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CRIMINAL LAW

COMMENTS

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AVAILABILITY OF FEDERAL POST-CONVICTION RELIEF IN LIGHT OF A SUBSEQUENT CHANGE IN LAW

INTRODUCTION

Our system of justice seeks finality in criminal prosecutions in order to ensure the adequate administration of justice. Yet, the protection of rights through appeal and through the availability of a special reviewing forum to afford relief in exceptional cases has traditionally been a part of the criminal justice system. This special relief has taken the form of the writ of habeas corpus and the more recent federal counterpart of habeas corpus: section 2255 of title 28 of the United States Code.\(^1\)

\(^1\) 28 U.S.C. § 2255 (1970) reads, in part, as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new

The tension between these two competing concerns has been the subject of discussion as courts seek to determine when further appeals from a conviction will no longer be allowed. It is necessary to impose finality on prosecutions after having offered the defendant an adequate opportunity to present his claims to higher courts for review. Yet, when a defendant alleges a violation of a fundamental right in the trial process, the courts may be egregiously denying the defendant justice if they fail to hear the defendant's claim.\(^2\)

Judges make mistakes and, cognizant of these errors, reviewing courts may grant a petitioner yet another hearing to see if the "right" decision has been made. Recognizing that courts can never make the conclusively correct decision, however, the criminal justice system must impose limits on the appellate process.\(^3\)

Traditionally the avenues of appeal established the necessary finality. After an exhaus-
tion of these standard appellate procedures a defendant could bring only the most grievous claims of unjust confinement in a writ of habeas corpus, alleging a violation of constitutional rights or lack of jurisdiction in the trial court. Increasingly, however, the Supreme Court has expanded the availability of this post-conviction relief to allow appeals from otherwise final convictions.

Recently the Supreme Court in United States v. Davis held that confinement in violation of a law of the United States, as well as an unconstitutional detention, allowed a motion under section 2255. This decision also held that a change in law subsequent to a person's conviction and appeal was also sufficient to merit collateral attack. The subsequent interpretations of this decision, coupled with its historical justification, provide guidelines for understanding the import of the holding.

A brief review of the facts of Davis provides a background for the discussion of the Court's reasoning. Joseph Anthony Davis, classified 1-A by his draft board, received an order to report for a pre-induction physical in February of 1965. Due to illness and failure to notify his local board of his current address, Davis missed several scheduled appearances and was therefore declared delinquent by his local board. After refusing twice to report for induction subsequent to this delinquent classification, he was prosecuted and convicted.

While Davis' appeal was pending in the Ninth Circuit, the Supreme Court announced its decision in Gutknecht v. United States. In Gutknecht the Court held that "the selective service regulations that accelerated the induction of delinquent registrants by shifting them to the first priority in the order of call were punitive in nature and, as such, were without legislative sanction." The Ninth Circuit therefore remanded the Davis case for consideration "in light of the intervening decision..." On remand the district court concluded that there had been no acceleration because of Davis' delinquent status and found that the decision in Gutknecht, therefore, did not affect Davis' conviction.

While Davis' request for a writ of certiorari to the Supreme Court was pending, the Ninth Circuit decided United States v. Fox. The Fox court applied the Gutknecht decision to reverse the conviction of Fox, reasoning that "Fox's induction was accelerated by the declaration of delinquency as a matter of law [because] without the declaration, the Board could not have ordered him to report for induction." The circumstances leading to Fox's induction order were virtually identical to those in Davis' case.

In light of the Fox decision, Davis unsuccessfully sought a rehearing before the court of appeals and commenced serving his three year sentence. Davis then instituted a collateral

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5 This delinquent classification was authorized by 32 C.F.R. § 1642.4(a) (1967) which allowed a local board to declare a registrant delinquent for failure to comply with appropriate duties. Such duties include reporting for a physical exam (32 C.F.R. § 1641.4 (1974)) and keeping the local board informed of a current address (32 C.F.R. § 1641.1 (1974)).
6 60 U.S.C. App. § 462(a) provides, in pertinent part:

Any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rule, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment.

8 417 U.S. at 338 (Davis paraphrasing Gutknecht).
9 432 F.2d 1009 (9th Cir. 1970).
10 454 F.2d 593 (9th Cir. 1972).
11 The court in Gutknecht had invalidated the induction of a delinquent on the basis of evidence of actual punitive acceleration of induction on the part of the local board. Relying on the Gutknecht reasoning, the government offered evidence of lack of actual acceleration of the defendant's induction in both Fox and Davis. The court in Davis found no actual acceleration of the defendant's induction despite Davis' delinquent classification. The government had shown that many registrants in the same class as Davis had already been inducted prior to Davis due to Davis' failure to report for scheduled physicals.
12 The decision in Fox, however, established a conclusive presumption that a declaration of delinquency by a local board accelerated the induction of a registrant. The Fox court reasoned that the local board could not have ordered the registrant's induction were it not for the delinquent classification, and thus delinquency hastened the induction.
13 417 U.S. at 339.
proceeding under section 2255, asserting that the decision in Fox had affected a change in law in the Ninth Circuit which should afford him collateral relief. The district court summarily denied petitioner’s motion. The court of appeals affirmed this decision without considering the merits of Davis’ claim. They reasoned that the decision in Davis on direct appeal was the law of the case and that any new law in that circuit would not be applied “under circumstances such as here presented.” Because the case presented “a seemingly important question concerning the extent to which relief under section 2255 is available by reason of an intervening change in law,” the Supreme Court granted certiorari.

**LAW VIOLATION COGNIZABLE**

In deciding that a change in statutory interpretation would afford a prisoner recourse under section 2255, the majority in Davis looked first to the statutory language itself. They cited the first paragraph of this section which allows a federal prisoner to assert a claim that his “confinement is ‘in violation of the Constitution or laws of the United States.’” The majority felt that this language rather plainly indicated that a violation of the law is cognizable.

The dissent, however, contended that the third paragraph of section 2255 operated to more specifically define the precise scope of relief. Justice Rehnquist pointed out, moreover, that the passage from the first paragraph quoted by the majority “does not speak of an illegal ‘confinement’ as suggested by the Court, or even an illegal conviction, but rather of illegal sentences.” Therefore Justice Rehnquist reasoned that only when sentences were in violation of the constitution or laws of the United States, could the court grant relief under section 2255.

Justice Rehnquist interpreted paragraph one to be concerned with the availability of motions, whereas paragraph three listed the relief which the courts could grant. This third paragraph made “no mention of judgments rendered in violation of the laws of the United States.” In analyzing appropriate situations for relief, Justice Rehnquist found relief available only when: (1) the court which rendered judgment was without jurisdiction, (2) the sentence was not authorized by law or was otherwise open to collateral attack, or (3) such a denial of constitutional rights had occurred as to render the judgment vulnerable to collateral attack. The dissent argued that the facts of Davis did not meet any of these tests.

The majority retorted to this reading of the statute by characterizing it as “microscopic,” while admitting that the “statutory language is somewhat lacking in precision.” The majority contended that the subsequent judicial interpretations of the statute cleared up any ambiguity and supported their interpretation that a violation of the law is sufficient for a section 2255 motion. Judge Friendly cogently recognized the technicalities of these arguments in United States v. Sobell in which he spoke about his attempts to analyze section 2255:

If it be deemed futile to endeavor to draw much meaning from the rather murky language of § 2255 and we turn for help to the decisions thereunder, we find these telling us that, in determining whether relief under § 2255 ought be granted, we should look to the previous practice in habeas corpus with respect to federal prisoners: . . . [b]ut this also does not get us far; the glass itself is a dark one.

Thus, the language of section 2255, although susceptible to analysis, is ambiguous. The cases dealing with this area provide some assistance in delineating its parameters.

A review of the case law associated with the availability of habeas corpus and section 2255 relief demonstrates the consistent expansion of the cognizable grounds for relief. The Judicial Conference of 1942 recommended the passage of section 2255 as a more convenient substi-

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13 472 F.2d 596 (9th Cir. 1972).
14 Id.
15 417 U.S. at 341.
17 417 U.S. at 356 (Rehnquist, J., dissenting).
18 417 U.S. at 357 (Rehnquist, J., dissenting).
19 417 U.S. at 357 (Rehnquist, J., dissenting).
20 417 U.S. at 343.
22 314 F.2d at 322.
tute for habeas corpus for federal prisoners. Since the scope of section 2255 was to be exactly the same as that of habeas corpus relief, a review of the development of habeas corpus will also provide accurate background for section 2255.

The language in the Judiciary Act of 1789 which provided for habeas corpus relief stated only that the courts of the United States "shall have power to issue writs of . . . habeas corpus." The Supreme Court initially limited habeas corpus relief to cases where the trial court had never had jurisdiction to consider the case. The decision in Ex parte Watkins established the principle that as long as the trial court had proper jurisdiction, even a substantive error by that court would not render a detention illegal so as to allow a writ of habeas corpus to issue.

This limitation pervaded the habeas corpus decisions after Ex parte Watkins, but courts began to contrive jurisdictional defects in many cases in order to grant relief. For example, in Johnson v. Zerbst, the Court held that a federal trial court did not have jurisdiction over a defendant who was denied assistance of counsel. Decisions such as this demonstrate the attenuated arguments to which courts resorted in order to find that an error resulted in lack of jurisdiction in the trial court. The courts refused to admit that the real thrust of their decisions was to expand the issues properly recognized in a habeas corpus proceeding. Rather, they continued to obscure the situation by references to lack of jurisdiction. This artificiality led the Court in Waley v. Johnston to acknowledge expressly that constitutional as well as jurisdictional questions were available as bases for habeas corpus relief.

Brown v. Allen then expanded this Waley doctrine by holding that all federal constitutional questions were cognizable in federal habeas corpus proceedings. When the Supreme Court decided Brown in 1953, Congress had revised the United States Code to substitute section 2255 as the avenue of relief for federal prisoners in lieu of federal habeas corpus. The Brown decision concerned only federal habeas corpus; yet, since Congress intended section 2255 to be the precise equivalent of federal habeas corpus any expansion of rights for state prisoners would apply equally to federal prisoners under section 2255.

To complete the availability of constitutional issues for use in collateral attack, Kaufman v. Johnson v. Zerbst. The only effect of § 2255 was to change the forum that federal prisoners would apply equally to federal prisoners under section 2255.

One commentary has described this decision as follows:

[This decision] reveals in a dramatic way that the use of 'jurisdiction' merely served to obscure the real problem, which was the proper range of issues cognizable on habeas.


316 U.S. 101 (1942).

344 U.S. 443 (1953). The Brown Court claimed to be following Moore v. Dempsey, 261 U.S. 86 (1923), in holding that all federal constitutional questions raised by a state petitioner were cognizable in a federal habeas corpus proceeding despite a full state hearing. The argument against allowing such broad habeas corpus relief was the desire for finality in criminal prosecutions, but the Court in Brown reasoned that habeas corpus did not concern guilt or innocence as much as protection of constitutional rights. Implicit in Brown was the desire to have constitutional claims considered in a federal forum. Another primary motivation was to ensure the uniform application of federal constitutional law by having federal courts decide constitutional claims.
United States\textsuperscript{30} made constitutional issues available for use in collateral attack by permitting federal prisoners to raise any constitutional claim on a section 2255 motion. The only limitation here was that having made a constitutional claim upon direct appeal a federal prisoner could not again raise the same claim in a subsequent section 2255 motion.

There is little indication that courts prior to \textit{Davis} had envisioned an expansion of cognizable issues for collateral attack to claims which do not present a constitutional question. Unless the facts of the claim went to jurisdictional errors,\textsuperscript{31} courts would deny such motions in habeas corpus. Yet, courts before the \textit{Davis} decision had agreed to hear claims of violation of law that went to the illegality of the detention itself. For example, the failure of public authorities to provide mental treatment for a patient involuntarily committed was sufficient to merit collateral attack in \textit{Rouse v. Cameron}.\textsuperscript{32} However, cases such as \textit{Lothridge v. United States}\textsuperscript{33} continued to require generally a claim of constitutional dimensions for a section 2255 motion. In that case the defendant brought a section 2255 action claiming that the judge improperly failed to instruct the jury on entrapment. The court curtly dismissed this motion on the grounds that "no issue of constitutional dimensions being present, the issue of entrapment cannot be raised on collateral attack under section 2255."\textsuperscript{34}

Even \textit{Kaufman v. United States}, the controlling Supreme Court case in this area prior to \textit{Davis}, had mentioned in dicta that courts had refused to allow claims of error of law by a trial court to be raised in collateral attack,\textsuperscript{35} citing \textit{Sunal v. Large}\textsuperscript{36} and \textit{Hill v. United States}.\textsuperscript{37} The Supreme Court had never held that collateral proceedings were absolutely closed to statutory questions, however, and the \textit{Davis} majority found that \textit{Sunal} and \textit{Hill} offered little support for \textit{Kaufman}'s contention that courts will not hear claims of error of law in a section 2255 motion.

The \textit{Kaufman} Court cited the decision in \textit{Sunal} as standing for the proposition that section 2255 is not designed for collateral review of errors of law committed by a trial court. The Court in \textit{Davis}, however, felt that \textit{Sunal} merely stated the proposition as a general rule subject to exceptions. The \textit{Davis} Court contended that \textit{Sunal} could not obtain relief under section 2255 because of his failure to avail himself of the regular appellate procedure. The \textit{Davis} Court cited the following passage from \textit{Sunal} in support of this interpretation of the case:

\begin{quote}
Of course if \textit{Sunal} and \textit{Kulick} had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.\textsuperscript{38}
\end{quote}

\textsuperscript{30} 394 U.S. 217 (1969). Before the \textit{Kaufman} decision some federal courts had refused to hear certain questions under § 2255 which courts had allowed state prisoners to raise on habeas corpus. \textit{Compare} \textit{Warren v. United States}, 311 F.2d 673 (8th Cir. 1963) (illegality of search and seizure not cognizable under § 2255) with \textit{Carafas v. LaVallee}, 391 U.S. 234 (1968) (illegality of search and seizure allowed to be raised on habeas corpus by state prisoners). The \textit{Kaufman} decision put such conflict to rest by holding that all constitutional claims are cognizable under § 2255 for federal prisoners. The basis of this decision was a desire to provide a separate proceeding to consider constitutional claims whether for a federal or state prisoner.\textsuperscript{31} See \textit{Ex parte Watkins}, 28 U.S. (3 Pet.) 193 (1830).

\textsuperscript{31} 373 F.2d 451 (D.C. Cir. 1966). Petitioner in this case was involuntarily committed to a mental hospital and brought a writ of habeas corpus for release. The petitioner claimed that in order to commit a person against his will a court must have some justification; although treatment had been the purpose of this commitment, no treatment had been given. \textit{See also} \textit{Donaldson v. O'Connor}, 493 F.2d 507 (5th Cir. 1974).

\textsuperscript{33} 441 F.2d 919 (6th Cir.), cert. denied, 404 U.S. 1003 (1971).

\textsuperscript{34} \textit{Id.} at 922. \textit{See also} \textit{Limon-Gonzales v. United States}, 499 F.2d 136 (5th Cir. 1974) where a federal prisoner sought § 2255 relief claiming a violation of rule 11 of the Federal Rules of Criminal Procedure. The court denied this petition since the grounds asserted did not "rise to the constitutional or jurisdictional significance as required for relief under section 2255."\textsuperscript{35} 499 F.2d at 937.

\textsuperscript{35} 394 U.S. at 223.

\textsuperscript{36} 332 U.S. 174 (1947).

\textsuperscript{37} 368 U.S. 424 (1962).

\textsuperscript{38} 332 U.S. at 181. The Court focused on the failure of these defendants to utilize appellate procedures as a basis for denial of their post-conviction motion. The court relates this failure to appeal to finality in criminal cases:

\begin{quote}
If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, liti-
Thus the impression remains that had Sunal appealed, the Court might have deemed his claim appropriate for section 2255 relief.

The Court in Hill also denied a section 2255 motion. The Kaufman Court contended that this denial substantiated the position that a defendant could not raise a statutory claim in such a motion. But the language used by the Court in Hill to deny the petitioner’s claim actually recognized a right, as the Court in Davis read the passage, to review some statutory claims. The trial court in Hill did not allow the defendant to speak in his own behalf before sentencing. The Supreme Court then denied Hill’s section 2255 motion based upon that error by saying:

It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present ‘exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.’ Bowen v. Johnston, 306 U.S. 19, 27.

One might question whether the second and third sentences in this passage merely further explain the nature of jurisdictional or constitutional errors rather than establish additional grounds for relief. The Court in Davis, however, had no doubt. The language of section 2255 coupled with the consistent expansion of habeas corpus relief by the courts led the Court in Davis to recognize fully a right to present some errors of law for review under section 2255 subject only to the general caveats of Hill.

One case following the Davis decision permitted a section 2255 motion for an alleged violation of a law of the United States. In United States ex rel. Soto v. United States, petitioner claimed that the trial court, by failing to advise appellant of his right to proceed pro se, deprived him of that right thereby committing reversible error. In granting this motion the Third Circuit characterized this right to proceed pro se as a fundamental right even if not of constitutional dimensions. They therefore concluded that the statutory right was sufficient to afford jurisdiction under the holding of Davis.

Although the court in Soto held that the right violated was fundamental, the court did not provide any guidelines for determining the fundamental nature of rights in the future. This court, then, held only that a violation of this right to proceed pro se satisfied the test of Hill that exceptional circumstances be shown before courts may grant collateral relief.

The preceding section thus illustrates the continual expansion of grounds cognizable as basis for relief under habeas corpus and the related provision of section 2255. The following section evaluates the second element of the Court’s decision in Davis, the effect of a subsequent change in law.

**History of Change in Law**

After establishing that confinement in violation of a law of the United States affords a petitioner recourse under section 2255, the issue remains whether a change in law after conviction creates an illegal confinement which merits relief. Is a person truly being confined in violation of the laws of the United States when he has been convicted under a valid statute, when he has utilized the appropriate appellate process fully, and when he has been finally sentenced, only to have a subsequent change in the law present him with an opportunity for release? This section will analyze the reasoning of the Supreme Court in Davis which also

40 504 F.2d 1339 (3d Cir. 1974). The court in Soto recognized the expansion of § 2255 relief which Davis now affords. The Soto court noted that the “Government’s position [that law violations could not be raised under § 2255] was widely accepted before Davis. . . . Many commentators have read Sunal v. Large, 332 U.S. 174 (1947), and Hill v. United States, 368 U.S. 424 (1962), as limiting § 2255 relief solely to constitutional claims.” 504 F.2d at 1342.
lowed a change in law to suffice for a motion under section 2255, and then it will review the judicial history concerned with the change in law issue.

To support their contention that the change in law presented by Davis affords a prisoner relief under section 2255, the majority in Davis relied primarily upon two cases, neither of which truly support its position. The Court cited passages from Sanders v. United States and Kaufman v. United States to indicate that a subsequent change in law after conviction and sentencing undoubtedly affords one access to section 2255.

In Sanders the petitioner was serving a sentence for bank robbery. The court denied a hearing on Sanders’ first motion to vacate the sentence, which he filed on January 4, 1960, since he alleged no facts, but only a conclusion that he was entitled to relief. On September 8, 1960, Sanders filed a second section 2255 motion which alleged facts to demonstrate his mental incompetence at the time of trial and sentencing. The district court also denied this motion. The court of appeals affirmed the district court’s decision. In denying this request for a subsequent hearing, the court of appeals said that the fact that the petitioner knowingly omitted relevant facts at the time of his first motion barred his subsequent motion. The Supreme Court, however, held that the traditional notions of finality of criminal convictions were not applicable to section 2255 motions since fundamental rights were concerned. It cited Fay v. Noia for the principle that res judicata is inapplicable in habeas proceedings.

In establishing standards to determine if a hearing on a section 2255 motion is necessary, the Court in Sanders reasoned that a prior section 2255 motion would bar a subsequent motion if: (1) the court had considered the same ground in a prior application, (2) the prior determination was on the merits, or (3) the ends of justice would not be served by reaching the merits of the subsequent application.

The facts of Sanders fall within the first two of these standards. The court did not reach the merits of Sanders’ first section 2255 motion but denied it because of the mere conclusory nature of the motion and the absence of any factual support for the allegations. Thus, the Supreme Court ruled that the court should properly have allowed Sanders to amend his application to supply the necessary facts. The denial of the application did not, therefore, bar a new motion alleging proper facts. Thus the Court allowed a subsequent hearing based upon the first two standards which it listed. The third standard, therefore, was not applicable to the Court’s holding in Sanders.

In the Sanders Court’s discussion of this third standard, however, the Davis Court found support for its contention that a change in law merits a section 2255 motion. The Davis majority quoted the following passage from Sanders: “The applicant may be entitled to a new hearing upon showing an intervening change in law . . . .” However, the Sanders Court was concerned with a hearing on a claim concededly cognizable under section 2255, not with grounds for a section 2255 motion. Justice Rehnquist, in his dissent in Davis, discussed this distinction:

Thus the Court in Sanders was faced with the question not of whether a particular type of claim is cognizable at all in a § 2255 proceeding but simply whether a hearing is required in a claim concededly within the reach of that section.

But a petitioner may not relitigate the same issues once a federal appellate forum has decided them unless the law has significantly changed since the prior appeal.

The availability of a hearing where the claimant presents an otherwise valid § 2255 motion is a distinct problem. Courts may not exchange criteria for the sufficiency of a motion itself with the determination of whether to hold a hearing.
Thus the decision in Sanders presumed a sufficient claim and therefore considered the secondary question of the availability of a hearing on the merits.

The complete quote from Sanders, moreover, indicates a further dilution of this passage's significance for the Davis majority:

If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application.47

Therefore, a mere change in law was not the issue in Sanders, but rather a change or justification sufficient to explain the petitioner's failure to raise a crucial point or argument in his prior application. The facts of Davis do not present this situation since Davis fully argued all issues in his direct appeal which he later sought to present in his section 2255 motion. The considerations in Sanders, then, offer scant support for the contention of the Court in Davis that any change in law makes collateral attack possible.

The Davis Court next referred to Kaufman v. United States for support. In Kaufman the majority adopted the reasoning of Judge Wright in his dissent in Thornton v. United States48 from which the Davis Court carefully selected an excerpt. Justice Stewart in Davis, citing Thornton, argued that a section 2255 motion would be permissible "if new law has been made . . . since the trial and appeal."49

Again, viewing this quotation in context provides a more accurate picture:

Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? . . . What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? 50

Here the quote relates to facts different from

47 373 U.S. at 17.
48 368 F.2d 833 (D.C. Cir. 1966). In Thornton the petitioner alleged that evidence seized in violation of the fourth amendment had been used to convict him at trial. The majority denied his § 2255 motion since they found that he could have raised these issues at trial and on appeal but had failed to do so. Judge Wright, dissenting, argued that since the court of appeals had never heard the constitutional claim, the court should allow the claim on a § 2255 motion despite the failure to raise it on appeal.
49 417 U.S. at 342.
50 Id. (emphasis added).
those of the case at bar. Kaufman had failed to raise a constitutional claim on appeal with the result that the court of appeals did not consider that issue. However, since the claim was of constitutional dimensions, the court could consider this motion for relief under section 2255.

These cases represent the extent of Supreme Court discussion on the change of law issue. The reliance of the Davis Court on these prior cases, therefore, seems inappropriate since these prior cases do not concern the issue presented by the facts of Davis. The lower federal courts have also considered this problem; yet, they too have reached no consensus concerning the availability of habeas corpus or section 2255 relief after a change in law. In the past, courts have consistently rejected the idea that a convicted criminal who had tried and failed on appeal could gain a new trial or complete release due to a subsequent change in law. As the grounds available for habeas corpus relief expanded, however, the courts began to waiver in their firm refusal to consider a convict's claim due to an intervening change in law.

An early landmark case, Warring v. Colpoy, demonstrated the courts' reluctance to consider an appeal based upon an alleged change in law. Here the petitioner was sentenced February 24, 1939, on four criminal contempt charges. On April 14, 1939, the Supreme Court handed down a new interpretation of the statute under which he had been convicted. This new interpretation would have resulted in a verdict for petitioner had it applied in his case. In rejecting the habeas corpus petition of the convicted person, the court said:

When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also to the principle expressed in so far as it can be determined. If, at last, the first decision is overruled, then there is new law, better evidence, or an enlightened basis for prediction. Those transactions which occurred between the two decisions, are, for the most part, accepted history. This is true even though a person had presented, in proper fashion, his case to the courts. His rights being finally determined, an attempt to reopen the question, in view of the new enlightenment would be greeted with the powerful answer of res judicata.

The court rejected the idea that a new statutory construction, as here, invalidated a previous construction of the statute. It reasoned that people conform their behavior to existing law. One who has violated the law of his time should not, therefore, receive the benefit of a newer interpretation of the same law. LaClair v. United States, a fairly recent case, embodies this same rationale. LaClair was convicted of bank robbery and sentenced to thirty years. After his conviction, the federal court reinterpreted the statute under which he had been convicted to require only an "objective fear" test for the victims of an armed robbery—that is, the gun must have actually been loaded. LaClair sought to raise this issue on a section 2255 motion, but the court held that "it had been repeatedly held that subsequent changes in substantive decisional law does not warrant relief under Section 2255."

Both of these cases involved statutory changes which, if applied to the defendants, would have freed them. But since the petitioner could not raise errors of law on collateral attack and since the courts had not given these interpretations retroactive effect, neither petitioner could raise a successful habeas corpus motion.

When the Supreme Court began to expand constitutional rights under the fourth amendment, the problems of denying section 2255 relief to those affected by the extension of these rights increased. In Gaitan v. United States, defendant was convicted of a narcotics violation with evidence obtained from an illegal search having been introduced at the trial. Following the establishment of the exclusionary

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61 Sunal v. Large, 332 U.S. 174 (1947) is one other Supreme Court case dealing with a change in law. Petitioner was convicted for failure to submit to induction; he took no appeal from this conviction since Sunal thought that it would be futile given the current state of the law. His 2255 motion came after a favorable change in the law, but the Supreme Court would not allow a 2255 motion since Sunal had purposefully by-passed the appellate review. See note 38 supra.


63 122 F.2d at 644.

64 241 F. Supp. 819 (N.D. Ind. 1965).

65 Id. at 829.

66 295 F.2d 277 (10th Cir. 1961).
rule in \textit{Mapp v. Ohio},\textsuperscript{57} Gaitan brought a section 2255 motion to vacate the judgment. The district court rejected this motion for the following reason:

The question whether the marijuana was admissible in evidence or should be excluded was put squarely in issue in the criminal case. The question was determined with pinpoint precision. The evidence was admitted and the judgments and sentences became final. \ldots{} and a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend application of the principle of res judicata to such judgments and sentences.\textsuperscript{58}

The Supreme Court had refused to give \textit{Mapp} retroactive effect due to the enormous impact such retroactivity would have had; thus, \textit{Mapp} did not truly apply to Gaitan's case.\textsuperscript{59} Although the court in Gaitan spoke in terms of res judicata, retroactive application of the \textit{Mapp} decision would have necessarily altered the court's approach.

In \textit{United States v. Sobell}\textsuperscript{60} the defendant was convicted of conspiracy to commit espionage. His ground of appeal under section 2255 was based upon the Supreme Court's decision in \textit{Grunewald v. United States}\textsuperscript{61} which held that a prosecutor could not comment on a witness' prior invocation before a grand jury of the privilege against self-incrimination. Sobell contended that such comments at his trial had seriously affected the fairness of the trial. The Second Circuit dismissed the motion, however, and reaffirmed the refusal of the courts to apply subsequent law to convictions already final:

There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for a court to yield broadly to that attraction not only would cause 'litigation in these criminal cases [to] be interminable' 332 U.S. at 182 \ldots{}, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens.\textsuperscript{62}

Even had the court accepted Sobell's claim, the alleged defect went to the procedure at trial and neither to the statute under which he was convicted nor to an element of proof necessary for conviction. The appropriate relief for Sobell, if the court had allowed his claim, would have been a new trial. Courts do not favor granting such relief after an extended lapse of time. The unavailability of witnesses and the staleness of the evidence would make such a trial inconvenient and often unfair.

More recently, in \textit{Hardy v. United States},\textsuperscript{63} the dissent of Judge Bazelon foreshadowed the \textit{Davis} ruling. Hardy was convicted of violation of the narcotics laws. He appealed on the basis of the delay between the commission of the offense and the arrest, claiming that it was unreasonably long. The court denied this contention on appeal, and Hardy was unable to obtain a rehearing before the court of appeals. The Supreme Court also denied his petition for a writ of certiorari. After Hardy had exhausted all appeals, the decision in \textit{Ross v. United States}\textsuperscript{64} held a similar delay

\textsuperscript{57}367 U.S. 643 (1961). The exclusionary rule requires that courts exclude from trial evidence seized in violation of the fourth amendment.

\textsuperscript{58}295 F.2d at 280.

\textsuperscript{59}The \textit{Mapp} decision did not apply retroactively and thus the exclusionary rule did not affect the decision in Gaitan. Thus a motion by Gaitan under § 2255 could not have been successful. In cases following \textit{Mapp}, however, some courts refused to allow a fourth amendment violation to support a motion under § 2255. These courts reasoned that since fourth amendment violations only concerned police procedure, such violations did not affect the integrity of the fact finding process at trial. Therefore the violations were not of such a grievous nature as to support a motion under § 2255. \textit{See} Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting).

\textsuperscript{60}314 F.2d 314 (2d Cir.), cert. denied, 374 U.S. 857 (1963).

\textsuperscript{61}353 U.S. 391 (1957).

\textsuperscript{62}314 F.2d at 324. Even though the changes of law in both \textit{Gaitan} and \textit{Sobell} were of constitutional dimensions, the courts did not consider themselves obligated to consider these claims under § 2255. The courts, then, did not need to discuss the retroactivity of these subsequent changes in law since the grounds were not sufficient at that time, even if they were to apply to the petitioner's case. Courts had fairly broad discretion in considering motions under § 2255 until Kaufman v. United States, 394 U.S. 217 (1969) held that every constitutional claim was sufficient for a motion under § 2255. \textit{See} note 30 supra.

\textsuperscript{63}381 F.2d 941 (D.C. Cir. 1967).

\textsuperscript{64}349 F.2d 210 (D.C. Cir. 1965).
of due process. The court of appeals, in affirming the district court's denial of Hardy's section 2255 motion on the basis of the Ross opinion, stated that "issues disposed of on appeal from the original judgment of conviction will not be reviewed again under section 2255." Judge Bazelon dissented because he believed that the petitioner had shown that the claim was subject to collateral attack due to the constitutional nature of the Ross decision, that Ross applied retroactively, and that the previous denial of the same contention by the court of appeals was no bar to collateral attack since res judicata did not apply. Judge Bazelon concluded: "Since Ross intervened between these appellants' original appeal and their motion under section 2255, and since Ross significantly changed the law in this area, it would seem quite clear that Sanders entitles these appellants to a new hearing on their claim." A comparison of the majority position with that of the dissent in Hardy indicates the differing views on the significance of a prior determination. The fact that Hardy consistently raised the precise issue of unreasonable delay sufficed to permit the majority to decide that there had been no manifest injustice. They felt that Hardy had had an adequate opportunity to have his claim heard. Judge Bazelon, however, saw the Ross decision as offering a new precedent which would support a section 2255 motion where a change in law of constitutional dimensions had occurred.

Several cases which consider the availability of the privilege against self-incrimination in cases where the party is seeking to avoid payment of taxes on illegal activities demonstrate the inconsistencies that ultimately developed. In United States v. Rodgers defendant was convicted of not paying the occupational tax on wagering. A subsequent decision, Marchetti v. United States, allowed the assertion of this privilege effectively to preclude criminal punishment for failure to pay the tax. The court in Rodgers ruled that "decisional changes in the law, even involving an interpretation of the Constitution, do not justify relief by habeas corpus or Section 2255." In Eby v. United States defendant similarly had been convicted for not paying transfer taxes on marijuana transactions. The law at that time stated that the defendant could not assert the fifth amendment defense in such a situation. The Eby court, too, held that the subsequent change in law effected by Marchetti did not afford relief to one previously convicted.

However, the Eighth Circuit in 1971 allowed an identical section 2255 appeal in Scogin v. United States. In 1967 Scogin had pleaded guilty to acquiring marijuana without payment of the transfer tax. He took no appeal but rather filed a section 2255 motion following the decision that the fifth amendment was a complete defense to any prosecution for failure to pay this tax. Since this motion to vacate judgment was the first opportunity after the change in law that the defendant had to plead the fifth amendment privilege, the court held it to be a timely assertion of the privilege. The court concluded:

[We] are convinced that to allow one to continue to be penalized for conduct which is now constitutionally immune from punishment would contravene basic concepts of justice and fairness.

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65 Different panels of judges within the same circuit decided Ross and Hardy. Thus the Ross decision would not control the decision of the Hardy court. In addition the court in Ross specifically distinguished its facts from those in Hardy. The distinction further supports the position that the Ross decision did not create a change in law sufficient to merit relief under § 2255 in Hardy's case.
66 381 F.2d at 953.
68 390 U.S. 39 (1968). The Court in Marchetti recognized that the imposition of such a tax was a proper exercise of the taxing power of Congress. The privilege against self-incrimination still attached to such a tax, however, and enabled one to avoid prosecution for failure to pay the tax.
69 286 F. Supp. at 58. The Rodgers court contended that the guilt of the prisoner was not in issue since the tax itself was valid. Since the petitioner failed to utilize his fifth amendment privilege, the court held that he should not be allowed to subsequently invoke it after his admission of guilt at trial.
71 The court reasoned that the judgment was already final and even if the decision in Marchetti did apply to petitioner's case, Eby's failure to appeal precluded raising the issue on a § 2255 motion.
72 446 F.2d 416 (8th Cir. 1971).
73 In contrast to Rodgers and Eby, moreover, the decision in Scogin came in 1971 after the Kaufman decision had required courts to hear every constitutional claim under § 2255. The constitutional basis of the Marchetti opinion, then, made consideration of petitioner's claim more compelling due to Kaufman.
The court focused on the fact that the conduct for which the defendant was presently incarcerated was now completely immune from punishment due to a constitutionally recognized defense.

The de-criminalization of the action for which the defendant had been convicted forms a basis for distinction between two other cases which involve a retroactive application of a statutory construction. In Brough v. United States\textsuperscript{74} the defendant was convicted for failure to register for the draft. This offense had a five year statute of limitations and Brough was convicted five years and five months after his eighteenth birthday. The selective service had employed a "continuing offense" theory to secure this conviction—that is, that defendant violated the law each day he failed to register, with the five year statute of limitation running from each violation. After the conclusion of defendant's trial and appeal on this offense, the Supreme Court in Toussie v. United States\textsuperscript{75} rejected this selective service continuing offense theory and held that one must be indicted within five years and five days of one's eighteenth birthday in order to be prosecuted within the statute of limitations. The Seventh Circuit gave retroactive effect to Toussie and allowed Brought to present a section 2255 motion.

In Santana v. United States\textsuperscript{76} however, the defendant pleaded guilty to receipt of illegally imported cocaine. The legal presumptions in effect at that time, that importation of cocaine and knowledge of that importation could be inferred from possession, induced the defendant to plead guilty. Subsequently, the decision in Turner v. United States\textsuperscript{77} invalidated these presumptions. Despite retroactive application of Turner, however, the court in Santana denied defendant's section 2255 motion. The court found nothing to show that the guilty pleas were invalid or unreliable. It held that a court should not grant a new trial after a fifteen year delay, and it feared a flood of section 2255 applications.\textsuperscript{78}

Many courts remained reluctant to recognize a change in law as grounds for a motion under section 2255. The decision in Odom v. United States\textsuperscript{79} established the principle which the Ninth Circuit applied in denying Davis' section 2255 motion. In his case on appeal, petitioner in Odom sought application of a new test for insanity, developed after his conviction. Odom had pleaded insanity at his trial, and therefore the court said:

The law in this circuit is clear that when a matter had been decided adversely on appeal from a conviction, it cannot be litigated again on a § 2255 motion.\textsuperscript{80}

Thus, the Ninth Circuit considered only whether the court had reviewed the issue on appeal. Since the courts had fully considered the issue of insanity at trial and on appeal, the Ninth Circuit decided to bar a section 2255 motion despite the new law that had developed subsequent to the court's decision.\textsuperscript{81}

Thus the cases prior to Davis displayed a certain inconsistency and vacillation with regard to whether a subsequent change in law would allow a motion under section 2255. Much of this confusion among the lower federal courts arose from the expansion of collateral grounds for relief through the more expansive construction of constitutional rights relating to various aspects of the trial. While voluntary guilty plea and the extensive lapse of time between conviction and the appeal. Two years earlier the same circuit in United States v. Liguori, 438 F.2d 663 (2d Cir. 1971), considered the effect of Turner for the purposes of § 2255. Liguori pleaded not guilty and was convicted at trial; he did not challenge the validity of the presumptions in effect at that time on his appeal. The Second Circuit, however, did not feel this failure to appeal barred him from raising the validity of these presumptions in issue on a § 2255 motion. The court stated that the fact that the government had offered no proof for several key elements of the offense (since Turner had invalidated essential presumptions) made continued confinement of Liguori unjust.\textsuperscript{79} 455 F.2d 159 (9th Cir. 1972).\textsuperscript{80} 455 F.2d at 160.

The Odom court spoke of issues raised on appeal without regard to the law as it applied to those issues at the time of appeal. The Court in Davis rejected this issue-oriented approach and held that when significantly new law appears, courts must consider the effect of the new law upon a petitioner's claim under § 2255. It was of no significance to the Davis Court that a petitioner had raised the same issue on appeal since the Court contended that a change in law gave the petitioner a totally new claim.
trends are difficult to determine in this area, courts have been more willing recently to consider a significant change in law sufficient for a motion under section 2255.82

**Contemporary View of Change of Law**

Questions as to the scope and impact of the *Davis* decision still remain in light of the complex nature of the problem dealt with in that decision. To adequately determine the extent of the *Davis* decision insofar as it allows a motion under section 2255 when there has been a change in law, courts must consider the type of change, the way in which the change affected the disposition of the defendant’s case, and the procedures which the petitioner followed after conviction. An analysis of the *Davis* decision reveals that the Supreme Court left open the issue of how authoritative the change in law must be. Therefore, courts may require some threshold of authoritativeness before the subsequent change in law will suffice for the purposes of section 2255. Cases following *Davis* also discuss the issue of retroactivity and exhaustion of remedies as possible limitations on the impact of the *Davis* decision. The Court in *Davis* established no adequate standards to be used by future courts to determine when a change in law should apply to petitioner’s case under a section 2255 motion. These standards should deal with the issue of the authoritativeness of the subsequent decision and the significance of the decision as applied to the merits of petitioner’s case.

With reference to this first standard Justice Rhenquist in his dissent in *Davis* points out the difficulty in holding that a court should consider the *Fox* decision as a change in law with respect to the *Davis* case:

Thus the real focus of petitioner’s argument must be that *Fox* is the governing law. But in that regard, I cannot see why a decision by a single panel of the Court of Appeals for the Ninth Circuit should be considered a ‘law’ of the United States. In fact the Court of Appeals itself stated that its decision in *Fox* had not overruled *Davis*, pointing out that an en banc decision of the Court of Appeals would be necessary for such a result. Thus the Court today categorizes as a ‘law of the United States’ a decision which is still open to question within the Court of Appeals’ own jurisdiction.83

When the Ninth Circuit receives *Davis*’ Section 2255 motion on remand it will face exactly the same issue it decided upon appeal, the application and interpretation of the decision in *Gutknecht* to the facts of *Davis*. Thus, although the *Fox* decision intervened, the Ninth Circuit may refuse to follow *Fox* when it considers the merits of petitioner’s Section 2255 motion. Such inconsistent decisions by different appellate panels within a circuit are perfectly permissible.84 Only an en banc hearing of the Ninth Circuit would resolve this conflict, but the Supreme Court’s remand did not mandate such a hearing.

By categorizing this type of decision as a change in law sufficient to merit an appeal under section 2255, the Court in *Davis* substantially broadened the grounds available for relief. Not only is a change in law now sufficient for section 2255 purposes, but the change need not bind the district court hearing the motion. In addition, although the inconsistent change in law in the *Davis* case came within the same circuit, Justice Rehnquist suggested that a decision from the Fourth Circuit, for example, may allow a section 2255 motion in the Ninth Circuit.85 The result would be prisoners searching among the circuits to find a more liberal interpretation of a rule or statute which would enable them to raise an effective section 2255 motion. Intra-circuit conflicts might allow prisoners convicted under the stricter decision to use the more liberal rule to obtain relief. All of these contingencies may not develop, but the possibility certainly remains under the *Davis* opinion.

A requirement that the subsequent decision changing the law be binding upon the court hearing the section 2255 motion would limit the effect of the *Davis* decision.86 The majority in *Davis* addressed the issue of authoritativeness by categorizing a decision as a ‘law of the United States’ a

82 See, e.g., People ex rel. Soto v. United States, 504 F.2d 1339 (3d Cir. 1974).

83 417 U.S. at 360 (Rehnquist, J., dissenting).

84 In *Davis* the panel consisted of Circuit Judges Chambers and Kilkenney along with District Judge Powell. Circuit Judges Merrell and Duniway and District Judge Crocker made up the panel in *Fox*.

85 417 U.S. at 361 (Rehnquist, J., dissenting).

tiveness only insofar as they held that the *Fox* decision permitted a motion to be raised under section 2255. *Fox*, however, as noted by Justice Rehnquist, did not control the decision in *Davis*. Therefore, if courts were to require a controlling change in law before permitting a motion under section 2255, a further modification of *Davis* would develop.

One can read *Davis* as allowing a non-authoritative change in law to permit a section 2255 motion only when the change occurred in the same circuit. This interpretation of the *Davis* decision would maintain the independent character of the various circuits. Even accepting this latter reading of the *Davis* decision, however, intra-circuit conflicts between panels would still pose problems. The district court when hearing *Davis*’ motion on remand, may refuse to follow the *Fox* decision and summarily dismiss the motion. Such a procedure would be a superfluous exercise for the prisoner and the courts.

With reference to the second standard, the effect of the change in law upon petitioner’s case is also an area open to questions. If the court applied the *Fox* decision in the *Davis* case, it would then release *Davis*. Limiting *Davis* to cases where application of the subsequent change in law would result in release would impose a further constraint on the impact of the *Davis* decision. Such a reading of the *Davis* opinion finds support in the language of the *Davis* majority:

In this case, the petitioner’s contention is that the decision in *Gutknecht* ... as interpreted ... in the *Fox* case ... established that his indiction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well-taken, then *Davis*’ conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance ‘inherently results in a complete miscarriage of justice’ and ‘presents exceptional circumstances’ that justify collateral relief under § 2255.87

Thus the language in the *Davis* opinion supports a position that if a subsequent change in law would result in a finding that the actions for which the person was convicted are no longer criminal, then relief under section 2255 would be available. Allowing relief in these situations fulfills the command of *Hill* that a “fundamental defect” or “exceptional circumstances” be present.

The question then remains whether the facts of *Davis* truly represent the limit of the holding. A subsequent change in law could apply to a petitioner, yet it might not result in his complete release. Such a situation would arise when, for example, a subsequent decision established a new test for criminal responsibility. The change, if applied to petitioner’s case, would require a new trial, perhaps long after the alleged crime. If the change is constitutional and applies retroactively,88 then an adequate motion under section 2255 could be raised since all constitutional claims may be raised on collateral attack.89

If the change in law is statutory, however, the court need not grant a motion under section 2255 even if the change applies retroactively. The *Davis* decision did not require that courts allow every change in law to suffice for the purposes of section 2255. The Supreme Court only indicated that the facts of *Davis* permitted a motion under section 2255. Several cases following *Davis* provide some indication of the direction in which the courts are moving and of the considerations they are taking into account when deciding whether to allow a motion under section 2255 after a change in law.

87 Justice Rehnquist contended that retroactivity of a subsequent change in law was not required for a sufficient motion under § 2255. The majority however, specifically stated that the retroactivity of *Gutknecht* is yet to be decided. Later cases citing *Davis* refer to retroactivity as an essential element for relief under § 2255.

88 Justice Black argued in his dissent in *Kaufman* that not every constitutional claim may be sufficient for collateral relief. He pointed to the language of § 2255 which requires that there be “such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.” From this language he concluded that not every constitutional claim is “such a denial” of rights. Black contended that before *Mapp* almost every constitutional violation “played a central role in assuring that the trial would be a reliable means of testing guilt.” 394 U.S. at 237 (Black, J., dissenting). Black then, would exclude fourth amendment attacks under § 2255 relief and require a claim that would cast some doubt on the guilt of the petitioner. See also Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).
Quinn v. United States and Joe v. United States both concerned the application of the Supreme Court decision in Keeble v. United States to cases tried and finalized prior to this decision. Both Quinn and Joe were Indians who were convicted under the Major Crimes Act. Prior to Keeble, courts had construed this statute strictly, preventing trial courts from giving lesser included offense instructions to the jury. Courts reasoned that they had jurisdiction only over those offenses specifically enumerated in the Major Crimes Act, and therefore, they deemed it beyond their jurisdiction to provide instructions on other crimes not listed in the act. Thus neither Quinn nor Joe had the benefit of these lesser included offense instructions at trial and were convicted of the major crime.

The Keeble decision, coming after their convictions and unsuccessful appeals, held that a statute which required that Indians be tried just like state criminals, required a court to give lesser included offense instructions at trial. The Court held that a federal district judge with jurisdiction over an enumerated offense also has jurisdiction over non-enumerated offenses that fall within the lesser included offense category. The Keeble Court reasoned that denial of this right to lesser included offense instructions would present serious constitutional difficulties.

The Tenth Circuit when considering Joe's subsequent section 2255 motion recognized that "Keeble averredly did not establish any new constitutional doctrine" and also that Joe's "conviction, affirmed on appeal, was, to be sure, in consonance with contemporaneous interpretations of § 1153." Yet, applying Keeble retroactively, the Tenth Circuit permitted Joe's section 2255 motion. They read the Davis opinion as reminding "us that the statute [Section 2255] was designed to empower a sentencing court to correct a judgment to conform to an intervening change in the law affecting the fundamental rights of a convicted defendant." Thus the court in Joe required a retroactive application of the change in law and further required that the change affect a fundamental right of the convicted defendant.

The Tenth Circuit also found significant the fact that Joe had exhausted his appellate procedures on this precise issue. The court in Joe recognized that had Joe's case been heard eleven months later, when the Keeble case was granted certiorari, the court would have certainly applied the Keeble decision. Since Joe had argued the propriety of lesser included offense instructions on appeal and in his petition for a writ of certiorari, the Tenth Circuit held the subsequent decision in Keeble should apply to Joe's case. Therefore, when the alleged error is statutory, the Tenth Circuit interpreted Davis to require that a petitioner must have exhausted his appellate remedies before requesting relief under section 2255 due to a subsequent change in law.

In contrast to Joe, the Eighth Circuit in Quinn denied retroactive application of the Keeble decision in that circuit. However, they affirmed "the district court order denying Quinn's Section 2255 motion for another reason." They found Quinn's failure to request a lesser included offense instruction fatal to his claim. Unlike Keeble, Quinn was entitled to a lesser included offense instruction at his trial since, according to the Eighth Circuit, the offense he committed was specifically enumerated in the federal statute. Thus the court of appeals did not see Keeble as changing the law as applied to the facts of Quinn. The thrust of the opinion, however, indicated that retroactivity of a change in law is essential and that exhaustion of remedies and procedures at trial and through appeal is also necessary.

Finally, United States v. Travers deals...
with the precise issue raised by Justice Rehnquist in his dissent in \textit{Davis} concerning the effect of \textit{United States v. Maze}\textsuperscript{100} on prior convictions for mail fraud. The \textit{Maze} decision relied on a narrow construction of the federal conspiracy law recognized by a minority of federal circuits prior to \textit{Maze}. Justice Rehnquist predicted that the \textit{Davis} opinion would seem "to provide full opportunity for all defendants convicted under the Mail Fraud Act in the circuits whose view was not accepted to relitigate those convictions in a section 2255 proceeding."\textsuperscript{101} \textit{Travers} was just such a proceeding.

\textit{Travers} was convicted of mail fraud under the broad interpretation of the mail fraud statute applied by a majority of the circuits prior to \textit{Maze}. At the time of the \textit{Maze} decision \textit{Travers} had already served his sentence, and therefore had brought a writ in error coram nobis. The court in \textit{Travers} acknowledged that \textit{Davis} involved section 2255, but they noted that the "standards applied in federal coram nobis are similar" to those of section 2255.\textsuperscript{102} Thus they looked to \textit{Davis} to determine the effect of \textit{Maze} on the conviction of \textit{Travers}.

The court found that \textit{Davis} clearly permitted an attack on a conviction by a section 2255 motion when a subsequent change occurred in the laws of the United States. However, the court also contended that the \textit{Davis} opinion left open the question of a requirement of retroactivity. In support of this view, they pointed to a footnote in \textit{Davis} which read:

> In the absence of a decision by the Court of Appeals on the merits of the petitioner's contentions, this case is not an appropriate vehicle to consider whether the \textit{Gutknecht} decision has retroactive application or whether the \textit{Fox} case was correctly decided by the Court of Appeals.\textsuperscript{103}

Thus the Second Circuit in \textit{Travers} contended that the Ninth Circuit in the \textit{Davis} case had not yet determined whether \textit{Gutknecht} should be applied retroactively. The implication is that a decision denying retroactivity to \textit{Gutknecht} would preclude relief for \textit{Davis} under section 2255 since the change in law promulgated by the \textit{Gutknecht} decision would then be inapplicable to petitioner's case.

\textit{Linkletter v. Walker}\textsuperscript{104} established certain standards for determining the retroactivity of any new law. These criteria are: (1) the purpose to be served by the new law, (2) the extent of reliance upon the old standard, and (3) the effect of the new standard upon the administration of justice. Courts, therefore, must test each change of law against these criteria and determine if the new law should apply to prior cases. Once a court determines that a change in law should apply retroactively, however, such determination does not guarantee a successful motion under section 2255. The \textit{Travers} court went beyond retroactivity and required other factors to be present before granting relief under section 2255. The manner in which the \textit{Travers} court handled petitioner's claim after granting retroactivity to the \textit{Maze} decision delineates these factors.

Looking to \textit{Maze}, the \textit{Travers} court found that the "Maze decision was no thunderclap like those that have given rise to Supreme Court rulings limiting the temporal effect of constitutional decisions on criminal procedure. . . ."\textsuperscript{105} Thus the \textit{Travers} court held the \textit{Maze} decision to be retroactive in the Second Circuit and proceeded to deal with its effect on \textit{Travers'} conviction.

Two factors strongly influenced the court to grant \textit{Travers} relief in this case. First, in view of \textit{Maze}, \textit{Travers} was convicted and punished for an act that the law did not now make criminal.\textsuperscript{106} This type of change made prior

\textsuperscript{100} 381 U.S. 618 (1965). Courts have denied retroactive effect to cases such as \textit{Mapp v. Ohio}, 367 U.S. 643 (1961) which established significant extensions of constitutional rights and whose effect would be enormous. Where the change is not so dramatic, or where the purpose of the new enactment is essential, courts will give retroactive effect to a new development in the law.

\textsuperscript{104} 417 U.S. at 341 n.12.

\textsuperscript{105} No. 74-1737 at 810.

\textsuperscript{106} The government argued that they could have proven the elements of conspiracy but thought it unnecessary due to the statutory construction then in effect in that circuit. To allow § 2255 relief
convictions under the statute “inherently result in a complete miscarriage of justice” and “present exceptional circumstances” which justify relief under section 2255. The fact that the new interpretation made the punished conduct now totally free from sanctions presented a clear case of manifest injustice for this court.

The second factor was Travers’ full utilization of the appellate process. Applying the holding in Sunal v. Large to these facts the court reasoned that:

[W]e must take Sunal as meaning that when the error is one which can be rectified by proper construction of a criminal statute without resort to the Constitution, a claim that a conviction was had without proof of all the elements required by the statute is not a constitutional claim as that phrase is used in respect of collateral attack, and that, in consequence, collateral relief will rarely be accorded to those who, even for apparently good reasons, did not exhaust the possibilities of direct review.

This reasoning comports with the other cases following Davis which have required full use of appellate procedure in order to raise a statutory claim on a section 2255 motion.

The final argument raised by the Government in Travers may help clarify the precise nature of the statutory change in law that a petitioner must assert in order to satisfy a section 2255 motion. The Second Circuit in United States v. Tarrago had held that the newly developed test for criminal responsibility established by that circuit in United States v. Freeman should apply to cases still open to direct review, thereby implying that this decision would be unavailable for purposes of collateral attack. The government argued that this decision was a precedent for not applying changes in law retroactively, but the court in Travers looked to the effect of the change in law on the case before them. They noted:

Furthermore application of the Freeman rule to convictions already final would by no means certainly have resulted in acquittals; rather it would have led to holding, or attempting to hold, hosts of new trials, in many instances long after the event.

Thus the Second Circuit’s refusal to apply the rule in Freeman in cases of collateral attacks did not bar the Travers court from so applying the decision in Maze. The Freeman decision would only allow the defendant the benefit of a new test for criminal responsibility at trial. Even with the application of the Freeman decision to a petitioner’s case, a new trial would be necessary to determine the case under the new test. Applying the Maze decision to a prior case, however, would reverse a petitioner’s conviction.

The Maze decision established that conduct for which prisoners had been convicted under the statutory construction prevalent in most circuits prior to Maze was no longer criminal. Thus release was appropriate for prisoners such as Travers. Such a remedy eases tremendously the administrative burden upon the criminal justice system by avoiding continued litigation of petitioner’s case. The Travers court also considered it a grievous violation of a prisoner’s rights to be confined when a new law has made the conduct for which a prisoner was convicted no longer criminal.

The decisions following Davis, therefore, indicate that a petitioner must show more than a mere change in law on some aspect of his case in order to be successful on a motion under section 2255. When a petitioner asserts a statutory ground for relief due to a change in law, courts have required that he initially demonstrate that a court should give retroactive effect to this change.

Additionally, petitioner must demonstrate his full utilization of direct appellate procedures.
If the grounds of the post-conviction relief are statutory then courts following *Davis* have indicated that petitioner must have raised the issue on appeal in order for the court to consider it on a motion to vacate judgment under section 2255.

Finally, the petitioner must show that the change in law will have a fundamental effect upon his prior conviction. If the subsequent change completely invalidates the conviction, then courts should grant relief. If, however, the effect of the subsequent change would be to require a new trial, then the court may deny relief if it does not consider the violated right to be fundamental.

Courts will need to develop and discuss this final point more fully. The court in *Joe* allowed relief when the remedy available to Joe would be a new trial with appropriate lesser included offense instructions given. The decision in *Travers*, however, required that complete release of the petitioner be the result when the court applies the new interpretation. In keeping with the rationales underlying habeas corpus and section 2255 relief, courts still must look to the decision in *Hill* for the standard to employ. Habeas corpus and section 2255 were designed to alleviate cases where serious injustice would result by the continued confinement of the petitioning prisoner. Once a court has decided that the new law should apply retroactively, it still must consider the effect of this change of law upon the petitioner's case to see if such serious injustice would be done by a failure to grant relief. If failure to apply the subsequent change in law would produce "fundamental defects which result in a complete miscarriage of justice," then courts must grant relief.

*People ex rel. Soto v. United States* spoke in terms of "fundamental rights," an analysis which may prevail. Under this analysis a change in law which established that a defendant was denied what courts conclude was a fundamental right, would require relief. The court in *Travers*, however, viewed actual effect as the key factor to consider in deciding whether to permit relief. The *Travers* decision indicates that unlike constitutional attacks which may be made whatever the effect on the trial would have been, a statutory claim must be of such a nature as to result in the release of the prisoner by applying the new law to petitioner's case.

Whatever the final determination of these issues will be, the cases succeeding *Davis* have posited some parameters for the availability of section 2255 relief, despite the fears of Justice Rehnquist that courts must now grant unbounded collateral relief. As Judge Friendly noted in *Travers*: "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling..." *Davis* certainly offers increased availability of federal post-conviction relief, but it provides this relief in keeping with the intent of habeas corpus—to cure grave injustices when no other remedy exists.

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115 504 F.2d 1339 (3d Cir. 1974).
116 No. 74-1737 at 810.
EXCLUSION OF UNCONSTITUTIONALLY SEIZED EVIDENCE
AT THE PRELIMINARY HEARING

Today, sixty-one years after the Supreme Court of the United States first imposed the "exclusionary rule" on the federal court system and fourteen years after the rule was made applicable in state courts, the separate questions of when prosecution evidence is seized in violation of fourth and fourteenth amendment rights and when it should be inadmissible at a criminal trial remain matters of controversy. Not only have several justices of the Supreme Court, including Chief Justice Berger, expressed misgivings about the exclusionary rule, but recent decisions handed down by the Court would appear to limit the application of the rule at criminal trials.

While the Supreme Court has been reconsidering whether the fourth and fourteenth amendments even require an exclusionary rule, Congress, the federal courts and many state courts and legislative bodies have been pondering whether the exclusionary rule, as set forth in earlier Supreme Court decisions, applies in all criminal proceedings. Time and again—in relation to grand jury and post-conviction deliberations, for example—the question has arisen whether the fourth and fourteenth amendments require exclusion of evidence at criminal proceedings other than trials.

but thought the question should have been reserved for decision in another case.

Other limitations have been placed on the applicability of the exclusionary rule in a criminal trial. In order to challenge the unconstitutionality of a search and seizure, for example, a defendant must allege a legitimate interest of some kind in the premises searched or the materials seized. Brown v. United States, 411 U.S. 223 (1973). Also, the exclusionary rule does not prevent the use of evidence to impeach defendants who have chosen to testify at their own trials. Walder v. United States, 347 U.S. 62 (1954).

For a general discussion of how the exclusionary rule relates to essentially non-criminal proceedings see Note, Admissibility of Illegally Obtained Evidence in Non-Criminal Proceedings, 22 U. Fla. L. Rev. 38 (1969).

With regard to grand jury proceedings, the Supreme Court held in United States v. Calandra, 414 U.S. 338 (1974), that a witness summoned to appear and testify before a grand jury could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure. That decision was the latest in a series of Supreme Court holdings recognizing the general freedom grand juries have under the Constitution to consider whatever evidence is available to them, whether legally or illegally obtained, and whether or not the evidence would be admissible at a criminal trial. The Supreme Court has also held that an indictment need not be overturned simply because the grand jury returning it considered hearsay evidence, Costello v. United States, 350 U.S. 359 (1956), or evidence obtained in violation of the defendant's privilege against self-incrimination, Lawn v. United States, 355 U.S. 399 (1958). Accord, United States v. Blue, 384 U.S. 251 (1966) (dictum); see generally, 8 J. WIGMORE, EVIDENCE § 2184a (McNaughton rev. 1961); R. MCCORMICK, EVIDENCE § 167 n.36 (2d ed. 1972).

The majority opinion in Costello contained the
This comment will focus on the exclusion at the preliminary hearing of evidence seized in violation of fourth and fourteenth amendment rights, giving particular emphasis to state practices. Under federal statutory law, objections to evidence on the ground that it has been acquired by unlawful means are not properly made at a federal preliminary hearing. While some state courts and legislatures have adopted a similar rule, a significant number of other states are allowing exclusion at the preliminary hearing upon motion of the accused.

Following explanation of why the Supreme Court declined to establish a rule permitting defendants in federal criminal cases to challenge indictments on the ground that they are not supported by adequate or competent evidence.

No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

One constitutional limitation on the power of grand juries to consider whatever evidence is available to them is that the fourth and fourteenth amendments provide protection against a subpoena duces tecum too sweeping in its terms to be regarded as reasonable, Hale v. Henkel, 201 U.S. 43 (1906).

Also, in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2515 (1970), Congress enacted a statutory exception to the general federal rule allowing grand juries to consider illegally obtained evidence. Where evidence has been obtained by wiretapping or electronic surveillance prohibited by the act, the use of such evidence in any grand jury investigation, or in any other criminal proceeding at the federal or state level, is generally prohibited. See Gelbard v. United States, 408 U.S. 41 (1972).

In states that still retain the grand jury, the typical rule is that indictments are not voided, despite introduction of evidence which would have been excluded at trial, as long as sufficient competent evidence to support the indictment was received by the grand jury. See, e.g., CAL. PENAL CODE § 939.6(b) (West 1970); N.Y. CODE CRIM. PROC. § 210.35 (McKinney 1958), analyzed in R. Perez v. New York Criminal Practice Under the CPL 400 (1972). Some states also have enacted statutes with provisions that conform generally to those in the section of the Omnibus Crime Control and Safe Streets Act found above. See, e.g., ILL. REV. STAT. ch. 38, § 14-5 (1973) and N.Y. CIV. PRAC. § 4506(1) (McKinney Supp. 1974).

With regard to exclusion after conviction, the few cases on the subject are split. Compare Verdugo v. United States, 402 F.2d 599, 609-13 (9th Cir. 1968), cert. denied, 397 U.S. 925 (1970) (where use of illegally seized evidence at sentencing would provide a great incentive to searches and seizures contrary to the fourth amendment, the evidence must be disregarded in sentencing) with Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967) and United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), aff'd 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971), noted in 40 U. CHI. L. REV. 172 (1971) and 71 COLUM. L. REV. 1102 (1971) (evidence obtained in violation of fourth amendment can be used at sentencing since need for it outweighs deterrent effect of excluding such evidence). See also In re Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970), in which the court held, despite a strong dissent, that the exclusionary rule is applicable to parole revocation proceedings. Justice Tobriner, in the majority opinion, reasoned that the incremental deterrent effect of not extending the rule to those proceedings would be less important than the "social consequences" of extension. The same conclusion was reached in United States ex. rel. Sperring v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970), noted in 41 U. CHI. L. REV. 177 (1970), although each of the judges deciding the case delivered a separate opinion.

Rule 5.1(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination.

Motions to suppress must be made to the trial court.

FED. R. CRIM. P. 5.1(a).

This rule represents a codification of a long-prevailing practice whereby evidence has been considered at federal court preliminary examinations without regard to the legality of the means by which it was acquired. Even under the less specific language found in the statute prior to its amendment in 1972, a federal magistrate had no authority in a preliminary hearing to determine the admissibility of illegally seized evidence. FED. R. CRIM. P. 5.1 (Advisory Committee Notes); Giordenello v. United States, 357 U.S. 480 (1958).


For state statutory language prohibiting exclusion in preliminary hearing see CAL. EVID. CODE § 300 (West 1966); CAL. PENAL CODE § 1538.5(f) (West 1954); ILL. REV. STAT. ch. 38, §§ 109-3(e),
STATE PRACTICES

Since state courts and legislatures have been operating under the exclusionary rule imposed by Mapp, state developments must be seen from the point of view of diverse and conflicting pressures. On the one hand, there is the pressure to conform to the viewpoint of the Supreme Court, which has recognized only a limited constitutional right to a preliminary hearing and has refrained from holding that the exclusionary rule applies at such proceedings. On the other hand, there is the pressure generated by the widely held conviction that states can go further than the Supreme Court in furnishing rights to the accused; that states can be laboratories of reform ultimately providing the Supreme Court with the data necessary for the reexamination of its own policies.

In coping with these competing pressures, courts and legislatures within various states have come into conflict over the relative merits of arguments for and against exclusion at the preliminary hearing. State legislatures have passed laws on the subject only to have them declared void by state courts. Courts in turn have allowed exclusion, or favored it in dicta, only to have legislatures pass laws specifically opposing it. Consideration of how state courts and legislatures who have participated in the debate on exclusion have decided the matter for their states is important to any assessment of the viability of applying the exclusionary rule at the preliminary hearing and the likelihood of its application in a greater number of states and, ultimately, the federal system.

This comment’s survey of state practices with regard to exclusion at the preliminary hearing opens with the recent decision of State v. Wilson, a Hawaiian case which not only contains an unusually thoughtful discussion of the considerations that favor and oppose exclusion but also provides an excellent picture of a state court struggling to determine the role it should play under the Constitution in extending rights to accused persons. In Wilson, the Supreme Court of Hawaii decided an appeal by the prosecution from a ruling of a state district court that it had jurisdiction to entertain a motion to suppress at a preliminary hearing. Appellees were charged, pursuant to an information, with promotion of a detrimental drug.

A preliminary hearing was held, where the state called its only witness, a police sergeant, who testified regarding the execution of a search warrant upon appellees’ residence. After the State had presented its case, the court granted appellees’ motion to suppress on the grounds that the warrant was an illegal “blanket” warrant.

The district court based its holding that it had jurisdiction to entertain the motion to suppress on rule 46(e) of Hawaii’s District Court Rules of Penal Procedure. On appeal, however, the Supreme Court of Hawaii pointed out that the rule in question allowed motions to suppress to be made only before the court having jurisdiction to try the offense.


12 The Supreme Court has rejected the contention that all accused persons have a constitutional right to a preliminary hearing even since Lem Woon v. Oregon, 229 U.S. 586 (1913). Recently, however, the Court did hold that the fourth amendment requires a preliminary hearing as a prerequisite to an “extended restraint of liberty” prior to trial. Gerstein v. Pugh, ___U.S.___, 95 S.Ct. 854, 863 (1975). The Gerstein Court refused to overturn Lem Woon, holding that a preliminary hearing is not a prerequisite to prosecution by information (or, presumably, by indictment). Id. at 863. A preliminary hearing is required only for those suspects who suffer restraint on liberty other than simply the condition that they appear for trial. Id. at 869 n.26.


14 Id. at ___, 319 P.2d at 229.

15 This rule states in pertinent part: MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the court having jurisdiction to try the offense for the return of the property, or to suppress for use as evidence anything so obtained.
Since the crime that appellees were charged with was a felony, punishable by a maximum five-year term of imprisonment, and since, by state law, district courts in Hawaii did not have jurisdiction to try felony cases, the district court did not have jurisdiction to try the offense charged in Wilson. For that reason, the Supreme Court of Hawaii ruled that the district court did not have jurisdiction under rule 46(e) to entertain a motion to suppress.

The Supreme Court of Hawaii, however, did not hold that the district court's exclusion of the evidence was erroneous. Instead, it upheld the exclusion and dismissal even though they were based upon "technically inaccurate authority." The court reasoned that a state district court, in conducting a preliminary hearing, must adhere to the general rules of evidence, which include objection to the admissibility of unconstitutionally seized evidence. According to the court, a district court judge is also bound by his oath of office to uphold the constitutions of the United States and Hawaii. Consequently, the exclusionary rule must also be upheld, even at the preliminary hearing, as a sanction essential to enforcing the constitutional prohibition against unreasonable searches and seizures.

To enable Hawaii's district courts to enforce the exclusionary rule at preliminary hearings despite lack of jurisdiction to hear motions to suppress, the Supreme Court of Hawaii held in Wilson that a motion to suppress is essentially the same as a motion to strike when dealing with the admissibility of evidence. On dubious authority, the court held that notwithstanding the label attached to the motion in the Wilson case, the court would treat it as a motion to strike and would affirm.

21 Id. at 519 P.2d at 230.
22 Id.
23 Id., citing State v. Pokini, 45 Haw. 295, 367 P.2d 499 (1961). In that case, the Supreme Court of Hawaii, recognizing the special position the exclusionary rule has always occupied in Hawaii, stated:

It is noteworthy that on the specific question of admissibility of evidence, debate was had in the [state] Constitutional Convention on June 5, 1950 . . . on an amendment which would have added the words: Evidence obtained in violation of this section (incorporating the exact language of the Fourth Amendment) shall not be admissible in any court against any person. That amendment was substituted out of fear that this state would . . . follow states holding against the exclusionary rule of Weeks. . . . There was no division among the delegates in their desire to follow the federal decisions but only as to how that was to be accomplished. The problem was resolved by an instruction that the Committee of the Whole Report contain the explanation [that the incorporation of the exact words of the fourth amendment was intended to give to the state the benefit of the federal decisions construing the same]; the amendment was withdrawn. This being the situation, it is evident that the ruling of the Supreme Court of the United States on June 19, 1961 (Mapp . . .), . . . holding the states to the exclusionary rule of Weeks, signifies no change in this State, for we were committed to that course from the date this State was admitted. Previously, of course, our Territorial status brought us directly under the Fourth Amendment. Territory v. Ho Me, 26 Haw. 331 (1922).

45 Haw. at 308-09, 367 P.2d at 506. There is some question, in view of the above, whether Pokini really supports the majority's position in Wilson. Although the language of the proposed amendment to the state constitution ("shall not be admissible in any court against any person") favored allowing exclusion at the preliminary hearing, this amendment was withdrawn. The explanation for withdrawal by the Committee of the Whole (giving the state "the benefit of Federal decisions") seems to cut against exclusion at preliminary hearings, since federal decisions do not require such exclusion.

It should be noted that the Wilson court cited Rule 5(d)(2) of Hawaii's Rules of Criminal Procedure, Laws 1970, Act 188, § 39, as a basis for its decision that exclusion was proper at the preliminary hearing. 55 Haw. at 519 P.2d at 230. However, this rule provided only that a district court had the power to conduct a preliminary hearing, hear evidence, and discharge a defendant should probable cause not appear from the evidence produced. The dissent of Justice Ogata demonstrated effectively that this rule could not provide support for the court's opinion. Id. at 519 P.2d at 231.

24 Riddle v. State, 257 Ind. 501, 275 N.E.2d 788 (1971), where the Supreme Court of Indiana held that the defendant had preserved for review the question of whether probable cause had existed for a magistrate to issue a warrant to search the defendant's room, by timely objection to the introduction of the disputed evidence at trial. The Wilson court cited Riddle for the court's dictum that "the admissibility of evidence secured under a search warrant can be challenged either before trial in a pre-trial motion to suppress, or at trial by timely objection or motion to strike." Id. at 504, 275 N.E.2d at 790.

25 55 Haw. at 519 P.2d at 231. Here the state supreme court was not in conflict with the state legislature, a phenomenon common in other states, since the supreme court itself, and not the
In a footnote to its opinion, the court rejected the argument by the state that in future cases it would be forced to take direct appeal to the Supreme Court of Hawaii or otherwise be bound by the decision of the district court on exclusion (res judicata). The court noted that since a preliminary hearing in the district court is only the initial stage of criminal proceedings, the trial court has jurisdiction after indictment to consider de novo the issue of admissibility of evidence and is not bound by the decision of the district court.

In his dissenting opinion, Justice Ogata struck at the heart of the court’s opinion by criticizing what he believed to be the court’s lack of understanding of the interests properly protected by the exclusionary rule. It was Ogata’s view that the rule, as enunciated in Weeks, Mapp, and other Supreme Court decisions, applies only to proceedings involving an adjudication of guilt or innocence. Very recently, he noted, the Supreme Court had even stated as much:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

Justice Ogata construed the “remedial objective” of the rule, and the implied interest to be protected by it, to be the necessity for an effective deterrent to illegal police action. Justice Ogata then contended that the exclusionary rule is not concerned with an attempt to redress the particular wrong done to the victim of an unconstitutional search. It seemed to him that exclusion occurs “far too late to be serviceable as a protective device assuring the privacy of the particular individual. . . .” Instead, he focused on the goal of deterring unlawful police conduct and came to the conclusion that no valid considerations support the entertaining of motions to suppress at preliminary hearings since this procedure could in no way be important to deterrence.

Looking at the relative disadvantages to society and the defendant, Justice Ogata felt that the interest of all citizens in the maximization of administrative efficiency opposed exclusion at the preliminary hearing. He also contended that from the accused’s point of view such a practice would not be advisable. Citing Blue, Lawn, and Calandra he pointed out that a prosecutor could obtain an indictment by a grand jury with excluded evidence because lower standards prevail for admissibility of evidence before a grand jury. For that reason, he predicted, prosecutors would seek to avoid any preliminary hearing to the extent the law allowed, with the consequence that the accused at 438: “In sum, the rule is a judicially-created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”

Justice Ogata formally dissented only on the ground that, until Hawaiian law could be changed, exclusion at a preliminary hearing, for he forced the state to seek a protective device assuring the privacy of the particular individual.

Legislature, promulgated the rule of procedure that allowed motions to suppress to be made only before the court having jurisdiction to try the offense. Haw. Rev. Laws §§ 5602-21 (1968).

22 55 Haw. at __ n.5, 519 P.2d at 231 n.5. Appeal was not precluded, however. 24 Id. at __, 519 P.2d at 232.

23 Id.


27 55 Haw. at __, 519 P.2d at 232. For further authority see United States v. Calandra, 414 U.S.
would lose important benefits usually derived from the preliminary hearing.\textsuperscript{33}

55 Haw. at \ldots, 519 P.2d at 233. Justice Ogata thought that two serious consequences for the accused flow from a policy of avoiding preliminary hearings. First, the accused loses both an opportunity for some early discovery of the nature of the case against him and also the occasion to create and preserve evidence for future use—as impeachment material, for example. \textit{Id.} at \ldots, 519 P.2d at 234, \textit{citing} Coleman v. Burnett, 155 U.S. App. D.C. 302, 477 F.2d 1187, 1198–1200 (1973) and State v. Faafiti, 54 Haw. 637, 641 n.4, 413 P.2d 697, 701 n.4 (1973). See 8 J. Moore, \textit{Federal Practice} § 5.1.02 [1] (2d ed. Gipes 1970, Supp. 1971), which states in pertinent part:

Although the purpose of the preliminary hearing seems to be confined to avoidance of unreasonable pretrial detention, its function is somewhat broader. In practice, the preliminary hearing may serve as a valuable device to discover the prosecution's case, particularly in the absence of other means of pretrial discovery.

Second, the accused loses the opportunity to have a determination made as to probable cause as soon as possible. 55 Haw. at \ldots, 519 P.2d at 234.

Some states allow prosecutors to avoid preliminary hearings under circumstances analogous to those described in 18 U.S.C. § 3060(e) (1970), which provides as follows:

No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a Court of the United States.

Other states allow omission of the preliminary hearing only after indictment or upon information.

The fear that prosecutors will avoid preliminary hearings has had a great influence on federal law. See \textit{Fed. R. Crim. P.} 5.1 (Advisory Committee Notes), which states in pertinent part:

A grand jury indictment may properly be based upon hearsay evidence. \ldots This being so, there is practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury. Otherwise, there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment.

\textit{Id.} See the procedural and evidentiary requirements applicable to the preliminary examination will therefore add to the administration pressure to avoid the preliminary examination.

That federal prosecutors often avoid preliminary hearings is evident from cases such as United States v. Cowan, 396 F.2d 83, 88 (2d Cir. 1968); United States v. Quinn, 357 F. Supp. 1348 (N.D. Ga. 1973); and United States ex rel. Wheeler v. Flood, 269 F. Supp. 194 (E.D.N.Y. 1967). In \textit{Note, The Function of the Preliminary Hearing in \textsl{Federal Pretrial Procedure},} 83 \textit{Yale L.J.} 771, 787–8 (1974), the author estimates that only one of every six cases in federal courts in which a preliminary hearing could be held actually involves a preliminary hearing, and that waiver accounts for only a small fraction of the remaining cases.

For a case in which state prosecutors skipped a preliminary hearing pursuant to a state practice allowing such action see Gerstein v. Pugh, \textit{\ldots U.S.} \ldots, 95 S.Ct. 854 (1975).

Justice Ogata also criticized the manner in which the court chose to implement its decision, by treating a motion to suppress as a motion to strike. Justice Ogata contended that conceptual differences exist between motions to strike and motions to suppress that should not become blurred.\textsuperscript{34} The motion to suppress, he said, urges exclusion because of the manner in which the evidence was obtained (a collateral issue),\textsuperscript{35} while the motion to strike is used as an "after-objection" following the inadvertent admission of evidence that is "inherently excludable" (because of non-responsiveness of the answer, incompetence, immateriality, privilege or hearsay).\textsuperscript{36}

\textsuperscript{33} 55 Haw. at \ldots, 519 P.2d at 234.

\textsuperscript{34} 55 Haw. at \ldots, 519 P.2d at 234. Justice Ogata explained away \textit{Riddle, supra note 21}, the only case the majority cited for its interpretation of motions to strike, claiming that the issue dealt with in the portion of the case referred to is not the same as the issue in \textit{Wilson}. In \textit{Riddle}, he correctly noted, the Indiana court merely stated that unconstitutionally obtained evidence should be excluded either before trial by a motion to suppress or during trial by a motion to strike.

\textsuperscript{35} 55 Haw. at \ldots, 519 P.2d at 235.

\textsuperscript{36} \textit{Id.} See R. McCormick, \textit{Evidence} § 52 (2d ed. 1972), which states in pertinent part:

Usually, in the taking of testimony of a witness an objection is apparent as soon as the question is asked, since the question is likely to indicate that it calls for inadmissible evidence. But sometimes an objection before an answer to a question is not feasible. In all these cases, an 'after-objection' may be stated as soon as the ground appears. The proper technique for such an objection is to phrase a motion to strike out the objectionable evidence, and to request an instruction to the jury to disregard the evidence. Counsel should use the term 'motion to strike' as just indicated. \ldots
In other jurisdictions where courts and legislatures have considered whether evidence obtained by unreasonable search and seizure should be excluded at a preliminary hearing, discussions have not been as extensive as in Hawaii. In fact, there are few clear decisions in other jurisdictions as to whether exclusion is allowed. Statutes dealing with the subject are rare and judicial opinion regarding exclusion has primarily been voiced in dicta.

Of the jurisdictions besides Hawaii in which the decision has apparently been made to allow exclusion at the preliminary hearing, California and Illinois have laid down the clearest rules. In California, the entire state evidence code is applicable to all criminal proceedings except grand jury deliberations. Evidence presented at the preliminary hearing must be such as would be admissible at a criminal trial. There is also a provision in the California Penal Code specifically providing that the motion to return property or suppress evidence may be made at the preliminary hearing in the municipal or justice court if the property or evidence to be suppressed relates to a felony offense initiated by a complaint or a misdemeanor filed together with a felony.

While the California rule on exclusion undoubtedly has constitutional roots in the fourth and fourteenth amendments, case discussions of the rule tend to emphasize the statutory requirement rather than the constitutional necessity for exclusion. An example of such discussion is from People v. Schuber:

The proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the "production of legal evidence" and the exclusion of "whatever is not legal" [citations omitted]. The constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence. There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations. The rule for the admission or rejection of evidence is the same for both proceedings.... The rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy or character.

The best expression of doubt of the necessity for exclusion at the preliminary hearing in California is that of the dissenting judge in Priestly v. Superior Court. He saw the exclusionary rule as the basis for the California system of exclusion, but he believed the rule was inapplicable to preliminary hearings. Citing Costello for the proposition that the rule is not applicable to grand jury proceedings, he reasoned that the Supreme Court would not apply the rule to any pretrial proceeding. He also pointed out that no right to a preliminary hearing was guaranteed by the federal Constitution.

The issue of whether a suppression order of a judge or magistrate at the preliminary hearing should be binding in later criminal proceedings arose in California, as it did in Hawaii. California's penal code provides that the state may seek a new complaint or an indictment after granting a motion to suppress at the preliminary hearing, a magistrate or judge at the preliminary hearing was guaranteed by the federal Constitution.

the accused. This “refiling” power, held by prosecutors everywhere, is a major handicap to the accused, since he may have no incentive to ask for exclusion at the preliminary hearing when the prosecutor can have another complaint filed. The accused will only have to wait a little longer for his trial and, perhaps, spend that time in jail. The California penal code also provides that the granting of the motion to suppress at the original preliminary hearing has no effect on the admission of evidence at grand jury proceedings or at proceedings on a new complaint. If the magistrate or judge at the preliminary hearing grants the motion to suppress, but finds enough other evidence to justify holding the accused, the State may request a special hearing de novo in the superior court on the admissibility of the evidence suppressed at the preliminary hearing. The State may even appeal the decision of the court at the special hearing to the trial court on the basis of new evidence of the search and seizure’s validity. The accused, on the other hand, may renew his motion to suppress at a special hearing if it is denied at the preliminary hearing. But if the motion is denied at the special hearing also, the accused ordinarily can relitigate the issue only by extraordinary writs of mandate or prohibition.

In Eiseman v. Superior Court, a motion to suppress was granted at the preliminary hearing, but the state failed to request a special hearing before the Superior Court within the time permitted, by the penal code. The court held in Eiseman that, in view of the state’s failure to follow the statutory procedure for relitigation, the finding of the court at the preliminary hearing on the motion to suppress was binding on the trial court.

In Illinois, the decision to allow exclusion of illegally seized evidence, apparently motivated at least in part by constitutional considerations, has been codified in the Illinois Code of Criminal Procedure. The proper means of exclusion in Illinois is the tendering of a motion to suppress at the preliminary hearing, held occasionally before the trial judge, but most often before a magistrate who does not have jurisdiction to try the case.

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ILL. REV. STAT. ch. 38, § 109–3(e) (1973) provides:

During preliminary hearing or examination the defendant may move for an order of suppression of evidence pursuant to Section 114–11 or 114–12 of this Act or for other reasons, and may move for dismissal of the charge pursuant to Section 114–1 of this Act or for other reasons. If any such order of suppression of evidence or dismissal of the charge is allowed and issued in the course of any preliminary hearing or examination, such order of suppression or of dismissal shall be non-final, the State may not appeal therefrom, and such order of suppression shall not in any manner bar, affect or be determinative in any subsequent proceedings.

ILL. REV. STAT. ch. 38, § 114–12 (1973) provides in pertinent part:

MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED (a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) except that, if the order suppressing evidence is non-final according to Sec. 109–3 of this Act, the property shall not be restored and shall not because of such order be inadmissible at any proceeding other than such preliminary hearing or examination.

It would appear that the specific provision for motions to suppress at a preliminary hearing in ILL. REV. STAT. ch. 38, § 109–3(e) (1973) is an exception to the general statutory rule, provided in ILL. REV. STAT. ch. 38, § 114–12(d) (1973), that the motion to suppress shall be made only before a

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48 For California law regarding the admissibility of evidence at the grand jury see note 7 supra.

49 CAL. PENAL CODE § 1538.5(f) (West 1954).

50 CAL. PENAL CODE §§ 1538.5(h), 1538.5(i) (West 1954). There is no right to suppress evidence once the trial has begun unless opportunity for the motion did not exist prior to trial or the defendant was not aware of the grounds for the motion.


52 Id. at 348, 98 Cal. Rptr. at 345. For an early evaluation of exclusion in California under the statutory provision see Graham & Letwin, The
As in Hawaii and California, the problem arose in Illinois whether the ruling of the court at the preliminary hearing ought to be binding in later proceedings. The state supreme court and legislature of Illinois disagreed on the proper means to decide this question. In enacting the statutory provisions allowing exclusion at preliminary hearings, the Illinois legislature reversed state supreme court decisions providing for appeal from the granting of pretrial motions, and making corresponding pretrial orders binding on the trial court in the absence of an appeal.\(^5\) In *People v. Taylor*,\(^6\) however, the Illinois supreme court noted that it had passed a rule providing for appeals from orders suppressing evidence.\(^7\) Finding that the legislature’s provisions had violated a state constitutional provision conferring rule-making powers on the supreme court,\(^8\) the court held that to the extent that the statute provided that the state could not appeal from a preliminary hearing suppression order, such an order was non-final and void. Nothing in Illinois law appears to prevent or provide for an appeal by the accused from a denial of a motion to suppress at the preliminary hearing, however.

In contrast to Hawaii, California and Illinois, other states’ courts and legislatures have forthrightly announced that however evidence might have been obtained, it is generally admissible at preliminary hearings.\(^9\) Kansas, Arizona, and Wisconsin are states whose courts and legislatures have engaged in particularly interesting discussions of why they have adopted such a rule.

In Kansas, the leading case is *McIntyre v. Sands*.\(^6\) In that case the court explained that in Kansas the main purpose of a preliminary examination is to determine whether the corpus delicti has been established and to give the accused general information of the nature of the crime charged and apprise him of the sort of evidence he will be required to meet when he is prosecuted in district court. The court held, therefore, that the same formality or strict compliance with procedure and the rules of evidence as would be present in a trial is not necessary at a preliminary examination.

[W]here an attempt has been made to give an accused a preliminary examination and he has been given reasonable notice by the papers and proceedings in the case, of the nature and character of the offense charged, the examination has served its principal purpose, and is ordinarily regarded as sufficient.\(^6\)

In Arizona, Rule 5.3(b) of the Rules of Criminal Procedure,\(^6\) making inapplicable to preliminary hearings ‘rules or objections calling for the exclusion of evidence on the ground that it was unlawfully obtained,’ was promulgated by the state supreme court in order to reverse the court’s earlier ruling in *State v. Jacobson*.\(^6\) The *Jacobson* case bears a

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\(^6\) *People v. Taylor*, 50 Ill. 2d 136, 277 N.E.2d 878 (1972).

\(^7\) In the *Taylor* court referred to section 7 of article VI of the 1870 constitution of Illinois as amended, 50 Ill. 2d at 139, 277 N.E.2d at 880. The particular provision referred to, that the “Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of the Circuit Courts,” can now be found in Ill. Const. art. 6, § 6. Other provisions relating to the supreme court’s rule-making power may be found at §§ 4, 5, 16.

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\(^8\) See. This is the general common law rule, said to apply unless modified by constitutional or statutory requirements. 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).


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\(^5\) In that case the court explained that in Kansas the main purpose of a preliminary examination is to determine whether the corpus delicti has been established and to give the accused general information of the nature of the crime charged and apprise him of the sort of evidence he will be required to meet when he is prosecuted in district court. The court held, therefore, that the same formality or strict compliance with procedure and the rules of evidence as would be present in a trial is not necessary at a preliminary examination.

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striking resemblance to the *Wilson* case in Hawaii on its facts and in the opinion of the court. The defendant was charged with the unlawful possession of marijuana. Before his preliminary hearing, he moved to suppress the seized marijuana on the grounds that it was obtained in violation of the fourteenth amendment. The state objected to the court's jurisdiction to hear and determine the motion and obtained a writ of prohibition against the justice who sat at the preliminary hearing. The state then sought a writ of special action from the state supreme court. At issue was whether the lower court properly found that it had the jurisdiction to entertain the motion to suppress and any other constitutional claims that might be raised.

In denying the writ of special action in *Jacobson*, the state supreme court stated that the lower court did not have the power to grant a motion to suppress evidence because the superior court had exclusive jurisdiction of felony cases under the Arizona constitution. However, the supreme court ruled that the lower court did have jurisdiction to rule at the preliminary hearing on an objection to the admission of evidence that the search and seizure was unlawful and the evidence incompetent.

Early Wisconsin decisions indicated that exclusion might be approved in that state.

These decisions prompted the state legislature to pass a law in 1969 stating that in felony actions, which are the only ones in which the accused is entitled to a preliminary hearing in Wisconsin, motions to suppress can not be made at a preliminary hearing. The legislative history of the statute indicates that the reason for its enactment was to promote administrative efficiency by preventing the same motion from being made both at the preliminary hearing and prior to trial. There have been no Wisconsin cases indicating that any right to exclude evidence by objection or motion to strike at the preliminary hearing survived the legislature's limitation on the motion to suppress.

While the above mentioned states represent the extremes with regard to allowing exclusion at the preliminary hearing—Hawaii, California, and Illinois clearly allowing it and Kansas, Arizona, and Wisconsin just as clearly disallowing it—the positions of other states cannot be so easily characterized. Of this latter group, New York, Michigan, Nevada, and Idaho are examples of states showing some indications of allowing exclusion.

In New York, the state code of criminal procedure is generally silent as to whether evidence other than hearsay that would be inadmissible at trial is admissible at a preliminary hearing. The only relevant provision requires that motions to suppress in cases involving an undetermined felony complaint must be made, not before the magistrate, but before the superior court having jurisdiction to try the offense. Two cases provide the bulk of pertinent judicial discussion of the exclusion problem.

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*See also* La Sota, Preliminary Proceedings Under the New Rules of Criminal Procedure, 9 Ariz. Bar J. 11 (1973). And note that rule 2.4 of Arizona's Rules of Criminal Procedure requires a finding of probable cause at the preliminary hearing based on "any testimony before . . . the magistrate or . . . any affidavits submitted" (emphasis added). Ariz. R. Crim. P. 2.4. Thus, Arizona is one state that allows a probable cause finding to be based wholly or in part on evidence seized in an improper manner.

64 *See* text accompanying notes 12-23 *supra*. 106 Ariz. at 130, 471 P.2d at 1022. 66 *Id.*

67 Brisk v. State, 44 Wis. 2d 584, 172 N.W.2d 199 (1969) (court relates without comment a dispute at the preliminary hearing concerning the voluntariness of a confession, but notes that the failure of the magistrate to exclude it did not affect the defendant's right to contest its admissibility at trial); State ex rel Wojcikowski v. Hanley, 248 Wis. 103, 20 N.W.2d 719 (1945) (challenged evidence had not been illegally seized); Hancock v. Hallman, 229 Wis. 127, 281 N.W. 703 (1938) (magistrate exceeds jurisdiction if he lacks competent evidence); State v. Baltes, 183 Wis. 545, 198 N.W. 282 (1924) (evidence secured by a warrant, shown to have been issued without sworn testimony to support it, will be suppressed).

68 Wis. Stat. Ann. §§ 970.02(c), 971.31(5) (b) (1971).

69 Wis. Stat. Ann. § 710.50(1) (b) (1971). (Comment). Recall that the dissenting judge in *Wilson* put forward the same argument and that administrative efficiency was one of the reasons for the passage of the federal statute prohibiting exclusion at the preliminary hearing.

70 R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL 208 (1972). Admission of hearsay evidence is prohibited at the preliminary hearing under CPL § 180.60 (McKinney 1971).

71 N.Y. Code Crim. Proc. § 710.50(1) (b) (McKinney 1971).
In People v. Weiss, a magistrate, finding no probable cause to bind over for trial, noted that under New York law probable cause had to be based upon the legal evidence before him. He stated that he could not act upon a suspicion founded on statements of the deceased, unless they were properly in evidence as dying declarations. From this holding, it appears that New York applies the same general rules of evidence at the preliminary hearing as at trial.

In People ex rel. Ruppert v. Hoy, the Supreme Court of Westchester County held that the petitioner in a habeas corpus proceeding was not entitled at his preliminary hearing to a statutory suppression hearing to determine the voluntariness of a confession which the state was attempting to use against him. The court noted, however, that a magistrate could not hold the defendant for the grand jury, which is the result of a probable cause finding in New York, where the evidence before him showed the incriminatory statement on which probable cause had to be based was involuntary. Presumably, the court meant by this that the probable cause finding would not stand when attacked in a higher court and that the complaint in such cases should be dismissed. Objections to evidence at preliminary hearings other than motions to suppress, however, are not ruled out by Ruppert. Nor does Ruppert or New York statutory law prohibit exclusion of illegally obtained evidence at the preliminary hearings granted misdemeanants.

In Michigan, the state supreme court has held that the corpus delicti in a criminal case must be established at the preliminary hearing by competent evidence and that the rights of criminal defendants are fully safeguarded by objections of their counsel to the admission of incompetent evidence. However, the manner in which a preliminary hearing is conducted in Michigan is historically very largely within the sound discretion of the magistrate. Apparently, the rationale for the Michigan rule is that the object of the preliminary hearing inquiry would be defeated if the magistrate did not have the discretion to search into whatever evidence seems relevant to the finding of probable cause. The only significant Michigan decision that places limitations on the discretion of the magistrate to determine whether evidence is or is not competent at the preliminary hearing is People v. Hatt. In that case, the Supreme Court of Michigan laid down the rule that no evidence of prior convictions is properly admissible at a preliminary hearing.

In Nevada, Goldsmith v. Sheriff is the only case providing some basis for exclusion. Quoting People v. Schuber, the court in that case stated that evidence received at a preliminary hearing must be legal evidence. The case was a challenge to a bind-over decision based on hearsay, rather than evidence obtained by unreasonable search and seizure. Moreover, the court found that the hearsay which had been accepted by the court at the preliminary hearing was admissible under a recognized exception to the hearsay rule. Thus, the court's statement that only legal evidence can be received at the preliminary hearing is dicta.

Finally, in Idaho, the state supreme court held in Martinez v. State that a statement made by the defendant to a sheriff that he kicked the deceased child was an "admission, not a confession" and was admissible at the preliminary hearing without any proof that it was voluntary.
had been voluntarily made. This holding implies that proof of the voluntariness of a confession must be shown at a preliminary hearing in Idaho, but it does not deal directly with unconstitutionally seized evidence. No other Idaho case casts any light on the admissibility of unconstitutionally obtained evidence at a preliminary hearing.

**DISCUSSION**

Having surveyed the arguments put forward by judges and legislators in various jurisdictions as they have considered whether evidence obtained by unreasonable searches and seizures should be excluded at preliminary hearings, this comment evaluates the usefulness of such exclusion in light of the policy considerations latent in the arguments for and against exclusion.

At least two strong constitutional arguments can be presented for exclusion at the preliminary hearing. First, deterrence of unconstitutional police misconduct has always been one of the main purposes of the exclusionary rule. Contrary to the opinion of the dissent in *State v. Wilson*, exclusion at the preliminary hearing can have a deterrent effect. Where evidence seized unconstitutionally is admissible at preliminary hearings, police could seize evidence illegally, hoping to use it to bind the accused over for trial. While he is incarcerated or out on bail, the police could unearth additional evidence, untainted by illegal police activities, which could support a conviction.

Where illegally obtained evidence is inadmissible at the preliminary hearing, however, police could not profit by unlawfully obtaining evidence and might be deterred from such activity. It has been argued that the exclusionary rule has no deterrent effect at trial because a trial is too remote from police behavior. If this is true, the police are more likely to be deterred at an early stage of the criminal process. If, however, considerations such as avoiding the taint of judicial partnership in official lawlessness and the subsequent undermining of popular trust in courts are primary, then tainted evidence must be excluded at all criminal proceedings.

These rationales for the application of the exclusionary rule in preliminary hearings must be reconciled with the Supreme Court's failure to recognize any constitutional necessity for exclusion at the preliminary hearing. Perhaps one reason for the Supreme Court's failure to require exclusion at the preliminary hearing is the Court's recognition of only a limited constitutional right to a preliminary hearing. If states are free under the Constitution to eliminate the preliminary hearing altogether, then it is arguable that the accused person has no constitutional right to have his preliminary hearing conducted in any particular way. If this is the rationale for the Supreme Court's stand, however, it should be reexamined. The same rationale would support allowing the preliminary hearing to be conducted along the lines of a trial by ordeal, to give just one example of the clearly unacceptable alternatives states might adopt.

Whatever the reasons for the Supreme Court's stand, it is not dispositive of the controversy over exclusion that has arisen in the states. The Court's rulings do not prevent other courts and legislatures from requiring exclusion at preliminary hearings on federal constitutional grounds. Indeed, so long as no rights recognized by the Supreme Court are denied by the states, other courts and legislative bodies should feel free to extend whatever rights they wish to accused persons. In doing so, the state courts and legislatures serve as laboratories of reform and provoke further examination by the Court of its past decisions.

Furthermore, state courts and legislatures can allow exclusion at preliminary hearings on other than federal constitutional grounds. The seldom cited ninth amendment to the Constitution could stand for the proposition that federally guaranteed constitutional rights need not be the only ones an accused person possesses. It states:

> The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

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84 See text accompanying note 30 supra.


86 This problem was mentioned by the dissenting justice in *Wilson*. See text accompanying notes 24–26 supra. The dissenting justice in *Priestly* also mentioned it. See text accompanying note 45 supra.

87 See note 11 supra.
In addition, differences in state court procedure from that in the federal system might support exclusion. For example, state law might require preliminary hearings or give a magistrate the authority to make suppression orders.

One of the principal arguments against allowing exclusion mentioned several times in the cases and the comments to the statutes examined earlier is that of administrative efficiency. Resolving constitutional issues at the preliminary hearing stage increases the amount of time required for the preliminary hearing and may be one of the main reasons for increasing calendar congestion in municipal courts. The argument for maximizing administrative efficiency is most cogent if a court's decision on a motion to suppress at a preliminary hearing is not final. If a motion to suppress or strike can be heard once at the preliminary hearing, again at trial, and perhaps even a third time at a grand jury proceeding, this is an inefficient procedure indeed. However, the determination at the preliminary hearing might be made final as long as appeal is allowed in order to avoid gross unfairness.

Of course, advocates of maximization of administrative efficiency could still argue that the possibility of appeals to state appellate courts by prosecutors and defendants would nevertheless prolong final judgment and further crowd appellate dockets. The administrative efficiency argument is a double-edged sword, however. Where exclusion motions cannot be heard and determined at the preliminary hearing, expenses on the part of the State and the accused may often be increased because prosecutors take cases to trial in the mistaken belief that the evidence they intend to use will survive the pretrial motion to suppress. Even if only a portion of the state's evidence in a particular case has been obtained illegally, the prosecutor may be obliged to drop the case after much needless expense if there is no exclusion motion permitted at the preliminary hearing. An early indication of possible success on the merits and the admissibility of evidence might therefore increase the efficiency of the state's criminal process.

A further argument occasionally made in the cases and comments to the statutes examined earlier is that prosecutors may choose to forego a preliminary hearing in jurisdictions allowing motions to suppress, thereby denying the accused the benefits he derives from that proceeding. This argument neglects to note that prosecutors often try to avoid preliminary hearings whenever possible even in jurisdictions where motions for exclusion of evidence cannot be made at the preliminary hearing. This is done because the possibilities for discovery inherent in a preliminary hearing are thought to be a great advantage for the accused.

An argument against allowing exclusion at the preliminary hearing that is related to the avoidance of preliminary hearings by prosecutors is the contention that unless motions to suppress can be made at the preliminary hearing, rather than just motions to strike or objections to evidence, the prosecutor often will be able to postpone the determination of the constitutionality of certain evidence until trial, even if exclusion is allowed. Unlike the motion to suppress, the motion to strike or objection to evidence cannot be used by the defense to exclude from use at trial evidence which the prosecutor finds unnecessary to introduce at the preliminary hearing. The utility of the motion to suppress to prevent the future use of evidence is limited by the requirement, generally imposed, that the party moving for a suppression order show that he has reason to believe that improper evidence will in fact be offered eventually against the defendant. Also, an order of suppression binds only the opposing party and his counsel. It does not prevent unsuspecting witnesses from

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88 California is one state that has a statutory provision requiring preliminary hearings. See note 39 supra.

89 See the dissenting opinion in Wilson in the text accompanying note 31 supra; the comment to the Wisconsin statute prohibiting motions to suppress at the preliminary hearing, supra note 69; Fed. R. Crim. P. 5.1 (Advisory Committee Notes).


91 See the Wilson dissent in the text accompanying notes 32-33 supra; Fed. R. Crim. P. 5.1 (Advisory Committee Notes).

92 See J. Moore, supra note 33, § 5.1.02[1].

volunteering suppressed information at trial in response to a perfectly innocuous question. Nevertheless, the motion to suppress is the most powerful exclusionary weapon an accused person can wield at the preliminary hearing, and it would appear that exclusion cannot be reasonably effective unless the motion to suppress can be made at the preliminary hearing.

Another argument against allowing exclusion at preliminary hearings is that the accused might lose his sixth amendment right to a speedy trial. However, the preliminary hearing might be considered part of the trial, thus tolling the time limitation within which a trial must be brought. Suppression at the preliminary hearing might even be made final, absent appeal, at all subsequent proceedings against the accused, thus eliminating the problem of refiling. Moreover, an accused person concerned about his sixth amendment right has the option of saving his motion to suppress for the trial court if he believes that moving for exclusion at the preliminary hearing will detrimentally delay his trial.

Another argument against allowing exclusion at the preliminary hearing is that there is little motive for the defense to launch an all-out attack on the admissibility of evidence at the preliminary hearing unless exclusion is made binding in future proceedings. As mentioned in the discussion of administrative efficiency, however, the determination at the preliminary hearing of a motion to suppress can be made final.

A final argument against allowing exclusion at the preliminary hearing is that neither side may be prepared to fully litigate the issue at that early stage in the proceedings. Actually, however, in states where exclusion is allowed at the preliminary hearing, that proceeding has served as a most important forum for the adjudication of constitutional issues. It has been estimated that constitutional rights are vindicated more often at the preliminary hearing than at any other point in the criminal process. Experience indicates, then, that when accused persons are allowed to press for exclusion at the preliminary hearing, their attorneys will prepare to litigate that issue in order to adequately represent them and will force the state to follow suit.

Opposing all of these arguments against exclusion at the preliminary hearing is the obvious interest of the accused in having an early determination of the admissibility of evidence that might be offered against him at trial. Even if an accused has no federally conferred or state constitutional right to have such a determination made at a preliminary hearing, courts and legislatures must recognize that this interest remains significant. The consequences to the individual of being bound over for trial are profound indeed, even if the accused is never convicted. Incarceration may result, together with the degradation and expense of a criminal trial. Irreparable harm to the accused's reputation may cost the accused his job and perhaps the affection of his family and friends. This is an approximation of criminal punishment that should not be handed down, perhaps, on the basis of unconstitutionally obtained evidence.

SUMMARY AND CONCLUSION

This comment has surveyed how many courts and legislative bodies in the United States have treated the issue of whether evidence seized in violation of constitutional rights should be excluded at preliminary hearings. In some states, the decision has been made to allow exclusion on motion of the accused or proper objection, contrary to present federal practice and the apparent practice in many other states. Although the states' decision-making processes have not been highly visible in this area, the varying solutions adopted can be seen as the interaction of existing state and federal procedures with policy arguments that have rarely been fully articulated. Neither the arguments for, nor the arguments against exclusion are overwhelmingly convincing. Many of them rest on behavioralist

95 Although California law, mentioned in the text accompanying note 50 *supra*, provides that the accused, like the state, may waive his right to contest the ruling on suppression at the preliminary hearing by appeal, no state provides that the accused has waived his right to make a suppression motion if he does not make it at the preliminary hearing.
speculations on the consequences of policy choices. Although some empirical data might be procured to support the strong arguments against exclusion on the grounds of administrative inefficiency or encouragement of prosecutorial avoidance of preliminary hearings, the value of such data is limited in the face of procedural variation among the states.

Reviewing the interests supporting and opposing exclusion at the preliminary hearing of evidence seized in violation of fourth and fourteenth amendment rights, one is forced to conclude that neither exclusion nor admission can or should be urged as a uniform national standard. Perhaps the best approach at present is for the "laboratories of the states" to develop those solutions to pretrial exclusion problems that local experience finds most appropriate, since a uniform standard for the states cannot yet confidently be proposed.
THE EXCLUSION OF YOUNG ADULTS FROM JURIES:
A THREAT TO JURY IMPARTIALITY

As the number and complexity of criminal prosecutions continue to grow, the constitutional guarantees extended to criminal defendants assume a significant role in the perpetuation of criminal justice. Yet, the ambiguous expressions of such rights in the general terms of the Constitution exist as a source of unlimited confusion. One such right, the sixth amendment guarantee of a trial by an "impartial jury."\(^1\) invokes a number of questions, particularly regarding the nature of impartiality and the means necessary to achieve it. The Supreme Court broadly construes the constitutional requirement to mean "a truly representative cross-section of the community."\(^2\) However, the overwhelming amount of litigation arising from this interpretation demonstrates the need for a more suitable approach to jury impartiality. Current pressures within the American community have engendered constant redefinition of the cross-section without creating a means for ascertaining the members of the cross-section.\(^3\) One unresolved aspect of the composition of the cross-section involves the inclusion of eighteen to twenty-one year olds in the jury process.

Until 1972 the minimum age qualification for jury service was almost universally twenty-one years or older, despite occasional attempts to lower the minimum age restrictions. However, the ratification of the twenty-sixth amendment,\(^4\) which lowered the voting age to eighteen for state and national elections, revitalized the interest in the inclusion of young adults in the jury selection process. This interest produced an amendment to the Federal Jury Selection and Service Act\(^5\) which lowered the age restriction to eighteen for federal criminal prosecutions. In turn, many states amended their jury qualification provisions to include eighteen to twenty-one year olds within their jury pools. Nevertheless, nearly three years after this trend began, a number of states still reject the notion that their minimum age qualifications fail to include an important segment of the community in the jury selection process. Even the states whose legislatures amended their juror qualification statutes to include eighteen to twenty-one year olds exhibit a reluctance to include that group within the actual jury panel. While inclusion theoretically exists in these states, purposeful exclusion may still occur through a lax implementation of the jury selection laws. If a jury panel must resemble a representative cross-section of the community in order to achieve impartiality, any divergence from that compos-

\(^1\) U.S. Const. amend. VI states in pertinent part:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. Until 1968, the sixth amendment only applied to federal criminal prosecutions. Then in Duncan v. Louisiana, 391 U.S. 145 (1968) the Court stated:
Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.


\(^3\) The most recent demonstration of this pattern redefinition in accordance with popular pressure relates to the inclusion of women within the jury process. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975).

\(^4\) U.S. Const. amend. XXVI states in pertinent part:
Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

\(^5\) 28 U.S.C. § 1865(b) (Supp. II, 1972) provides: In making such determination [of whether a person is qualified for jury service] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand or petit juries in the district unless he (1) is not a citizen of the United States 18 years old...
tion poses a threat to the rights and interests secured by the sixth amendment.

This comment will examine the current legislative and judicial attitudes toward the inclusion of young adults in the jury process and will evaluate the impact of those attitudes on the criminal defendant's right to an impartial jury. Consideration of the meaning of representative cross-section, in light of its case-by-case construction, necessarily precedes these points. A study of the development of the cross-section requirement will demonstrate the need to include young adults in order to achieve jury impartiality.

**DEFinIng THE CROSS-SECTION**

For over 150 years the courts regarded the sixth amendment guarantee of an impartial jury as the right to an unbiased jury. The realization that no jury selection process could achieve that ideal standard resulted in the acceptance of a more practical definition of "impartiality." In 1940, the Supreme Court stated in *Smith v. Texas*:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For . . . discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Rather than seeking a jury panel untainted by bias, the new approach attempted to blend the community biases so as to cancel out their individual effects. Shortly thereafter the Court in *Glasser v. United States* employed an example of cross-section:

![Cross-section example](image)

A cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is . . . a democratic institution, representative of all qualified classes of people.

pression which has since become the standard against which courts evaluate the constitutionality of jury selection processes. Referring to a federal jury statute, the Court deemed it reflective of a plan to make the jury "a cross-section of the community and truly representative of it".

As the litigation following these early jury selection cases indicates, much confusion existed concerning the "cross-section" requirement imposed by the Court. In cases then and now, courts have explained that not every jury must contain representatives of every group in the community, for this would require a jury of far more than twelve persons. The standard merely gives recognition to the fact that those eligible for jury service are to be found in every stratum of society.

To achieve impartiality, the process of selection must function without the "systematic and intentional exclusion" of any racial, economic or social group, for such exclusion would result in injury not limited to the defendant; there is injury to the jury system, to the law as an institution.

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7 311 U.S. 128, 130 (1940).

8 See Comment, The Jury: A Reflection of the Prejudices of the Community, 20 Hastings L.J. 1417 (1969). This article discusses the need for change in jury selection in order to achieve a balance of prejudices existing within the community. In addition, it suggests several possible remedies including federal legislation pertaining to state jury selection, proportional representation, statistical population analysis, and elimination of some bases for exemptions and excusals.

9 315 U.S. 60 (1942).

10 *Id.* at 86. The Court prefaced this phrase by stating: Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government.


12 *See* Taylor v. Louisiana, 419 U.S. 522 (1975) in which the Court asserted that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect various distinctive groups in the population.

13 *Id.* at 538.

14 Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). Cf. Fay v. New York, 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting) where it was stated: [A] cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is . . . a democratic institution, representative of all qualified classes of people.
to the community at large and to the democratic ideals reflected in the processes of our courts.\textsuperscript{15}

While these decisions clarified the initial problems of interpretation of “a truly representative cross-section,” they left unsolved the matters of what constitutes “systematic exclusion” and where the burden of proof falls in cases involving such flaws in the jury process. One of the first Supreme Court cases to confront these issues, \textit{Fay v. New York},\textsuperscript{16} involved the constitutionality of a “blue ribbon jury panel.”\textsuperscript{17} The Court declared that

a mere showing that a class was not represented in a particular jury was not enough; there must be a clear showing that its absence was caused by discrimination; and in nearly all cases, it has been shown to persist over many years.\textsuperscript{18}

Regarding proof of the existence of exclusionary practices, the Court held that the burden fell upon the petitioner.\textsuperscript{19} Here the petitioner failed to establish that the use of the blue ribbon jury panel had resulted in discrimination. The Court thus rejected the notion that the absence of any particular group from the jury panel constituted a violation of the fourteenth amendment, and deemed the New York practice of selection of blue ribbon jurors constitutional.\textsuperscript{20}

In 1954 the Supreme Court again considered the question of what constitutes systematic exclusion in \textit{Hernandez v. Texas}.\textsuperscript{21} The petitioner here, a man of Mexican descent, alleged purposeful exclusion of persons of such origin from jury service.\textsuperscript{22} While most cases to that time concerned exclusion on the basis of either race\textsuperscript{23} or sex,\textsuperscript{24} the Court conceded that local prejudices clearly extended to other groups defined as such by community norms. The Court stated:

When the existence of such a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.\textsuperscript{25}

Thus, in \textit{Hernandez} the court defined systematic exclusion as the arbitrary exclusion of a distinct class of persons by a means unjustifiable under the provisions of the Constitution.\textsuperscript{26}


\textsuperscript{17} Blue ribbon jury panels consist of jurors specifically selected from the general jury panel by the county clerk. Each prospective blue ribbon juror receives a subpoena to enter a personal appearance and testify under oath as to his qualifications and fitness. The standards prescribed for this panel are far more restrictive than those applicable to general jury panels and make ineligible those who: (1) have been disqualified or exmempted from general service; (2) have been convicted of a criminal offense or fraud in a civil court; (3) possess an opinion regarding the death penalty that would preclude their finding the defendant guilty where the punishment was death; and (4) doubt their ability to disregard prejudices, either personal or created by publicity, in rendering an opinion of the defendant’s guilt. Blue ribbon juries are part of the “regular trial machinery” in heavily populated jurisdictions of New York, and are used in those cases where the court upon motion of either party determines the need for the special jury. Id. at 267–68.

\textsuperscript{18} Id. at 264.

\textsuperscript{19} Id.

\textsuperscript{20} The Court justified its decision in upholding the “blue ribbon jury” practice as an act of judicial self-restraint in the absence of federal legislation standardizing judicial administration in the states. The majority suggested that interference by the Court in state jury practices would result in stagnation of the states’ experimentation with new techniques in jury selection. Id. at 295. However, Justice Murphy rejected this reasoning, stating that the Court should interfere when a state employs a practice which systematically excludes certain classes of persons deemed qualified for general jury panels. Id. at 297 (Murphy, J., dissenting).

\textsuperscript{21} 347 U.S. 475 (1954).

\textsuperscript{22} Petitioner established that within Jackson County, Texas, approximately 14 per cent of the 13,000 residents had Mexican or Latin American surnames. The parties stipulated that “for the past 25 years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.” Id. at 480–81.

\textsuperscript{23} See, e.g., Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 587 (1934).

\textsuperscript{24} See, e.g., Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942).


\textsuperscript{26} The Court in Hoyt v. Florida, 368 U.S. 57 (1961), expanded this point by stating that where an alleged systematic exclusion is accomplished through a statutory exemption, the fundamental questions to be considered are whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation. Id. at 61. These two cases give rise to the inference that any exclusion, whether by statutory
Elaborating on the holding in *Fay v. New York*, the Court held that the petitioner had the initial burden of proving that persons of Mexican descent formed a "separate class" within the community. It suggested that the petitioner could establish that point by showing the "attitudes of the community," thereby implicitly requiring a subjective factual analysis. The next step in the case depended upon the petitioner's ability to demonstrate the discriminatory nature of the jury selection process. To accomplish that task, the Court suggested a comparison of the percentage of members of the alleged excluded class in the community population with the percentage of that class within the actual jury pool. Where the proportions proved to be unusually disparate and thus incompatible with the "representative cross-section" requirement, the burden would presumably shift to the government to prove the existence of a reasonable basis for such practice. Nevertheless, the Court's proposals created problems in defining the identity of groups within the cross-section.

In *Hernandez* and later cases, the decisions of the Court complicated rather than clarified the issue. Moreover, the new decisions did little more than reiterate the broad solutions provided in the earlier cases. The vague standard for determining impartiality of a jury remained unaltered from its 1942 form. As the Court recently noted in *Taylor v. Louisiana*:

The unmistakable import of this Court's opinions . . . is that the selection of a petit jury from a 'representative cross-section of the community' is an essential component of the Sixth Amendment right to a jury trial.

Furthermore, the Court pointed out that Congress also adhered to this standard in the Declaration of policy in the Federal Jury Selection and Service Act. Yet, despite the wide acceptance of the standard, application of the cross-section requirement has proved far more difficult than the simple expression indicates. The major source of this difficulty inheres in the resistance of the term to any precise definition, since every community has a distinct composition.

In the absence of an exact definition, the threat of spurious challenges to jury selection processes compelled the Court to impose a policy that only "systematic and intentional exclusion" will be deemed unconstitutional. However, this expression has also defied restrictive definition and has therefore resulted in considerable controversy. For instance, the right of

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27 332 U.S. at 284.
28 See note 22 supra.
30 Id.
31 While the Court in *Hernandez* offered statistical comparison as a logical means for examination of the representative nature of a jury selection process, it later rejected reliance on proportional representation alone in achieving the cross-section standard. See *Hoyt v. Florida*, 368 U.S. 57 (1961) in which the Court stated that disproportion . . . on the list independently carries no constitutional significance. In the administration of the jury laws proportional representation is not a constitutionally required factor.
32 Id. at 69. See also *Swain v. Alabama*, 380 U.S. 202 (1965).
33 The decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968) further complicated matters because the Court applied the sixth amendment to state action.
34 See Comment, "Jury Mandering": Federal Jury Selection and the Generation Gap, 59 IOWA L. REV. 401, 403 (1973) [hereinafter cited as *Jury Mandering*]. This article focused on the possibility of the existence of a constitutional right of young adults to participate in federal juries.
35 An early use of this phrase in connection with jury selection appears in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). The Court recognized that complete representation of every group in the community was an impossibility and therefore an unreasonable interpretation of the cross-section requirement. The Court preferred a construction of the standard for impartial juries as one by which prospective jurors would be selected by court officials "without systematic and intentional exclusion" of any identifiable groups.
states to impose statutory qualifications for jurors has come under attack where qualifications such as a minimum age for jurors allegedly result in unreasonable exclusion of otherwise qualified jurors. There is furthermore the problem of sufficiency of proof where the process allegedly constitutes systematic exclusion, in light of the Court's reliance upon a two-factor test including both objective statistical and subjective factual analyses.

Finally, the "cross-section" requirement as it relates to the "systematic exclusion" rule presents the problem of determining the existence of an "identifiable group." Prohibitions have been imposed thus far upon discrimination against groups identifiable on the basis of sex, race, color, national origin, religion and economic status. However, the inclusion of race and sex within this list during the past century makes the exclusiveness of even the present categories doubtful.

The guarantee of an impartial jury, representative of the community attitude, depends upon recognition of the existence of all groups competent to evaluate the defendant's rights. This factor therefore constitutes the basis for the inclusion of any class within the cross-section for jury service.

Young Adults as a Cognizable Group

Determination of whether eighteen to twenty-one year olds should be considered an essential element of a fair and impartial jury depends upon their existence as a cognizable group within the community. Two factors support the contention that young adults do constitute a definite and essential part of the social structure: an objective analysis of the American population and consideration of congressional legislation during the early 1970's. In contrast, judicial attitudes with few exceptions represent the viewpoint that eighteen to twenty-one year olds do not exist as an identifiable group within the American community. Consideration of the validity of each position resolves the dichotomy in favor of the acceptance of young adults as a necessary part of the impartial jury.

First, an objective examination of the American population reveals that it includes twelve million citizens between the ages of eighteen to twenty-one. This figure represents 5.5 per cent of the total population. Approximately 79 per cent have graduated from high school, and of this age group nearly half of those graduates are enrolled in college. Furthermore, many of the twelve million young adults participate in the civilian or military labor force. They are subject to governmental taxes and to social security payments. Since 1972 the eighteen to twenty-one year olds have been eligible to vote in both state and national elections under the twenty-sixth amendment.

Second, judicial attitudes with few exceptions represent the viewpoint that eighteen to twenty-one year olds should be considered an essential part of the criminal laws of state and federal governments.


The Court prescribed the use of both objective statistical reports and subjective factual material in Alexander v. Louisiana, 405 U.S. 625 (1972). Cf. note 30 supra.

Cf. Peters v. Kiff, 407 U.S. 493 (1972) in which the Court stated that the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues and particular cases.

ID. at 498. Despite this insight, the Court fails to explain the nature of class identification.


BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES: 1973 at 32.


See Excluding Young People, supra note 38, at 131-32.
constitute a definite part of social, political and economic life.

Second, recent congressional legislation reinforces this objective analysis by accepting the role of young adults in the community. In the areas of voting rights and federal jury service, Congress reacted to public pressure during the early 1970's and lowered the minimum age requirements to eighteen. The Senate judiciary subcommittee hearings on lowering the voting age\textsuperscript{45} considered whether young adults in the social structure have a discernible identity. According to the report submitted by the National Committee on Causes and Prevention of Violence,\textsuperscript{46} the youth of today are distinct from any prior generation of youth in that they possess greater knowledge and perspective. The report attributed these characteristics to the availability of higher education for more young adults and to the development of mass media and scientific technology. The testimony of Senators Birch Bayh of Indiana,\textsuperscript{47} Edward Kennedy of Massachusetts,\textsuperscript{48} and Joseph Tydings of Maryland\textsuperscript{49} pointed to the parallel expansion of the adult responsibilities of eighteen to twenty-one year olds. To illustrate this view, the Senators cited military and civil service, responsibility under criminal and civil laws, and tax accountability. Their testimony suggested that depriving the same group of young adults of the rights extended to persons over twenty-one has created an anomalous situation for eighteen to twenty-one year olds. Society's failure to accept their maturity in matters of political responsibility is incongruous with the recognition of their ability to defend their country and of an adult responsibility for their actions under the law. One commentary\textsuperscript{50} submitted to the Senate subcommittee proposed that this tension existing between the social and political responsibilities of young adults could be relieved by extending the rights of inheritance, voting, and jury service to eighteen to twenty-one year olds. In complying with that suggestion by lowering minimum age restrictions for voting and federal jury service, Congress implicitly accepted the existence of a qualified, yet previously excluded, group of young citizens.

Notwithstanding these factors giving recognition to young adults as an identifiable group within the community, courts with few exceptions have rejected the notion of such a group. Jury impartiality which the Constitution requires demands that the selection processes include discernible groups of competent citizens. As the Court stated in Peters v. Kiff:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.\textsuperscript{51}

Beyond the general statement, however, the Supreme Court cases fail to enunciate any standard for the establishment of group identity. Thus it remains the task of the lower courts to establish their own criteria. Where the problem arises with reference to young adults, the courts have applied tests which are unsuitable in light of the actual justification for including eighteen to twenty-one year olds in the jury panel.

The most restrictive approach yet taken is that set forth in United States v. Guzman,\textsuperscript{52} a federal district court case, and later employed in other federal and state cases. This test sets up three factors upon which the determination of the existence of a cognizable group will depend. First, the court must find that the "group" has a definite composition which distinguishes its members. Second, this group

\textsuperscript{45} Hearings on Lowering the Voting Age to 18 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 90th Cong. 2d Sess. 1 (1968) [hereinafter cited as Senate Hearings (1968)]; Senate Hearings (1970), supra note 43.

\textsuperscript{46} Senate Hearings (1970), supra note 43, at 315, 316.

\textsuperscript{47} Senate Hearings (1968), supra note 45, at 3, 4. 48 Senate Hearings (1970), supra note 43, at 161.

\textsuperscript{49} Senate Hearings (1968), supra note 45, at 9.

\textsuperscript{50} Comment, Right to Vote at 18, 6 Trial 46, 47 (1970), included in Senate Hearings (1970), supra note 43, at 427.

\textsuperscript{51} 407 U.S. 493, 503 (1972).

must be cohesive, possessing a basic similarity of attitudes, ideas, and experience which ties the members together and which would not be adequately represented by a jury from which this group were excluded. Finally, there must be a possibility that exclusion would result in a bias against the interests of the group. Under this test, the claim that eighteen to twenty-one year olds constitute a cognizable group has generally failed. In Guzman, for instance, the court held that no factor other than age defined the group. Furthermore, since its membership was in a constant flux, the court found it impossible to discern any definite composition. As a consequence, the district court found that no identifiable class existed.  

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Other courts, however, have rejected the position taken in Guzman. In United States v. Butera, the First Circuit admitted the difficulty of defining a precise group. Furthermore, it insisted that too much precision would introduce unnecessary and unrealistic inflexibility and might effectively preclude anyone from ever showing a distinct class [in terms of age].

In Butera, the court implicitly rejected a test that existed.  

At least this part of the Guzman test has been adopted elsewhere. See, e.g., Adams v. Superior Court, 12 Cal. 3d 55, 524 P.2d 375, 379, 115 Cal. Rptr. 247, 250 (Sup.Ct. 1974) in which the court held:

While exclusion of other groups [beyond racial, sexual, political, economic, social, religious and geographical groups] might also be improper, it is apparent that, before exclusion may be held improper, there must be a common thread running through the excluded group—a basic similarity of attitudes, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community. (Emphasis added)

Whether the court accepted the other facets of the Guzman test is unclear from the opinion. See also People v. Veralli, 64 Misc. 2d 321, 314 N.Y.S.2d 723 (1970).

See United States v. Olsen, 473 F.2d 686 (8th Cir.), cert. denied, 412 U.S. 905 (1973); United States v. Ross, 468 F.2d 1213 (9th Cir. 1972), cert. denied, 410 U.S. 899 (1973); cf. Chase v. United States, 468 F.2d 141 (7th Cir. 1972). In the last of these cases, Chase, the court observed that the enumeration of prohibited bases of discrimination failed to include any reference to age groups in 28 U.S.C. § 1862 (1972). Id. at 146.


420 F.2d 564 (1st Cir. 1970).

Id. at 571.

as stringent as that employed later in Guzman. Instead of the three-fold test, this court concluded that common experience alone sufficed to establish variations in attitudes based on age differences and thus provided a basis upon which the court could conclude that young adults constitute a cognizable though admittedly ill-defined group for the purposes of the defendant's prima facie case.

To deny such group's existence would be to ignore the contemporary national preoccupation with a 'generation gap' which creates the impression that the attitudes of young adults are in some sense distinct from older adults.

Although this case arose during a time when discussion of a generation gap was prominent in national news, the bases for such a gap still pervade American society. Young adults continue to occupy an unique economic, social and philosophical position in society. Thus the treatment in Butera of youth as an identifiable group finds justification today just as it did in 1968. Moreover, the fact that the group recognized in Butera ranged in age from twenty-one to twenty-nine does not lessen the significance of the case. While clearly in the minority, Butera represents a judicial awareness of the distinctive characteristics of young adults. Since the court decided Butera, other state and federal courts who are unwilling to preclude young adults from jury service solely on the basis of a narrow definition of group identity, have recognized the existence of a group of

Id. at 570.

Id. The court's view that young adults possess attitudes different from those of their elders finds support in sociological studies of youth. See, e.g., K. Keniston, Young Radicals (1968); K. Keniston, The Uncommitted (1965).

The breadth between the upper and lower age limits of the 'young adult' group provided a basis of distinction between this case and a later one. See United States v. Guzman, 337 F. Supp. 140, 145 (S.D.N.Y. 1970). Furthermore, the group in Butera failed to encompass eighteen to twenty year olds. This factor arguably makes the application of Butera to the group of eighteen to twenty-one year olds even more tenuous. However, Butera arose prior to the period when the campaign for the rights of young adults gained momentum. One may speculate that, had the court decided Butera in the 1970's, the First Circuit would have included eighteen to twenty year olds in the category.
young adults in order to reach the issue of discrimination.\footnote{See text accompanying notes 52-54 supra.}

As present case laws reflects, the reluctance of most courts to admit the presence of a cognizable class of eighteen to twenty-one year olds within the American community stems from an unsatisfactory, rigid definition of a group.\footnote{See also White v. Georgia, 414 U.S. 886 (1973) (Brennan, J., dissenting).} Yet the approach taken in determining the existence of a group of young adults is far more restrictive than any test applied where other alleged groups have been considered for jury service purposes. For example, a series of cases culminating in Taylor v. Louisiana\footnote{Taylor v. Louisiana, 419 U.S. 522 (1975).} gave recognition to the existence of women as a group for jury purposes without demanding that the petitioner demonstrate cohesion within that group. Rejecting the view that an all-male jury would be as representative as one including women, the Court in Taylor admitted that neither sex acted as a class when participating in jury duties. However, the inclusion of both sexes is essential due to the “subtle interplay of influence one on the other.”\footnote{White v. Georgia, 414 U.S. 886 (1973).} It can be argued likewise that while young adults as jurors do not necessarily act as a group, their presence may have a definite influence on the jury de-

\footnote{On the federal level see Hamling v. United States, 418 U.S. 87 (1974) in which the Court was willing to assume that such a group existed in order to reach the narrower issue of discrimination. See also White v. Georgia, 414 U.S. 886 (1973) (Brennan, J., dissenting).}


Within these guidelines then, it is necessary to review the proof this defendant introduced in his challenge to this array. Id. at 473, 168 N.W.2d at 578 (emphasis added).

Even where the courts as in Holmstrom have been willing to recognize or assume a cognizable group of young adults, they have found no instances of systematic exclusion. Thus the restrictive interpretation of an identifiable group is not, in itself, the determinative factor in the exclusion of young adults from juries.

EXCLUSION FROM THE CROSS-SECTION

Assuming that a cognizable group of young adults does exist with the American community, the next issue is whether such group has been wrongfully excluded from the “representative cross-section of the community,” the jury panel. Claims of exclusion of eighteen to twenty-one year olds have arisen in two distinct situations. First, the absence of young adults from the jury selection process may stem from the statutory imposition of minimum age qualifications. Second, the alleged exclusion may result from a latent discriminatory application of jury selection procedures. Although the end products of both processes are identical, the analysis of their development and possible effects and remedies requires separate treatment.

Uniform State Laws approved a Uniform Jury Selection and Service Act\textsuperscript{67} resembling the federal legislation and submitted it to the states for their consideration. This act also set the proposed age qualification at twenty-one.\textsuperscript{68}

This nearly universal acceptance of twenty-one as the minimum age for qualified jurors was founded upon two factors. To begin with, the age of twenty-one had long represented the age of maturity in Anglo-American society\textsuperscript{69} and thus became the age at which citizens were competent to serve as jurors.\textsuperscript{70} In George v. United States,\textsuperscript{71} the Ninth Circuit stated:

\begin{quote}
[M]aturity as a disqualification for participation in certain types of employment and the performance of certain public or social functions is recognized in the law of U.S.\textsuperscript{72}
\end{quote}

Rejecting the argument that the statute wrongfully excluded minors from jury service, the court held that

as to adults, minors would represent not a part of the cross-section of the community, but a wholly foreign group unrelated to the adult stream which dominates American life.\textsuperscript{73}

\textsuperscript{67} See Uniform Jury Selection and Service Act, 8 HARV. J. LEGIS. 280 (1971). The Commissioners suggested that while the states have a right to prescribe restrictions upon juror eligibility, they are bound to observe the uniform standard imposed by the fourteenth amendment due process clause. The Conference offered this model act as a means of achieving consistency in the states' interpretations of due process as it relates to state jury selection. However, only a handful of states, including Maryland, Maine, Michigan and North Carolina, have enacted the model provision.

\textsuperscript{68} Id. at 300.

\textsuperscript{69} See James, The Age of Majority, 4 AM. J. LEGAL HIST. 22 (1960) in which the author traces the history of the designation of twenty-one as the age of majority. He concludes that age was adopted as such during the mid-thirteenth century when the age for knighthood was raised from fifteen to twenty-one. Mr. James attributed this change in the minimum age for knighthood, not to any recognition of increased maturity or competency, but to the increased weight of armor and need for extra training in combat skills and chivalry. This age was then carried over into the common law.

\textsuperscript{70} Deputy U.S. Attorney General Richard Kleindienst observed during his testimony before the Senate subcommittee hearing that in England, where twenty-one was first recognized as the age of maturity, Parliament lowered "the age of full legal capacity" to eighteen, effective January 1, 1970. Moreover, this act also set the minimum age for jury service in England. Senate Hearing (1970), supra note 43, at 78.

\textsuperscript{71} George v. United States, 196 F.2d 445, 452 (9th Cir. 1952).

\textsuperscript{72} Id. at 454. This case arose out of an alleged violation of the Selective Service Act of 1948, 50 U.S.C.A. appendix §§ 453, 456(1), 462 (1948), by a person under twenty-one years old. 396 U.S. 320, 332 (1970). This case is the first affirmative relief case in the area of jury selection. The petitioner was not a criminal defendant seeking to challenge the composition of the jury which convicted him. Instead the case was brought as a class action by Negroes in the Greene County vicinity who charged local jury officials with discriminatory exclusion. Justice Jackson suggested such an action as a means of attacking state jury selection in Cassell v. Texas, 339 U.S. 282, 298 (1949) (Jackson, J., dissenting).

\textsuperscript{73} 436 F.2d 1120, 1122 (5th Cir.), cert. denied, 404 U.S. 822 (1971). This case was an appeal from a conviction of unlawful possession and sale of a hallucinogenic drug STP. The petitioner was under twenty-one years of age, whereas the jury which convicted him was drawn from a pool excluding persons under twenty-one. The Fifth Circuit held that the statutory exclusion of persons under twenty-one years old did not deprive petitioner of his rights under the fifth and sixth amendments.

The Ninth Circuit decided this case in 1952; courts in more recent cases have dealt with the minimum age requirement of twenty-one merely as a matter of legislative discretion. This change in position perhaps stems from the parallel change in attitudes towards twenty-one as the age of maturity. Eighteen to twenty-one year olds no longer represent a "wholly foreign" entity, but have come to be viewed as a part of adult society with attendant responsibilities and obligations.

In addition, the present view arises from the judicial acceptance of the legislatures' right to impose certain criteria for jury selection purposes. With regard to state jury selection, for example, the Supreme Court held in Carter v. Jury Commissioner:

The states remain free to confine the [jury] selection to citizens, to persons meeting specified qualifications of age and educational attainment and to those possessing good intelligence, sound judgment and fair character.\textsuperscript{74}

On the federal level, the Fifth Circuit asserted in United States v. McVern that

it has never been thought that federal juries must be drawn from a cross-section of the total population without the imposition of any qualification.\textsuperscript{75}

The courts repeatedly upheld the statutory disqualification of eighteen to twenty-one year olds as within the legislative prerogative.
A second ground for excluding that age group from jury service lay in the parallel disqualification of eighteen to twenty-one year olds for other purposes such as voting in national and state elections. However, the minimum age qualification for voting historically derived from the concept that twenty-one was the age of majority. As the ratification of the twenty-sixth amendment indicates, there was no longer any viable foundation for the twenty-one year old age of majority by 1972. The Senate hearings which considered proposals for that amendment illustrate this point. Senator Bayh, for instance, suggested that it would be

in keeping with the tradition of expansion of the franchise, as well as recognition of the greater role played by American youth in our lives today, that we should now allow the Constitution to reflect what has already become a fact of life in our land: that our young people today are well-bred, well-educated and extremely well aware of the position and needs of our Nation, and that they should now be permitted to participate in the building of our Nation through the most valuable American right, the right to vote.76

Similarly, Senator Tydings stated that any regard for the age of twenty-one as the traditional age of maturity should not remain "sacred or immutable."

Whatever justification existed for imposing 21 as the minimum age a century ago, however, the fact is that today's American young people are achieving physical, emotional, and mental maturity at an earlier age than ever before. While the traditional 21 year old voting age has remained unchanged, the character of our population has changed drastically, especially with regard to the education, maturity and responsibilities assumed by our young people.76

In 1972 Congress and the ratifying states finally recognized as anachronistic the practice of restricting voting rights to citizens at least twenty-one years old. They thus lowered the minimum age to eighteen for state and national elections.77

Loss of the voting age justification for the minimum age requirement for jury service resulted in immediate attacks upon the jury selection processes of state and federal jurisdictions. In Guzman, the petitioners alleged that the right to serve on juries was analogous to the right to vote, and that, as fundamental rights, neither could be denied without a compelling governmental interest.78 Therefore, statutory exclusion of eighteen to twenty-one year olds under the Federal Jury Selection and Service Act violated the Constitution.

The court disagreed, finding no justification for equating the two.79 The court argued that while voting enables the voter to express his personal beliefs and interests, jury service necessitates the juror's acceptance and application of the law as the judge instructs. The court then stated that the latter act demands a greater maturity and understanding than voting. Furthermore, while voting is a fundamental right, the court held that sitting in judgment of another is not a right, but a duty imposed on those selected. However, the right more properly at issue in jury selection cases is the right of the defendant to an impartial jury, in which case the statutory exclusion of young adults does jeopardize a fundamental right of the criminal defendant. Congress presumably considered this factor in 1972 when it amended the Federal Jury Selection and Service Act to include eighteen to twenty-one year olds within the federal jury process.80

On the state level the twenty-sixth amendment has had varying effects upon jury selection processes.81 In those states where juror

77 Id.
80 See note 5 supra.
A.B.A.J. 695, 697 (1972) in which Judge Kaufman viating the need for a specific age provision.

He noted, furthermore, that some states' attorneys general had ruled that eighteen year olds would be automatically eligible, even in the absence of specific statutory provision.

These states may eventually follow the example set by other states and relax their jury qualifications. Until they take this step, however, the jury panels within these states arguably violate the cross-section requirement for impartial juries. Undeniably, the same conditions which led other jurisdictions to recognize the need for young adult jurors exist in these states: voting age, criminal responsibility, eligibility for military and civil service among others. Moreover, acceptance by some states of the ability of eighteen to twenty-one year olds to act as responsible jurors and denial of the same fact in other states constitutes an unjustifiable inconsistency. The states frequently cite Carter v. Jury Commissioners as determinative of the states' right to prescribe relevant qualifications for potential jurors and thus to resist pressures directed at changing the mini-


Some states altered their requirements to co-incide with those for voting qualification, thus obviating the need for a specific age provision.

It is likely that the consideration that moved state legislatures rapidly to adopt the lower voting age amendment most likely will move them to lower the age for jury duty as well. The trend toward lower age for state jury eligibility is already apparent.

He noted, furthermore, that some states' attorneys general had ruled that eighteen year olds would be automatically eligible, even in the absence of specific statutory provision.

See People v. Scott, 17 Ill. App. 3d 1026, 309 N.E.2d 257 (1974); State v. Silva, 259 So. 2d 153 (Fla. 1972). In the former case, the Illinois Appellate Court held that the twenty-sixth amendment did not implicitly repeal the minimum age requirement of twenty-one for jury service, nor was it inconsistent or irreconcilable with the higher minimum age.

Those states are Alabama, Alaska, Colorado, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, Rhode Island, South Carolina and Utah. See note 81 supra.

366 U.S. 320 (1970). The Court stated: Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise ... That kind of discrimination contravenes the very idea of a jury—a body truly representative of the community," composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellow associates, persons having the same legal status in society as that which he holds. Strauder v. West Virginia, 100 U.S. 303, 308 (1879). (Emphasis added).

ld. at 330. Arguably, the cross-section should include young adults because they have the same legal status as persons over twenty-one. Their exclusion from jury service contravenes the principle of trial by one's peers for those criminal defendants under twenty-one.
mum age. In the *Carter* decision, however, the Court held that the states' discretion must be restricted where it jeopardizes the cross-section requirement.

Another case, *San Antonio Independent School District v. Rodriguez*, provides an appropriate test of propriety for state laws. The Court held that a standard of "strict judicial scrutiny" applies wherever the laws of a state operate to the disadvantage of a suspect class of individuals or interfere with the exercise of fundamental rights, either explicitly or implicitly guaranteed by the Constitution. In the present situation, the courts should follow the same judicial standard to determine the constitutionality of laws excluding eighteen to twenty-one year olds from jury service in light of the equal protection clause of the fourteenth amendment. The fundamental right at stake, that of the criminal defendant to have an impartial jury, demands this precaution.

Such careful scrutiny should also extend into those jurisdictions where the exclusion of young adults occurs because of a latent discriminatory application of jury selection procedures. In such cases, the legislatures have reformed the minimum age qualifications for jury service, but the jury selection processes in practice continue to exclude eighteen to twenty-one year olds. Implementation of the amended laws necessitates a revamping of the lists from which the panels are drawn and perhaps a resort to additional lists if the original fails to include the new group of eligible jurors. The tediousness and time-consuming aspects of this adjustment often result in a general reluctance to begin the process until a change in law requires new juror lists.

Courts such as the Fourth Circuit in *United States v. DiTommaso* have actually supported such activity by jury selection officials. In that case, for instance, the criminal defendant demonstrated a disparity in the number of young adults on the jury panel as compared to the number of such young adults in the community. The court took judicial notice of the likelihood that young adults, having greater mobility than the average of the population, persons in military service, and young women with small children and the responsibility of caring for them, would be more likely than older adults having a relatively fixed abode, not in military service and having grown families, to be unresponsive to jury questionnaires. The court thus dismissed the possibility of a flaw in the system itself.

In other cases, the courts also have refused to recognize actions as resulting in impermissible exclusion. In order to show a violation of the sixth or fourteenth amendment, the claimant must show that exclusion from the cross-section was systematic and intentional. *Hamling v. United States*, a recent Supreme Court case, upheld the Ninth Circuit finding that petitioners had failed to establish a purposeful systematic exclusion of the members of that class [eighteen to twenty-one year olds] whose names, but for such systematic exclusion, would otherwise be selected for the master jury wheel.

In this case, the master jury wheel from which federal jury panels were selected had not been refilled for nearly four years. Because eligibility at the last refilling had been restricted to citizens twenty-one and over, the youngest juror in the master jury wheel at the time of petitioner's trial in 1972 was twenty-four. The Court deemed this exclusion of eighteen to twenty-four year olds an unavoidable consequence of judicial administration, rather than a systematic exclusion. Yet it left unanswered the fundamental question of whether a court may correctly subordinate the right of the criminal defendant to an impartial jury to such an exaggerated form of administrative convenience.

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88 Id. at 3.
90 Id. at 389.
91 See generally Twelve Good Persons, supra note 37, at 573, 584-87.
93 Id. at 138. The court stated: Congress could reasonably adopt procedures which, while designed to assure that 'an impartial jury is drawn from a cross-section of the community,' *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, at the same time take into account practical problems in judicial administration.
94 See Taylor v. Louisiana, 419 U.S. 522, 535 (1975), in which the Court criticized the state's
United States v. Guzman demonstrates another technique by which the courts have avoided the issue of exclusion of young adults from jury panels. In that case, the court stated that where a particular group is under-represented in the source of the jury panel names, the court will infer intentional or systematic exclusion.\textsuperscript{95} The test of under-representation, as set forth in United States v. Butera, consists of comparing the percentage of representation of the group in the source list with the percentage of the group in the total population. Where the percentage in the latter category exceeds that of the former, the Butera court suggested that such disparity constitutes an inference of discrimination necessitating correction.\textsuperscript{96} The court in Guzman stated that the failure of the Butera court to establish precise limits for permissible disparities in percentage made such a test impracticable. Thus the Guzman court refused to infer from the facts of the case that the jury selection process constituted prohibited discrimination against any group.\textsuperscript{97}

As the minority opinion states in White v. Georgia, statistical disproportions in jury panel analyses deserve more weight than they have received thus far.\textsuperscript{98} The petitioners in that case claimed that the state jury selection process discriminated against young adults in violation of their fourteenth amendment rights. The Court dismissed the case for lack of a substantive federal question,\textsuperscript{99} thus avoiding the issue of whether statistically disproportionate under-representation of cognizable groups in the state jury pool would constitute a prima facie case of discrimination. In their dissenting opinion, however, Justices Brennan, Douglas, and Marshall found clear evidence of under-representation of eighteen to thirty year olds in the statistics offered by petitioners. Although 26.2 per cent of the community were eligible young adults in this age category, only 3.0 per cent of the petit jury pool and 1.25 per cent of the grand jury pool were within that age group. The under-representation amounted to 95.2 per cent in the grand and 88.2 per cent in the petit jury pools. While noting that there is no constitutional right to mathematically proportional representation on jury panels, the minority stated that the selection procedure must provide "a fair possibility for obtaining a representative cross-section."\textsuperscript{100} The dissenters questioned whether the principle of Alexander v. Louisiana\textsuperscript{101} should apply whenever any large identifiable segment of the community is arbitrarily or discriminatorily under-represented on a jury panel.

Alexander v. Louisiana concerned an allegation that the grand jury indictment was invalid because it was returned by a grand jury selected from an unrepresentative panel. The selection process required potential jurors to fill out questionnaires regarding their qualifications, and included a question about the race of the applicant. Relying upon a combination of statistical and factual considerations, the Court found that defendants had established a prima facie case of discriminatory jury selection. Moreover, the Court held that the process resulted in the systematic exclusion of eligible black jurors in violation of the sixth amendment.\textsuperscript{102}

Following the Alexander formula, the first step in the defendant's case necessitates convincing the court of the existence of eighteen to twenty-one year olds as an identifiable segment of the community. While an examination of objective factors implicitly demonstrates this fact, a standard by which courts may directly determine the identity of that or other segments of the community remains a mystery. As

\textsuperscript{96} United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970).
\textsuperscript{98} 414 U.S. 886, 888 (1973) (Brennan, J., dissenting).
\textsuperscript{99} Id. at 886.
\textsuperscript{100} Id. at 889-90 (Brennan, J., dissenting).
\textsuperscript{101} 405 U.S. 625 (1972).
\textsuperscript{102} Id. at 630.
the discussion earlier suggested, the courts' reluctance thus far to recognize young adults as a part of the cross-section stems from a stringent definition of group status. In light of two current trends, however, a change to a more flexible approach in defining the cross-section appears likely.

First, the increase in responsibility extended to eighteen to twenty-one year olds during the past decade suggests a general movement toward acceptance of eighteen as the age of political and social maturity. As society has adopted that viewpoint, the state and federal governments have slowly begun to regard eighteen to twenty-one year olds as part of the cross-section for matters such as jury service. Public pressure will presumably compel those jurisdictions which still exclude young adults to follow the pattern.

The second trend indicative of future flexibility in defining the cross-section lies in the Supreme Court decisions concerning that cross-section. In *Hamling v. United States*, for example, the Court declared unconstitutional a special statutory exemption from jury service for women. It thus resolved a struggle which began when society treated women as an amorphous part of the community, much as the courts now regard eighteen to twenty-one year olds as part of the cross-section for matters such as jury service. Public pressure will presumably compel those jurisdictions which still exclude young adults to follow the pattern.

Under the second element of *Alexander*, the defendant must demonstrate the lack of current justification for the form of exclusion operating against young adults in the jury process. Where such exclusion arises from statutory minimum age provisions, the defendant may base his argument on *Carter v. Jury Commissioners*. Although the Court held in that case that the states possess an undeniable right to prescribe certain qualifications for their jurors, the states do not have unlimited powers of discretion. More specifically, the states do not have

the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute.\(^\text{104}\)

In establishing jury qualifications, the states' only legitimate objective is to obtain a panel of jurors competent to determine the criminal defendant's guilt or innocence.\(^\text{105}\) In light of the fact that society deems eighteen to twenty-one year olds competent to accept most other responsibilities, the continuation of a statute which excludes them from jury service bears no rational relationship to the states' objectives. Furthermore, as the Court stated in *Thiel v. Southern Pacific Co.*:

**[J]ury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.**\(^\text{106}\)

Jury selection should not exclude eighteen to twenty-one year olds on the basis of the hardship which jury duty causes for a few within that group, since the state and federal jury statutes make special provision for exemptions in the case of undue hardship or extreme inconvenience resulting from jury service. Finally, the process of voir dire enables the parties to eliminate any jurors, whether eighteen or fifty, whom they deem incompetent. Thus a statute which excludes young adults has no reasonable connection with the objective of se-

\(^{104}\) Reed v. Reed, 404 U.S. 71, 75-76 (1971). The Court in this case considered the application of the fourteenth amendment equal protection clause to state legislation which differentiated between the sexes in probate administration.

\(^{105}\) Williams v. Florida, 399 U.S. 78 (1970). The Court here recognized:

"The purpose of the jury trial . . . is to prevent oppression by the Government. Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard. . . ." *Duncan, supra*, at 156. Given this purpose, the essential feature of a jury obviously lies in the inter-position between the accused and the accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

lecting competent jurors and therefore prevents selection of an impartial jury by unreasonably excluding a part of the cross-section.

Exclusion during the implementation of jury selection laws allows the defendant to dispense with argument about the competency of young adults, since a statute already recognizes that fact. Instead, the defendant must demonstrate by factual and statistical analyses that the jury panel improperly omits representation of young adults as a segment of the community. Where the defendant establishes a blatant under-representation of young adults on the panel, the possibility of discrimination in the process then arises.

If the court accepted such analyses, the burden of proof would shift to the government to rebut the presumption of improper jury selection. The problems which would confront the government would arise not only from the fundamental nature of the right to an impartial jury, but also from the subtlety of the influence on a jury determination which any segment of the community may have. Furthermore, the government's rebuttal would require proof that the selection process did not jeopardize any of the rights and interests which jury impartiality protects. These rights and interests include the defendant's right to an impartial jury, the interests of those persons excluded under an outmoded jury selection provision or implementation of a reformed process, and the national or state interest in preserving a basic tenet of representative government—the cross-section standard for jury panels.\textsuperscript{108}

**Conclusion**

Under-representation or total exclusion of young adults constitutes a potential threat to the sixth amendment guarantee of jury impartiality. The fact that a young defendant may find himself confronted by a panel of jurors whose values, attitudes, experiences, and ages differ greatly from his poses a serious problem. To alleviate the possibility of bias against young defendants, jury selection processes should include in the panel persons of ages closer to those of young defendants.

An additional threat engendered by the exclusion of young adults from jury panels stems from the ambiguous matter in which the legal system and society treat young adults. This group bears more responsibility for the society in which it lives than any previous generation of young adults in this country; yet, its rights to participate in the functions of the government which controls its actions remain as limited as those of earlier generations. Such ambiguities only bely the tenets upon which this representative government operates. Thus inclusion of eighteen to twenty-one year olds would not only increase the probability of a truly impartial jury system, but would also encourage a deeper respect for the concepts of criminal justice.

\textsuperscript{107} Alexander v. Louisiana, 405 U.S. 625, 630 (1972).