leeway to confirm an identification with other identifications.

418. For existing proposals, see N. SOBEL, *supra* note 11, at 109-13 (standards for photographic displays); Read, *supra* note 36, at 381 (standards for lineups).

learning the suspect's identity, since there may be a significant danger of unintentionally conveying this knowledge to the witness.[419] Since some previously reviewed empirical evidence suggests that witnesses may feel compelled to make an identification whenever they believe the suspect is before them,[420] the use of confrontations without the suspect may be appropriate.[421] In these areas, as in others, uncertainty admonishes against headlong efforts to adopt countless regulations supported only by speculative fears. Nevertheless, the legal profession currently has sufficient sophistication to recognize the appropriate issues and to commission empirical studies for their answers.

An expanded due process approach may also require certain mandatory identification procedures to eliminate unnecessary risks of misidentification. A defendant perhaps should be entitled to a pretrial lineup before being forced to confront identification witnesses in court, either at the preliminary hearing or at trial.[422] In some cases, an in-court lineup[423] or permission for the defendant to sit among spectators or with a nonsuspect at counsel table may be appropriate.[424] While defense requests for these safeguards are occasionally honored,[425] appellate courts have left the matter to the trial court's discretion.[426] Such indifference is surprising, since an identification more unreliable than the witness's familiar selection of the conspicuous defendant, frequently after scanning the courtroom for dramatic effect, is difficult to imagine. In effect, these defense requests seek only to avoid one-man showups, albeit in the courtroom. At a minimum, pretrial lineups should be required

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419. *See* Gilligan, *supra* note 170, at 185 n.13; Williams & Hammelmann, *supra* note 177, at 489.

420. *See* text accompanying notes 112-14 *supra.*

421. P. WALL, *supra* note 26, at 61.

422. *But cf.* United States v. Cole, 449 F.2d 194 (8th Cir. 1971), *cert. denied,* 405 U.S. 931 (1972); United States v. Ravich, 421 F.2d 1196 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970).

423. *But cf.* United States v. Williams, 436 F.2d 1166 (9th Cir. 1970), *cert. denied,* 402 U.S. 912 (1971).

424. *But cf.* United States v. Edward, 439 F.2d 150 (3d Cir. 1971). Defense counsel have sometimes provided a decoy without seeking the Court's permission. For a case in which this resulted in the incarceration of the wrong man, see Duke v. State, — Ind. —, 298 N.E.2d 453 (1973). Of course, an identification made from an in-court lineup would be devastating to the defense.

425. *See, e.g.,* Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970), *cert. denied,* 404 U.S. 834 (1971).

426. *See* cases cited in notes 422-24 *supra. See also* N. SOBEL, *supra* note 11, at 46-49. *Cf.* State v. Riley, 126 Wash. 256, 218 P. 238 (1923) (denying counsel's request to bring a nonsuspect, masked like the robber, into the room).

whenever the prosecutor plans to introduce identification evidence at trial.

VI. The Mallory Rule: Prompt Arraignments and Postcustody Identifications

Practically all jurisdictions have legislation or court rules requiring an arrested person to be taken promptly before a committing authority for preliminary arraignment.[427] In *Mallory v. United States*,[428] the Supreme Court, in an effort to enforce the federal prompt-arraignment rule,[429] held that confessions elicited during a period of unnecessary prearraignment delay would not be admissible at trial.[430] Without specifically defining the period of permissible delay, the Court indicated that the delay could not be "of a nature to give opportunity for the extraction of a confession."[431] Although *Mallory* was not a constitutional decision, it prompted many state courts to adopt similar exclusionary rules.[432] Recently, however, *Mallory* has ceased to be a potent weapon in the defense arsenal. First, *Miranda* established strong prophylactic safeguards to protect the privilege against self-incrimination in the police station, thus eliminating some of the concern underlying the *Mallory* decision.[433] Second, Congress, in title II of the Safe Streets Act of 1968,[434] rejected, or at least modified, the *Mallory* confession rule.[435]

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427. *See, e.g.*, Mich. Comp. Laws Ann. § 764.13 (1968); Pa. R. Crim. P. 118. A listing of these provisions can be found in ALI Model Code of Pre-Arraignment Procedure app. IV (Tent. Draft No. 1, 1966).

428. 354 U.S. 449 (1957).

429. Fed. R. Crim. P. 5(a) requires arresting officers to take the defendant before the nearest available magistrate "without unnecessary delay." Fed. R. Crim. P. 5(c) requires the magistrate, among other things, to advise the defendant of his right to retained or appointed counsel.

430. 354 U.S. at 453. *See also* Upshaw v. United States, 335 U.S. 410 (1948) (the Court's first decision applying an exclusionary rule to enforce Rule 5); McNabb v. United States, 318 U.S. 332 (1943) (applying an exclusionary rule to enforce an earlier federal prompt-arraignment statute).

431. 354 U.S. at 455.

432. Although constitutional concerns underlie *Mallory* and McNabb v. United States, 318 U.S. 332 (1943), the Court carefully based both holdings on its supervisory authority over the federal courts. State courts may have been influenced by the constitutional overtones in the decisions. *See, e.g.*, People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

433. *See* Miranda v. Arizona, 384 U.S. 436 (1966). Since the police are now required to give constitutional warnings, the need for judicial advice, at least according to some authorities, is no longer apparent. *Compare* Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970) *with* United States v. Keeble, 459 F.2d 757 (8th Cir. 1972). *See also* Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969).

434. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, § 701(a), 82 Stat. 210 (codified at 18 U.S.C. § 3501 (1970)).

435. 18 U.S.C. § 3501(c) (1970) provides that a voluntary confession shall not be

Perhaps unwittingly, *Kirby* may provide the impetus for jurisdictions to breathe new life into the moribund *Mallory* rule, but in the context of eyewitness identifications rather than confessions.[436] If the right to counsel applies at all critical stages after the initiation of formal judicial charges, the defendant has a significant interest in a prompt arraignment, before a precharge lineup without counsel can be conducted. Two issues merit consideration. First, do formal judicial proceedings, with the concomitant right to counsel, actually commence at the preliminary arraignment? Second, if the adversary system does commence with the preliminary arraignment, should *Mallory* be exhumed and applied in this new context?

Kirby did not explicitly define when a criminal prosecution commences for sixth amendment right-to-counsel purposes. The Court merely commented that all previous right-to-counsel precedent had involved "points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[437] Lower courts interpreting this language have expressed conflicting viewpoints. At one extreme, a federal court has taken the view that it would be a "twist of logic" to interpret *Kirby*, a decision obviously intended to limit the sixth amendment, as extending the *Wade-Gilbert* counsel rules into preindictment stages.[438] At the other extreme, another federal court has indicated that a criminal prosecution commences, at least in some instances, when a warrant is obtained for the defendant's arrest.[439] Such differences will continue as long as courts believe that *Kirby* requires them to

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inadmissible solely because of prearraignment delay "if such confession was made or given . . . within six hours immediately following . . . arrest." It is not altogether clear whether the *Mallory* rule could apply where the prearraignment delay exceeds six hours.

436. Presumably, 18 U.S.C. § 3501(c) (1970), would not preclude federal courts from applying *Mallory* to identification evidence, since the statute only addresses the effect of delay on the admissibility of confessions. Other sections of the statute, however, indicate that Congress would not favor a new exclusionary rule for identification evidence. *See* 18 U.S.C. § 3502 (1970), which attempts to repeal *Wade* and *Gilbert* by making all eyewitness identification testimony admissible in the federal courts. Because of its obvious constitutional infirmities, courts have ignored this latter provision.

437. 406 U.S. at 689.

438. Moore v. Oliver, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

439. United States *ex rel.* Robinson v. Zelker, 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). *But cf.* United States v. Counts, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973). For other cases applying the right to counsel before indictment or information, *see* Arnold v. State, 484 S.W.2d 248 (Mo. 1972); State v. Tingler, 31 Ohio St. 2d 100, 285 N.E.2d 710 (1972); Dickson v. State, 492 S.W.2d 267 (Tex. Crim. App. 1973). *Contra*, State v. Branch, 108 Ariz. 351, 498 P.2d 218 (1972); State v. West, 484 S.W.2d 191 (Mo. 1972). Some courts apparently fail to recognize the issue. *See, e.g.*, People v. Brown, 6 Ill. App. 3d 500, 285 N.E.2d 515 (1972).

look to local procedures in determining when a criminal prosecution commences. Why local procedures should govern, however, is not altogether clear. For example, some jurisdictions, in order to protect the defendant's interest in a speedy trial, require the most binding indication of intent to prosecute, such as the filing of an indictment or an information,[440] before tolling the statute of limitations. But the concerns surrounding the right to counsel may be entirely different, thus mandating a different result.[441] In fact, if a criminal prosecution cannot commence until an information or indictment tolls the statute of limitations, *Coleman v. Alabama*,[442] which required counsel at preliminary examinations, cannot be justified.

Despite the diversity of practices, a convincing argument can be made that a criminal prosecution commences at least with the preliminary arraignment when a formal complaint is filed in court against the accused. According to *Kirby*, the line must be drawn at "the starting point of our whole system of adversary criminal justice," the point at which the government "has committed itself to prosecute."[443] Professor Miller, supporting his exhaustive analysis of the charging function with extensive field study data, has called the decision to file a complaint "the heart of the charging process."[444] Similarly, to an American Law Institute study committee, "[t]he issuance of a complaint by the prosecuting attorney or other authorized official signifies a formal decision to charge a person with a specified offense."[445] It would defy common sense to say that a criminal prosecution has not commenced against a defendant who,

440. *See, e.g.*, 18 U.S.C. § 3282 (1970).

441. The Supreme Court has even interpreted the same constitutional language differently in varying contexts. *See, e.g.*, United States v. Marion, 404 U.S. 307 (1971) (criminal prosecution for sixth amendment speedy trial purposes commences with indictment, information, or arrest).

442. 399 U.S. 1 (1970).

443. 406 U.S. at 689.

444. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 14 (1969). Professor Miller also indicated that application for an arrest warrant can represent a decision to bring charges against the defendant. *Id.* at 13-14.

445. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.02 & commentary at 198 (Tent. Draft No. 1, 1966). The committee also viewed the preliminary arraignment as a stage of the criminal prosecution warranting counsel's assistance for the accused:

> Even if there is not a constitutional right to counsel at the first appearance, as a matter of policy it is wise to assure that the defendant is represented at the first appearance. At the first appearance the judge is required to determine whether there exists reasonable cause to support the complaint and to fix bail or other pre-trial release conditions, both of which decisions are critical to the defendant's securing his immediate freedom and require representation and advocacy.

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE art. 310, commentary at 79-80 (Tent. Draft No. 5, 1972). Whether or not the preliminary arraignment itself should be deemed a critical stage, the Institute's committee is certainly correct in describing the arraignment as an important part of the adversary process.

perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law.

Whether state and federal jurisdictions should adopt *Mallory*-type exclusionary rules for delayed prearraignment identification procedures without counsel is a more difficult problem, depending in part on the function of a prompt-arraignment requirement. In the decisions leading up to *Mallory*, the Court emphasized that the prompt-arraignment rule was designed "to check resort by officers to 'secret interrogation of persons accused of crime.' "[446] *Mallory* repeated this emphasis[447] but also noted that a prompt arraignment assures the defendant early advice concerning his rights to remain silent and to have counsel's assistance.[448]

Judicial advice concerning constitutional rights constituted an important safeguard to a defendant subject to police interrogation, especially before *Miranda*. Prior to *Wade*, however, judicial advice could not benefit a defendant subject to pretrial identification procedures. Since the prompt-arraignment rule seemed to serve few functions outside the confession context, courts refused to apply it to exclude identification evidence.[449] After *Wade*, a few courts recognized the increased importance of prompt arraignments and *Mallory*'s exclusionary rule.[450] Chief Justice Burger, then a circuit judge, most succinctly described the interrelationship of *Wade* and *Mallory*:

> The reason our earlier holdings do not apply is that the Supreme Court's decision in United States v. Wade . . . has made the underlying rationale of those cases irrelevant. . . . [T]he reason for not applying *Mallory* to a lineup identification was that a lineup in the absence of counsel before *Wade* was a perfectly legitimate procedure . . . and that *Mallory* was concerned with improper "interrogation." It was natural for the cases following *Mallory* to concentrate on the

446. Upshaw v. United States, 335 U.S. 410, 412 (1948), *quoting* McNabb v. United States, 318 U.S. 332, 344 (1943). *See also* United States v. Mitchell, 322 U.S. 65 (1944) (confession not product of delay). *But cf.* United States v. Nygard, 324 F. Supp. 863 (W.D. Mo. 1971) (using *Mallory* to suppress a gun).

447. The Court found a prompt-arraignment rule a safeguard against "those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." 354 U.S. at 452-53, *quoting* McNabb v. United States, 318 U.S. 332, 344 (1943).

448. 354 U.S. at 454.

449. *See* Williams v. United States, 419 F.2d 740, 742 n.2 (D.C. Cir. 1969) (citing cases).

450. *See* United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972). *Cf.* Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969). *Contra*, People v. Matthews, 28 Mich. App. 473, 184 N.W.2d 474 (1970).

> exclusion of utterances, but not other forms of evidence. But *Wade* has changed this. Now that the right to counsel is an integral part of the lineup procedure, the warnings that are given at presentment and the opportunity to have counsel appointed are highly relevant to the lineup situation. . . . Since the *Mallory* rule was a response to the protections afforded by prompt presentment, it is appropriately applied to the lineup situation in the wake of *Wade*.[451]

The *Mallory* rule is even more important if, under *Kirby*, a criminal prosecution commences for sixth amendment purposes with preliminary arraignment. If the *Mallory* rule is not applied, the police will be able to violate prompt-arraignment statutes and court rules in order to avoid the constitutional right to counsel at post-arraignment lineups. While never to be condoned, police illegality deserves special condemnation when utilized to flout constitutional requirements.[452] Courts can only disparage the Constitution's exalted role in our society by minimizing the consequences of such illegality.[453]

VII. Remedies: The Exclusionary Rule and Jury Instructions

In *Gilbert v. California*,[454] the Supreme Court concluded, without much discussion, that only a "*per se* exclusionary rule" for testimony referring to a lineup identification made in the absence of counsel would be an effective sanction to assure law enforcement compliance with the right to counsel. To the Court, the desirability of deterring constitutionally objectionable lineups outweighed the undesirability of excluding relevant evidence.[455] In *United States v.*

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451. Adams v. United States, 399 F.2d 574, 580 (D.C. Cir. 1968) (concurring opinion), *cert. denied*, 393 U.S. 1067 (1969).

452. *Cf.* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1, 28-33 (1958).

453. Strict enforcement of prompt-arraignment rules should not preclude the police from conducting "open crime" lineups. After making an arrest for one crime, police frequently conduct lineups before witnesses in similar but unsolved crimes. If prompt arraignments are required, the arraignment judge can either condition the defendant's release on his return for the desired lineups or delay release until the lineup is conducted. *See* United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969). *See also* McGowan, *Constitutional Interpretation and Criminal Identification*, 12 Wm. & Mary L. Rev. 235, 246-48 (1970). Once probable cause to arrest is established, the defendant cannot justifiably complain about reasonable intrusions on his liberty. *Cf.* Gustafson v. Florida, 42 U.S.L.W. 4068, 4070 (U.S., Dec. 13, 1973) (Powell, J., concurring) ("an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person"). The prompt-arraignment rule, therefore, can protect the defendant's constitutional right to counsel without impeding effective law enforcement.

454. 388 U.S. 263 (1967).

455. 388 U.S. at 273.

Wade,[456] the Court concluded that extension of the per se exclusionary rule to in-court identification testimony would be unduly harsh, while confinement of the rule to out-of-court identifications would inadequately assure compliance with the counsel requirement. The Court resolved the dilemma by holding that the prosecutor must have an opportunity to prove the absence of taint from the illegally procured identification.[457]

In the fourth amendment context, years of fervent debate preceded the Court's conclusion that the exclusionary rule provides the most effective safeguard against police illegality.[458] Yet, in establishing a right to counsel at lineups, a right not presaged in a single jurisdiction,[459] the Court, without the benefit of debate, apparently assumed that no other remedy would suffice. The Court did not even specify the possible alternatives being rejected as it had done in the search and seizure area.[460] Since criminal prosecutions without identification evidence are difficult to imagine,[461] the Court's rulings understandably generated substantial antipathy, usually and unfortunately directed at the counsel requirement rather than at the remedy. Dissenting in *Wade*, Justice White recognized a dominant source of the discontent:

> It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present.[462]

Of course, Justice White exaggerated the problem. While *Gilbert* would preclude a suspect's mother or brother from referring to an out-of-court identification made without counsel, the prosecutor could easily establish an independent source for an in-court identification. Justice White, however, did correctly perceive the difficulty

456. 388 U.S. 218 (1967).

457. 388 U.S. at 241.

458. The Supeme Court adopted the exclusionary rule for federal cases in Weeks v. United States, 232 U.S. 383 (1914). In Wolf v. Colorado, 338 U.S. 25 (1949), the Court refused to apply the exclusionary rule to state criminal proceedings. Mapp v. Ohio, 367 U.S. 643 (1961), overruled *Wolf*.

459. *See* Stovall v. Denno, 388 U.S. 293, 299 (1967).

460. The alternatives included criminal prosecution of the police officers and civil suits. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961).

461. *See* United States v. Brown, 461 F.2d 134, 145-46 n.1 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

462. 388 U.S. at 251.

in establishing an independent source for witnesses not previously acquainted with the defendant. The ingenuity displayed by lower courts in finding an independent source[463] has not diminished the force of his criticism. An exclusionary rule made farcical by strained factual analysis, almost blatantly defying the obligation to uphold the Constitution and the Supreme Court's interpretation of it, is even less acceptable than an unduly harsh rule.

An exclusionary remedy for right-to-counsel violations does not automatically follow from the use of that remedy in fourth amendment cases. The two areas can be distinguished by drawing an analogy to the *malum in se-malum prohibitum* dichotomy in substantive criminal law. Generally, conduct that is *malum in se* would be considered offensive apart from its legal prohibition; conduct that is *malum prohibitum* is wrong only in the sense that it violates positive law.[464] Although criminal liability theorists have convincingly criticized these distinctions,[465] they offer a useful point of departure for exclusionary-rule analysis.

The abhorrence that democratic societies have for unreasonable searches and seizures predates the Constitution.[466] As Justice Frankfurter so eloquently stated, "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society" and "implicit in the 'concept of ordered liberty.' "[467] Therefore, the exclusion of illegally obtained evidence, though it be unquestionably relevant and perhaps crucial to conviction, can be justified for several reasons. First, exclusion provides some deterrence against the *malum in se* conduct of the police.[468] Second, by excluding the evidence, courts refuse to become accessories, albeit after the fact, to a basic constitutional wrong.[469] Finally, although this is not articulated in the cases, exclusion serves an important educative function. By forcing judges, lawyers, law students, and police to grapple frequently with search and seizure issues, the exclusionary rule raises

463. *See* Note, *supra* note 20.

464. *See generally* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 337-42 (2d ed. 1960); R. PERKINS, CRIMINAL LAW 784-91 (2d ed. 1969).

465. *See, e.g.*, J. HALL, *supra* note 464, at 339-42.

466. *See, e.g.*, Entick v. Carrington, 19 How. St. Tr. 1030 (C.P. 1795).

467. Wolf v. Colorado, 338 U.S. 25, 27 (1949), *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

468. *See* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965). Recently, several critics have questioned the efficacy of the exclusionary rule as a deterrent to illegal police conduct. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 413-27 (1971) (Burger, C.J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

469. *Cf.* Kaufman v. United States, 394 U.S. 217, 225 (1969); Lee v. Florida, 392 U.S. 278, 385-86 (1968). Recently, this rationale has been overshadowed by the emphasis on deterrence.

the level of consciousness, and therefore underscores the primacy, of fourth amendment concerns.

On the other hand, violation of the right to counsel at lineups can best be described as *malum prohibitum*. As previously demonstrated, *Wade* and *Gilbert* were not concerned with vindicating the right to counsel as such, but instead were concerned with protecting the defendant's right to a fair trial.[470] In the fourth amendment area, the invasion of a basic right occurs the moment the police behave illegally, whether or not criminal prosecution follows; in the identification area, the denial of counsel, which itself invades no inherent right, only becomes significant upon the introduction of evidence at trial. A suspect not identified at a lineup held in the absence of counsel could hardly claim a violation of his basic rights. In view of these considerations, excluding identification evidence appears to be an inappropriately drastic remedy.[471] First, since the offense is merely *malum prohibitum*, the interest in deterrence may be outweighed by the interest in admitting probative evidence. Second, the accessory role of the courts is not so pernicious, especially if some modicum of fairness—the primary concern of *Wade* and *Gilbert*—can be preserved at trial. Finally, since the right to counsel at lineups is not itself basic to a free society, the educative value of incessant litigation must be de minimus, at best.

The *malum in se-malum prohibitum* distinction is more difficult to perceive in some contexts. For instance, the exclusion of evidence for violations of nonconstitutional prompt-arraignment rules, as recommended in the last section, may appear inconsistent with a reluctance to exclude evidence for sixth amendment violations. This is admittedly a close question, as the vehement criticism of *Mallory* well attests.[472] Nevertheless, it can be argued that violations of the prompt-arraignment rules lean somewhat closer toward the *malum in se* segment of the continuum. Practically every jurisdiction has legislation requiring prompt arraignments.[473] The pervasiveness of these rules, as the Supreme Court has recognized, indicates their central role in the administration of criminal justice.[474] The rules constitute an essential safeguard against third degree tactics, which democratic and civilized societies have universally condemned.[475] Moreover, the very act of delaying arraign-

470. *See* Part III *supra*.

471. *Cf.* P. WALL, *supra* note 26, at 181.

472. *See* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

473. *See* note 427 *supra* and accompanying text.

474. McNabb v. United States, 318 U.S. 332, 343-44 (1943).

475. McNabb v. United States, 318 U.S. 332, 344 (1943).

ment affects the defendant substantively, since at least one purpose of the prompt-arraignment rules is to assure an early opportunity to regain liberty by posting bail.[476]

Aside from these considerations, there is yet another reason for distinguishing the needs for an exclusionary remedy in the fourth and sixth amendment areas. Since an illegal search does not affect the probative value of items seized, it would be unrealistic to ask a jury to discount evidence because of police illegality.[477] In contrast, the denial of counsel at lineups may have a negative impact on the probative value of the resultant identification evidence. In these cases it would not be unrealistic to expect the jury to weigh the evidence accordingly. True, the rules of evidence often preclude the jury from considering relevant evidence, but the recent trend favors admissibility of all probative evidence in the absence of social policies, such as police deterrence, that might warrant exclusion.[478] As long as adequate safeguards are employed to assure informed judgment, the jury should generally be trusted to evaluate the probative worth of evidence.

In view of these differences, the following proposals are offered with some misgivings and subject to certain provisos. The exclusionary rule should be abolished on a jurisdiction-by-jurisdiction basis for right-to-counsel violations at pretrial identification procedures, and exclusionary remedies should not be adopted for violations of the prophylactic due process rules proposed in this Article. Violations of the *Stovall-Simmons* rule do warrant continued exclusion, since such violations necessarily indicate the substantial unreliability of identification evidence.[479] The risk of misidentification in these cases is substantially greater than in those cases only involving a violation of a prophylactic rule.

Any proposal to abolish the exclusionary remedy generates concern that substantive constitutional safeguards will be eviscerated. This justifiably imposes a burden on the advocates of abolition to propose an adequate substitute. Accordingly, jury instructions cautioning against the deficiencies in eyewitness identification and apprising the jury of the particular constitutional violation, with its concomitant, gratuitous increase in the risk of misidentification,

476. *See* Hogan & Snee, *supra* note 472, at 24-25.

477. *Cf.* Jackson v. Denno, 378 U.S. 368 (1964) (jury deciding guilt cannot be expected to discount involuntary confessions).

478. *See, e.g.*, the expansion of hearsay exceptions discussed in text accompanying notes 254-61 *supra*. Search and seizure evidence, of course, is excluded for policy reasons unrelated to probative value.

479. *See* Part V(A) *supra*.

should be considered as a substitute. To the extent possible, this proposal should be empirically tested, first with simulated reality experiments and then, as the exclusionary rule is abolished in certain jurisdictions, with field studies. To qualify for the exclusionary rule's abolition, a jurisdiction should be required to promulgate regulations demonstrating adherence to the counsel requirements and prophylactic rules that this Article proposes. These regulations, as recommended in an earlier section, should also be required to provide general guidelines for police conduct not subject to specific constitutional proscriptions.[480]

The efficacy of a constitutional right varies in direct proportion to the potency of the available remedy. A remedial jury instruction can adequately deter constitutional violations only by substantially increasing the likelihood of acquittal where improperly obtained identification evidence constitutes a crucial part of the prosecution's case. Since federal constitutional rights are at stake, the proposed remedy should not vary in substance and in effect from jurisdiction to jurisdiction. The Supreme Court can assure uniformity and maximize deterrence by dictating at least the general outlines of the remedial instructions. The Court certainly has the same authority to impose remedial instructions as it had to impose the exclusionary rule in the first place.

Remedial instructions should complement general instructions cautioning the jury against the danger of misidentification. Recently, some courts have proposed general cautionary instructions,[481] but these proposals have not been sufficiently concrete to apprise the jury of the magnitude of the problem. The British Law Revision Committee has also proposed legislation requiring judges "to warn the jury of the special need for caution before convicting the accused in reliance on the correctness" of identification testimony.[482] The requirement would apply whenever the prosecution's case "depends wholly or substantially" on the correctness of identification testimony, even in cases involving more than one eyewitness. While certainly a step in the right direction, the proposal suffers from a failure to specify the content of the recommended instruction. Although instructions must be tailored to the facts of a par-

480. *See* Part V(B) *supra.*

481. *See, e.g.*, United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971) (adopting approach of the Pennsylvania courts); United States v. Telfaire, 469 F.2d 552, 557-59 (D.C. Cir. 1972) (strongly urging trial courts to use instructions similar to those adopted in *Barber*). *Contra*, United States v. Evans, 484 F.2d 1178 (2d Cir. 1973).

482. *See* BRITISH REPORT, *supra* note 36, at 116-21, annex 1, § 21.

ticular case, some minimal standards would seem appropriate. The evidence that this Article reviewed concerning the dangers of wrongful conviction warrants an instruction along the following lines:

> One of the most important issues in this case concerns the identification of the defendant as the perpetrator of the crime. Identification testimony must be received with the greatest of caution. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification. Some evidence indicates that the danger increases the more excited the observer. Many cases of wrongful conviction have been reported. In some cases, several witnesses incorrectly identified the defendant; in one of the most dramatic, seventeen witnesses mistakenly identified the accused. Often the actual offender and the defendant did not resemble each other.
>
> In evaluating the identification evidence in this case, you should consider the opportunity to observe the offender at the time of the crime, the lighting conditions, the length of time that elapsed between the crime and the first identification by the witness of the defendant, and the certainty or doubt expressed by the witness. The government has the burden of proving identity beyond a reasonable doubt, but it is not essential that the witness himself be free from doubt. To convict, you the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find him not guilty.[483]

This instruction should be given whenever identification is a disputed issue. Remedial instructions should be added between the first and second paragraphs whenever the police violate the right to counsel or fail to obey a due process prophylactic rule. For example, if the police conduct a station-house showup instead of a lineup, an instruction along the following lines should be given:

> Because of the scientifically proven dangers of mistaken identification, the law has established certain rules for the conduct of identi-

483. This proposal is based in part on the recommendations contained in the cases cited in note 481 *supra*. The reference to the example of mistaken identifications by 17 witnesses comes from E. BORCHARD, *supra* note 30, at 1-3. Some have argued that an instruction referring to the difficulty encountered by members of one race in identifying those of another race should also be given. *See* United States v. Telfaire, 469 F.2d 552, 559 n.3 (D.C. Cir. 1972) (Bazelon, C.J., concurring). Some empirical data supports this view. *See* Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERS. & SOC. PSYCH. 330 (1969) (surprisingly showing, however, that blacks scored better in identifying whites than in identifying other blacks; the lowest scores were of whites attempting to identify blacks). Racial prejudice may cause stereotyping that makes identification difficult. For some evidence that such stereotyping is on the wane, at least among college students, see Karlins, Coffman & Walters, *On the Fading of Social Stereotypes: Studies in Three Generations of College Students*, 13 J. PERS. & SOC. PSYCH. 1 (1969). For a case in which expert testimony convinced a trial judge that a white victim could not accurately identify a black defendant, see Regina v. Peterkin, 125 Can. Crim. Cas. 228 (Que. Ct. Sess. 1959).

> fication procedures. One of the most significant dangers is that the identification procedure will itself mislead the witness into identifying the wrong person. For example, when the police present only one person to the witness, they magnify the risk of mistake. The witness, though perfectly honest, is likely to be misled into believing that the police must have captured the right person if they are presenting him [her] for identification. A much safer procedure is to conduct a lineup, where the witness is tested by being forced to pick the defendant from a group of men. Because lineups are much more reliable, the law has forbidden the police from conducting one-man showups when a lineup can be held. In this case, the police, without justifiable excuse, violated that law. In doing this, they unnecessarily increased the risk of mistaken identification. In evaluating the identification evidence in this case, you should consider this violation and the unnecessary risk it caused.

Similarly, remedial instructions should be drafted to cover violations of the other substantive constitutional rules proposed in this Article.

In summary, the dangers of mistaken identification warrant strict, prophylactic constitutional safeguards. Violation of these safeguards, however, should not always result in the complete loss of identification evidence. The need for the evidence may often outweigh the benefits obtained by excluding the evidence. It is hoped that the proposed jury instructions will accomplish several objectives. First, they will alert the jury to the inherent dangers in identification testimony. Second, they will alert the jury to the increased dangers when the police flout appropriate constitutional safeguards. Finally, by increasing the probability of acquittal when constitutional safeguards are violated, they will sufficiently deter improper identification techniques. If the instructions do accomplish these objectives, the exclusionary rules can safely be eliminated.

VIII. Conclusion

Empirical research and reported instances of wrongful conviction indicate a need for greater sensitivity to the risk of unreliability inherent in eyewitness identifications than is reflected in *Kirby*, *Biggers*, and *Ash*. From a legal perspective, *Kirby* and *Ash* are neither well reasoned nor consistent with precedent. Nevertheless, while *Ash* should be reconsidered, *Kirby*'s sixth amendment limitation can be justified by policy reasons, including, primarily, the need to preserve constitutional flexibility in the precharge stages of the criminal process. Since *Kirby* limited its discussion to sixth amendment analysis, it does not preclude consideration of alternate bases for the right to counsel at pretrial identification procedures. In particular, due process should require counsel's assistance at post-

custody station-house lineups and postcustody photographic displays. Unlike the sixth amendment, due process permits a balancing of interests that would enable the status quo to be maintained with respect to prompt on-the-scene identifications. Due process is also sufficiently flexible to permit, in certain rare cases, postcustody photographic displays in the absence of counsel. *Biggers* cannot be faulted, if it is interpreted as preserving the option to adopt a due process prophylactic approach in future cases. This Article proposes prophylactic rules to prohibit one-man showups and photographic displays whenever lineups are feasible. Bringing the various sections together, this Article proposes a relatively simple five-step analysis:

1. Is the identification procedure prohibited by a prophylactic due process rule?

2. If the procedure is not prohibited, does the sixth amendment right to counsel apply? (*Kirby*'s limitation would be accepted.)

3. If the sixth amendment does not apply, does due process require the assistance of counsel?

4. Did a violation of a prompt-arraignment statute or rule preclude the defendant from having counsel's assistance at the identification procedure?

5. Did the identification procedure result in a violation of the *Stovall-Simmons* rule?

This Article also proposes the gradual abolition of the exclusionary rule for identification evidence except with respect to *Stovall-Simmons* and prompt-arraignment rule violations. Jury instructions, tailored to the particular constitutional violation, should replace the exclusionary rule in all other instances. This recommendation is subject to two provisos. First, the efficacy of the instructions would have to be tested empirically.[484] Second, to free itself of the exclusionary remedy, a jurisdiction would have to adopt regulations demonstrating adherence to the prophylactic constitutional rules.

The risk of mistaken identification can never be eliminated. Nevertheless, a system historically dedicated to protecting the innocent from wrongful conviction should take every reasonable step to minimize that risk. In the words of the British Criminal Law Revision Committee, "The best . . . that can be done is to reduce the danger of injustice in an area where the administration of the criminal law is particularly vulnerable to mistake . . . ."[485]

484. *Cf.* Doob & Kirshenbaum, *supra* note 204.

485. BRITISH REPORT, *supra* note 36, at 117.