Journal of Criminal Law and Criminology

Volume 62 | Issue 3 Article 2

1972

Student Comments

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 62, No. 3

Printed in U.S.A.

STUDENT COMMENTS

The following comments were written by students at Northwestern University School of Law. Contributors to the present issue are Alan D. Nesburg, William S. McKay, Jr., Donald M. Flayton, William H. Luking, John L. Ropiequet and George I. Gellman.

JUVENILE DUE PROCESS IN THE LOWER COURTS

The 1967 decision of the Supreme Court in *In re Gault*[1] marked the beginning of a new phase in the American experiment with juvenile courts.[2] The Court attempted to remedy the unfairness it perceived by applying fourteenth amendment due process standards to juvenile hearings. As a result, some of the unique procedural flexibility enjoyed by juvenile courts was circumscribed by the introduction of due process safeguards. While the *Gault* holding was carefully limited by the Court's opinion, subsequent decisions have gone beyond *Gault* and further limited the juvenile court's procedural freedom. This comment will examine some of those decisions and their implications for future extensions of procedural due process standards to juvenile proceedings.

TRADITIONAL PROCEDURAL FLEXIBILITY IN THE JUVENILE COURT

A fundamentally humanitarian impulse produced the juvenile court movement in the United States. At the turn of the twentieth century, civic-minded groups and individuals[3] sought to reform the usual practice whereby youthful offenders were tried and punished as adults.[4] Such treatment of juveniles often resulted in unnecessarily harsh punishment, undesirable confinement of children with adult criminals, and the lifelong stigma of a criminal conviction.[5] Reformers argued persuasively that children who had experienced a term in prison or jail were often lost to a life of crime. The fruition of the reform movement was the juvenile court, which was to function as a children's clinic rather than a criminal court.[6] In lieu of punishment, the juvenile court's proponents looked to

[1] 387 U.S. 1 (1967).

[2] It is generally recognized that the experiment began with the Illinois Juvenile Court Act, passed in 1899. *See, e.g.*, Abbott, *The History of The Juvenile Court Movement Throughout the World*, in THE CHILD, THE CLINIC AND THE COURT 267, 270 (1925).

[3] For a brief background of the reform movement, see Platt, *The Rise of the Child-Saving Movement*, in DELINQUENCY AND SOCIAL POLICY 15 (P. Lerman ed. 1970).

[4] The common law exception to adult treatment for juveniles was that children under seven years of age were regarded as incapable of forming criminal intent. *See, e.g.*, Fortas, *Equal Rights—For Whom?*, 42 N.Y.U.L. REV. 401, 405 (1967).

[5] For example, one writer, a Los Angeles juvenile court referee, thought the juvenile court should function to save children from an ordeal with a penitentiary or prison, as well as shield them from criminal courtroom procedure. Van Waters, *The Juvenile Court From the Child's Viewpoint*, in THE CHILD, THE CLINIC AND THE COURT 217–25 (1925). Another writer, a police court judge, noted that courts in the 1800's did not hesitate to imprison ill-behaved children. His writing traced the early English efforts to remove children from prison influences. H. WADDY, THE POLICE COURT AND ITS WORK 107–16 (1925).

[6] *See, e.g.*, Hoffman, *Organization of Family Courts, With Special Reference to the Juvenile Court*, in THE CHILD, THE CLINIC AND THE COURT 255 (1925), where it is submitted that delinquency is a disease and that "the delinquent child is entitled to treatment analogous to that given a child afflicted with any organic or functional disease." Consider also Van Waters, *supra* note 5, at 218, quoting from Judge Julian Mack on the nature of the court's inquiry into the child's background: "What is he, how has he become what he is, and what would best be done in his interest to save him from a downward career." Little attention was given to whether a child had committed a specific offense. Rather, the inquiry was whether he was wayward and missing his fundamental childhood rights to shelter and guidance. Referee Van Waters also saw in the juvenile court a reflection of reformers' beliefs that human conduct is caused and if the causes are understood, childrens' behavior could be modified. *Id.* at 223–25. Judge Mack also articulated the need for the juvenile court to recognize the causes leading to wrongdoing. Mack, *Chancery Procedure in the Juvenile Court*, in THE CHILD, THE CLINIC AND THE COURT 310–15 (1925). Likewise, two other influential writers in the juvenile court field stated that the juvenile court's emphasis was not on the act done by the child, but on the social facts and circumstances that are the inducing causes of the child's appearance in court. B. FLEXNER & R. BALDWIN, JUVENILE COURTS AND PROBATION 6 (1914). *Cf.* Witter v. Cook County Commissioners, 256 Ill. 616, 623, 100 N.E. 148, 150 (1912):

> The infant is not brought before the court as a defendant charged with an infraction of the laws, but is brought within the jurisdiction of the court to receive its care and protection.

As an indication of the reformers' effort to completely separate the juvenile court from the criminal court, there was even opposition to the use of ordinary courtroom furniture in the juvenile court. *See* WADDY, *supra* note 5, at 143–45.

rehabilitation as their goal.[7] As agent of the state, the juvenile court would exercise the state's power as *parens patriae*, which is the right to step in and replace the natural parents if they default.[8] The task of the fatherly judge and his aides was to assess the child's entire background before deciding what was best for the youngster's future.[9] During the hearing itself, the judge was to evaluate the clinical reports of experts and hear testimony pertaining to the child's problems.[10] Following the hearing, the judge would select an appropriate remedy from a wide variety of alternative dispositions. Most juvenile court reformers believed that the routine disposition for juvenile offenders would be probation, with commitment only the last resort.[11]

Just as the clinical function differentiated it from the criminal court, the juvenile court was also estranged from its criminal counterpart in terms of procedure. In the framing of the pioneer Illinois juvenile court law, "great care was taken to eliminate in every way the idea of a criminal procedure."[12] Specifically, juvenile procedure was to be distinguished from criminal procedure in that there would be no right to a jury, no swearing-in of young witnesses, no appearance of counsel for the juvenile, no right to bail, and no rules of evidence.[13] Further, there was no right to notice of the charges, no right to confrontation and cross-examination, and no privilege against self-incrimination.[14] The entire proceeding was to be characterized by flexibility and simplicity.

The arguments presented on behalf of this flexible procedure revolved around the central notion of benefit to the child. It was argued that simplified procedure enabled the child to understand the proceedings[15] and spared him the trauma of a public trial.[16] The juvenile court judge was said to be most effective, and the child received the most benefit, in an informal atmosphere conducive to developing rapport.[17] It was also argued that informal procedure encouraged the child to discuss his problems freely, thus giving the judge a fuller picture of the youth's needs. When juvenile procedure was first attacked in the courts as amounting to a denial of due process, the challenge was successfully met by the assertion that the proceedings were "civil," not

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[7] *See* Hoffman, *supra* note 6, at 262–63.

[8] For a discussion of the background of the concept of *parens patriae*, *see* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909), and Mack, *supra* note 6, at 310–15. The concept is also discussed by FLEXNER & BALDWIN, *supra* note 6, at 6–8. The Supreme Court in *Gault* questioned the applicability of the *parens patriae* doctrine in the juvenile court context. 387 U.S. at 16–17. Similar doubts are expressed in Note, *A Due Process Dilemma—Juries For Juveniles*, 45 N.D.L. REV. 251, 264–66 (1969), and the author suggests that the juvenile court should be recognized as a separated entity.

[9] The probation officer was to be the investigatory arm of the court, assisted by voluntary community agencies. Mack, *supra* note 6, at 315.

[10] *See* Platt, *supra* note 3, at 18: "Judges were expected to show the same professional competence as doctors and therapists."

[11] It has been said that the parent has the primary right to custody of his child, and this right is ordinarily not to be interfered with. FLEXNER & BALDWIN, *supra* note 6, at 9. Judge Mack adopted the same view, emphasizing the importance of probation and the need to avoid separating child from parent. Mack, *supra* note 8, at 116. A third writer stated:

> My own view . . . is that no child should be sent to an industrial or reformatory school if there is any reasonable hope of improving him by other means.

W. HALL, CHILDREN'S COURTS 142 (1926).

[12] *See generally* Hurley, *Origin of the Illinois Juvenile Court Law*, in THE CHILD, THE CLINIC AND THE COURT 320, 327 (1925), where the author states:

> The law was expressly framed to avoid treating a child as a criminal. To this end the proceedings were divested of all features which attach to a criminal proceeding. Instead of a complaint or an indictment, a petition was suggested; instead of a warrant, a summons. The child was not to be arrested, but brought in by the parent or guardian, or by a probation officer. The bill expressly forbade keeping a child in jail or enclosure where adults were confined.

[13] *Id.* at 328; *In re* Gault, 387 U.S. 1, 14 (1967). *See also* Fortas, *supra* note 4, at 406; Gardner, *Gault and California*, 19 HAST. L.J. 527, 528 (1969); Annot., 43 A.L.R.2d 1128 (1955).

Regarding the rules of evidence, Hurley, *supra* note 12, at 328, stated that strict application of the rules did not comport with informal procedure. In contrast, another writer believed that the rules of evidence should be adhered to:

> It is of course necessary that so long as criminal responsibility attaches to a developed child, the trial of a juvenile offender . . . must take place with due regard to formality in a court of justice, and be conducted according to the rules of evidence.

WADDY, *supra* note 5, at 145. Contrast also the comment made in Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 795 (1966):

> But to the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry.

[14] *See generally* note 13 *supra;* 387 U.S. at 14, 29; the cases cited in Pee v. United States, 274 F.2d 556, 563 (D.C. Cir. 1959).

[15] WADDY, *supra* note 5, at 146. *See also* HALL, *supra* note 11, at 59, where he states that it is essential in children's courts to secure the utmost simplicity in the proceedings.

[16] *See, e.g., In re* Burrus, 275 N.C. 517, 529–30, 169 S.E.2d 879, 887 (1969), holding there is no constitutional right to a public hearing in a juvenile proceeding. The Supreme Court in *Gault* mentioned that juveniles are often denied a public trial. 387 U.S. at 14.

[17] *See* Note, *supra* note 13, at 802.

"criminal," and the child was not entitled to safeguards enjoyed by a criminal defendant.[18] But for a state to maintain that its juvenile proceedings were "civil" in nature, it had to appear that the child was being rehabilitated and not punished as an adult.[19] Thus, arguments supporting a flexible juvenile procedure depended both on the absence of punishment and the success of rehabilitation. Should the juvenile court undertake to punish youths, or fail to rehabilitate them, much of the justification for simplified procedure would be lost, leaving only the argument that the child benefits from the informal courtroom situation.

Unfortunately, rehabilitation efforts have been conspicuously unsuccessful.[20] The failure of the juvenile courts was aptly summarized in *Kent v. United States:*

> [t]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded adults nor the solicitous care and regenerative treatment postulated for children.[21]

Not only were understaffed juvenile courts unable to investigate thoroughly the background of each child appearing before them, but also children were sometimes sent to institutions when probation appeared to be a more desirable alternative.[22] Once rehabilitative treatment failed, the distinction between adult imprisonment and juvenile commitment was no longer compelling. It was therefore forseeable that the courts would act to equalize adult and juvenile due process rights by eliminating procedural distinctions between adult and juvenile "trials."

In *Kent v. United States*,[23] the Supreme Court's first decision involving juvenile courts, the Court refused to countenance a procedural shortcut taken at heavy cost to a youthful defendant. The District of Columbia Juvenile Court had waived jurisdiction of a sixteen-year old and directed that he be held for a regular criminal trial on charges of rape, housebreaking and robbery.[24] Kent moved to dismiss the criminal indictment on the grounds that the juvenile court's waiver was procedurally invalid because the court had failed to give any reasons. That motion was denied and Kent was found guilty at his criminal trial. Although the District of Columbia Circuit affirmed the decision of the district judge,[25] the Supreme Court reversed, holding that the juvenile court's waiver was procedurally invalid.[26] The *Kent* decision was not of constitutional

[18] Mack cited some of the cases which accepted this justification. Mack, *supra* note 8, at 109–14 (1909). The justification was emphatically rejected by the Supreme Court. 387 U.S. at 49–50. The Court emphasized that at least for the purpose of the privilege against self-discrimination, proceedings which may lead to commitment must be regarded as "criminal." The Court's reasons were that commitment, realistically viewed, is always a deprivation of liberty, and that some juveniles may even be placed in the same institutions as adults. Also, the juvenile court may bind a juvenile over for a criminal trial.

[19] *See, e.g.*, HALL, *supra* note 11, at 244, stating that the juvenile court "exists solely for the purpose of helping the child." The important point is that the claim of "rehabilitation, not punishment" shielded the juvenile court from constitutional attack. As one writer perceptively observed, the juvenile court could no longer exist once it began to mete out punishment:

> It has been held that the juvenile court acts framed on this theory [*parens patriae*] must not provide for that which is clearly punishment, e.g., a fine or penalty, either of which would make them unconstitutional.

FLEXNER & BALDWIN, *supra* note 6, at 9.

[20] *See* S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 32 (1966):

> Juvenile court operations and procedures have been subject to many criticisms in recent years. Any close look at the facilities and alternative dispositions actually available to the juvenile court makes it clear that the promise of the court has gone largely unfulfilled. In theory, the court could embody its spirit of individualized justice by providing a detailed diagnosis of the problems of the juvenile in question, followed by the development of a treatment plan that would help solve those problems. . . .
>
> But the reality in most jurisdictions is that these facilities are so underdeveloped and understaffed that one cannot speak of them as in any sense the equivalent of parental care and protection.

The Supreme Court decision in *Gault* relied heavily on the Wheeler and Cottrell study.

A Pennsylvania court made this succinct remark on the failure of rehabilitation:

> With the passage of years, however, the grand hopes for the juvenile court system were never realized. Juvenile Court judges were not well trained. Institutions were woefully inadequate. Psychiatric, psychological, probationary and sociological services were meager.

Commonwealth v. Johnson, 211 Pa. Super. 62, 70, 234 A.2d 9, 13 (1967). *See also* Boches, *Juvenile Justice in California: A Re-Evaluation*, 19 HAST. L.J. 47, 103 (1967).

[21] Kent v. United States, 383 U.S. 541, 556 1966).

[22] *See, e.g.*, WHEELER & COTTRELL, *supra* note 20, at 32; 387 U.S. at 19–20.

[23] 383 U.S. 541 (1966).

[24] *Id.* at 546.

[25] 343 F.2d 247 (1965).

[26] 383 U.S. at 557. The Court noted that the consequence of a waiver was to subject the juvenile to the possibility of a criminal punishment which was more severe than juvenile treatment. The Court also pointed out that the Juvenile Court Act provided for a waiver only after a "full investigation" and here there was no record of such an investigation. *Id.* at 546–47.

dimension,[27] since it was based on the Supreme Court's interpretation of the Juvenile Court Act, sitting as the highest court of the District of Columbia. The Court interpreted the Juvenile Court Act as entitling a juvenile to both a hearing with effective assistance of counsel and a statement of the juvenile court's reasons for its waiver.[28] Despite the fact that the Court was not erecting a constitutionally required rule, the Court did express its overall concern with juvenile procedure, foreshadowing its landmark decision in *Gault*.[29]

In *In re Gault* the Court attempted to seek out the "reality" of the juvenile court's operation.[30] The Court said that application of the "civil" label to juvenile proceedings was mere rhetoric, and observed that juvenile commitment amounted to a loss of liberty for a term of years, the same as criminal imprisonment.[31] The holding of *Gault* was narrow in two important respects. First, the Court held only four specific elements of due process constitutionally applicable to juvenile proceedings through the fourteenth amendment: the right to adequate notice of the charges; notification of the right to be represented by counsel, or if indigent, that counsel would be appointed; the privilege against self-incrimination; and the right to confront and cross-examine witnesses.[32] It was the Court's belief that this degree of "constitutional domestication" [33] would not adversely affect the unique benefits derived from the juvenile courts.[34] Second, *Gault* was limited because it dealt solely with the adjudicatory stage of the juvenile proceeding, where facts are found and the juvenile is declared delinquent.[35]

Despite the limited scope of the *Gault* holding, the Court's analysis deflated myths surrounding the juvenile court's operation and suggested parallels between juvenile commitment and adult confinement. No longer could a state successfully argue that a juvenile proceeding was "civil" when in reality the commitment of adults and juveniles was indistinguishable in terms of loss of liberty. If the punishment was the same, in the sense that the liberty of adults and juveniles was equally restrained, then due process safeguards afforded at criminal trials should apply equally to juvenile proceedings. But because *Gault* indicated that not all due process safeguards need apply, difficult questions remained. There was no indication how far the "unique benefits" derived from flexible juvenile proceedings justified departure from ordinary criminal due process standards, nor was it apparent whether the reasons for procedural safeguards in criminal trials had equal application in the juvenile court context.

[27] The Court declined the invitation to "rule that constitutional guarantees which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings." 383 U.S. at 556.

[28] *Id.* at 557. The Court stated:

> we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.

[29] *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 THE SUPREME COURT REVIEW 167, 183. The following language appears in *Kent:*

> These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae*, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act. However, . . . we do not pass upon these questions.

383 U.S. at 551–52. The Court's language foreshadowed *Gault* in another portion of the opinion:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.

Id. at 555.

[30] 387 U.S. at 21. The Court was determined to "candidly appraise" the claimed benefits derived from the juvenile process.

[31] *Id.* at 27.

[32] *Id.* at 31–57.

[33] *Id.* at 22.

[34] *Id.* at 21–23. As examples of the unique benefits, the Court listed: separate processing and treatment of adults and juveniles, juveniles are not labeled "criminals," juvenile court records are secret, and the paternalistic nature of the proceedings. *Id.* at 22–27.

[35] *Id.* at 13, where the Court states:

> We do not in this opinion consider the impact of these constitutional provisions [the fourteenth amendment and the Bill of Rights] upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." We consider only the problems presented to us by this case. These related to the proceedings by which a determination is made as to whether a juvenile is a "delinquent"... with the consequence that he may be committed to a state institution.

The adjudicatory, or fact-finding, stage is usually sandwiched between the pre-adjudicatory and post-adjudicatory, or dispositional, stages of the proceedings.

Quantum of Proof

Before the *Gault* decision, courts divided over the issue of whether the proper quantum of proof in delinquency proceedings must meet the civil standard (preponderance) or the higher criminal standard (reasonable doubt).[36] Although the Supreme Court did not confront the quantum of proof question in *Gault*, the Court's reasoning adapted easily to the argument that the reasonable doubt standard should be a due process requirement. That argument was made in a number of cases following *Gault*.

In an opinion handed down six months after *Gault* was decided, the Illinois Supreme Court in *In re Urbasek*[37] faced the issue of whether the standard of proof in juvenile proceedings was to be the civil "preponderance of the evidence" [38] standard or the criminal "beyond a reasonable doubt" [39] standard. The court noted that none of the rights specifically preserved by *Gault* had been denied Urbasek, but felt that the "spirit" of *Gault* "logically require[d]" application of the reasonable doubt standard when a charge alleges conduct which would be a crime if committed by an adult.[40] The court stressed that *Gault* had frequently equated juvenile commitment with adult imprisonment and had concluded that the liberty of juvenile and adult is equally restrained.[41] The court also reasoned that it would be inconsistent to grant some due process rights to juveniles, such as right to counsel and notice of the charges, but then to deprive those rights of their "full efficacy" by failing to require the higher standard of proof.[42]

The Fourth Circuit reached the same result in *United States v. Costanzo*.[43] The court recognized that *Gault* turned on the "loss of liberty for years" and therefore, in terms of liberty, a juvenile court adjudication was just as serious as a felony prosecution.[44] Rejecting the argument that the juvenile court proceeding was "civil," the court held that it must be regarded as "criminal" for purposes of the quantum of proof because of a possible four year commitment.[45] The Fourth Circuit reasoned that if juveniles and adults were entitled to equal treatment with regard to the *Gault* safeguards, then the importance of the standard of proof as a protection required that it be applied to both adults and juveniles.[46]

In *State v. Santana*,[47] the Texas Supreme Court also ruled on the quantum of proof issue, but unlike the *Costanzo* and *Urbasek* courts, it held that the reasonable doubt standard was not required in juvenile proceedings.[48] The court's opinion properly characterized *Gault* as a limited decision which announced that basic constitutional guaranties applied to juvenile proceedings.[49] The court then stated its view that *Gault's* purpose was to make certain that juvenile proceedings were "basically fair." [50] By adhering to the preponderance of the evidence standard, the majority felt it could insure basic fairness and still comply with state legislative policy.[51] Implicit in the court's opinion was the assumption that Texas juvenile courts conducted basically fair proceedings and complied with the literal dictates of *Gault*. However, the court failed to analyze the impact of *Gault* on the quantum of proof issue. The court did not inquire whether the reasonable doubt test was an essential of due process and fair treatment when an accused faces a loss of liberty, nor did it ask if application of the reasonable doubt test might adversely affect the juvenile court's unique benefits.

Justice Pope, dissenting, concluded that the reasonable doubt test should be adopted. His opinion focused on the fact that *Gault* spoke only to the adjudicatory stage of the juvenile proceeding.[52] At

[36] *See* Annot., 43 A.L.R.2d 1128 (1955).

[37] 38 Ill.2d 535, 232 N.E.2d 716 (1967).

[38] The preponderance of evidence rule is the standard of proof for civil cases. 9 J. Wigmore, Evidence §2498 (3d ed. 1940).

[39] The "beyond a reasonable doubt" test is applied in criminal cases. 9 J. Wigmore, Evidence §2497 (3d ed. 1940).

[40] 38 Ill.2d at 540–41, 232 N.E.2d at 719.

[41] *Id.* The court observed that the liberty of incarcerated juveniles is restrained just as effectively as that of adult prisoners.

[42] *Id.*

[43] 395 F.2d 441 (4th Cir. 1968).

[44] *Id.* at 444.

[45] *Id.* The Court stated that no use of a "benign label" can turn a four-year commitment into a civil proceeding.

[46] *Id.*

[47] 444 S.W.2d 614 (Tex. 1969), *vacated and remanded sub nom.*, Santana v. Texas, 397 U.S. 596 (1970).

[48] 444 S.W.2d at 622.

[49] *Id.* at 617.

[50] *Id.*

[51] *Id.* The court observed:

> The policy of the juvenile laws has been fixed by the Texas legislature; and we conceive it to be our duty to uphold the spirit of that law while at the same time insuring to minors the basically fair proceedings required by *Gault* and the Constitutions of Texas and of the United States.

The dissent in *Santana* pointed out that the Texas Juvenile Court Act did not require the preponderance standard, nor did previous Texas Supreme Court decisions. *Id.* at 628.

[52] *Id.* at 623.

that stage, Justice Pope noted, the juvenile court "is at last a court; a court which sits to resolve issues under principles of due process, which is the best method yet devised for fair play." [53] Considering the basic role played by the reasonable doubt test as an essential procedural safeguard to the liberty of an accused in our system of jurisprudence, he argued:

> Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first, therapy second. . . . The rights which *Gault* accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different.[54]

In another post-*Gault* case, *W. v. Family Court*,[55] the New York Court of Appeals held that the preponderance of evidence standard was sufficient in juvenile proceedings.[56] Largely ignoring the changes introduced by *Gault*, the court relied on its own previous decision[57] for the proposition that juvenile proceedings were not criminal and therefore criminal safeguards did not apply.[58] However, *Gault* had clearly specified that juvenile proceedings must be regarded as criminal for some purposes.[59] Moreover, a recurrent theme had been that both juvenile commitment and criminal punishment must be regarded as a deprivation of liberty.[60] The New York court also doubted whether attorneys could serve a useful purpose in juvenile proceedings, while *Gault* had held that the right to counsel is guaranteed to juveniles.[61] The court again differed with *Gault* when it contended that a delinquency adjudication does not amount to a conviction.[62] Further, the court characterized *Kent* and *Gault* as "hard cases" and seemed to disregard them because they were atypical and injected undesirable technicalities into the juvenile proceedings.[63] Finally, the court feared that the extension of additional rights to juveniles would curtail the judges' freedom and cause youths to escape treatment.[64] The court concluded that the preponderance standard was still the correct quantum of proof.[65]

The decision in *W. v. Family Court* showed the New York court's reluctance to impose further procedural strictures on that state's juvenile courts.[66] The court, reiterating the traditional view that the juvenile process is "designed not as a punishment but as salvation," [67] implied that the juvenile system was already doing an adequate job.[68] Yet the clear import of *Gault* had been that

[53] *Id.* at 625.

[54] *Id.* at 628.

[55] 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969), *rev'd sub nom.*, *In re* Winship, 397 U.S. 358 (1970).

[56] 24 N.Y.2d at 203, 247 N.E.2d at 257–58, 299 N.Y.S.2d at 420.

[57] People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932).

[58] 24 N.Y.2d at 198, 247 N.E.2d at 254–55, 299 N.Y.S.2d at 416.

[59] 387 U.S. at 49–50. The Court said that for the purpose of the privilege against self-incrimination, juvenile proceedings must be regarded as criminal because "[f]or this purpose, at least, commitment is a deprivation of liberty." *Id.* at 50. Discussing the right to counsel, the Court said: "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 36.

[60] *Id.* at 27, 29, 34, 36, 41, 50.

[61] 24 N.Y.2d at 199, 247 N.E.2d at 255, 299 N.Y.S.2d at 417. *Compare* the New York court's view *with* the Supreme Court's discussion in *Gault* of the importance of the right to counsel in juvenile proceedings, 387 U.S. at 34–42.

[62] 24 N.Y.2d at 200, 247 N.E.2d at 255–56, 299 N.Y.S.2d at 417. *Compare* the New York court's view *with* the Supreme Court's skeptical treatment of the argument that juvenile proceedings are confidential, 387 U.S. at 24–25, and the Court's observation that the "delinquency" status involves only slightly less stigma than a "criminal" status, 387 U.S. at 24. The Court also said that even if the delinquency status involved no loss of civil rights, that benefit could continue under revised procedures. 387 U.S. at 25.

[63] 24 N.Y.2d at 200–01, 247 N.E.2d at 256, 299 N.Y.S.2d at 418, where the court states: "The juvenile court system, on the basis of that argument, has had the singular misfortune of being impaled on the sharp points of a few hard constitutional cases."

[64] *Id.* at 202, 247 N.E.2d at 257, 299 N.Y.S.2d at 419. Much like the early juvenile court reformers, the court determined that if a child were given his rights, his potential for good might be lost. This recalls the notion that the judge should be able to prescribe treatment for a child whether or not he had committed an offense. *See* FLEXNER & BALDWIN, *supra* note 6, at 6. But if one accepts the *Gault* view of the seriousness of commitment, a judge cannot commit children who are innocent of any offense. *E.g.*, State v. Santana, 444 S.W.2d at 628 (Pope, J., dissenting).

[65] 24 N.Y.2d at 203, 247 N.E.2d at 258, 299 N.Y.S.2d at 420.

[66] The premise underlying the New York court's decision appeared to be its outdated conception of the juvenile court as a clinic which operates free of criminal law technicalities. Under that view, the specific reason for the child's appearance before the court was less important than his background leading up to his appearance. *See* note 6 *supra*. The Court of Appeals restated arguments which traditionally sustained procedural flexibility in the juvenile courts, but *Gault* had rendered most of those arguments untenable. *See* the Supreme Court's treatment of the New York court's arguments in *Winship*, 397 U.S. at 365–66.

[67] 24 N.Y.2d at 199, 247 N.E.2d at 255, 299 N.Y.S.2d at 417.

[68] The court found that "the juvenile court has profoundly changed for the better the way children in difficulty are treated by the public legal system." *Id.* at 198, 247 N.E.2d at 254, 299 N.Y.S.2d at 416.

the performance of the juvenile court was unacceptable insofar as it deprived youths of freedom without regard for due process. The Supreme Court repudiated the approach of the New York Court of Appeals by reversing it in *In re Winship*.[69]

The Court's decision in *Winship* is important not only because it holds the reasonable doubt standard applicable to juvenile proceedings, but also because its analysis may be useful in determining whether additional due process standards will be extended to juvenile proceedings. The Court emphasized that *Gault* focused solely on the adjudicatory stage of the juvenile proceeding.[70] *Gault* had decided that fourteenth amendment due process required the application of the "essentials" of due process and fair treatment at the adjudicatory stage.[71] Turning to the quantum of proof issue, the Court inquired whether proof beyond a reasonable doubt is likewise an "essential" when a juvenile is charged "with an act which would constitute a crime if committed by an adult." [72] The Court noted the vital role played by the reasonable doubt standard in the American scheme of criminal procedure,[73] then stressed that possible loss of the child's liberty demanded the highest standard of proof.[74] It dismissed the argument that adoption of the reasonable doubt test would risk destruction of the beneficial aspects of juvenile proceedings.[75] The Court stressed that insofar as a finding of delinquency was still not tantamount to a criminal conviction, did not deprive a child of his civil rights, and was carried out in a confidential proceeding,[76] the beneficial character of the juvenile court was retained. *Gault* had already declared that these beneficial policies should be protected, but *Winship* went farther, concluding with the cryptic phrase:

> Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place.[77]

Indeed, the reasonable doubt test is not a procedural device at all, but merely an expression of the degree of certainty required of the trier of fact. The Court's mention of informality, flexibility, or speed may be a simple recognition of the fact that the reasonable doubt test entails no procedural complexity. Alternatively, the Court might now regard speed, informality and flexibility as interests of the state which must be considered in applying due process standards to juvenile proceedings.[78] If that phrase were merely a recognition that the reasonable doubt test will not complicate procedures, then *Winship* did not modify *Gault*. But

[69] 397 U.S. 358 (1970).

[70] *Id.* at 358–59.

[71] *Id.* at 359.

[72] *Id.*

[73] *Id.* at 361–64. To resolve any doubts as to the constitutional status of the reasonable doubt test, the Court specifically held that the test is incorporated in the due process clause. *Id.* at 364. Among the reasons for requiring proof beyond a reasonable doubt, Justice Brennan listed the following: the accused's interest in not losing his liberty or being stigmatized by a conviction, society's interest in not committing persons when there is a reasonable doubt as to their guilt, and the need to assure the community that the criminal law operates fairly. *See* the discussion in the concurring opinion of Justice Harlan, 397 U.S. at 369–72.

[74] *Id.* at 368.

[75] *Id.* at 366. Justice Harlan also listed a set of policies which would not be adversely affected by the adoption of the reasonable doubt test. The reasonable doubt test did not interfere with the worthy goal of rehabilitating the juvenile, make any difference in the extent to which a youth is stigmatized as a criminal because he has been found delinquent, or burden juvenile courts with procedures making adjudications more time-consuming or rigid. *Id.* at 375. Justice Harlan's approach differs from the Court's because he would balance the interests of the juvenile against the interests of the state in conducting simplified proceedings. The Court, however, seemed to disregard the state's interest and instead focused solely on the question of fairness to the child and whether application of due process standards will impair benefits derived *by the child* from juvenile proceedings.

[76] *Id.* at 366–67. The Court also noted there would be no impact on pre-adjudicatory or dispositional procedures.

[77] *Id.* at 366.

[78] Three considerations suggest that the Court did not mean to apply the "speed, informality and flexibility" criteria in future cases. First, *Gault* took into account only the "substantive benefits" derived *by the child* from juvenile proceedings for the purpose of determining whether those benefits would be adversely affected by the introduction of due process safeguards. 387 U.S. at 21. The Court's candid approach inquired whether claimed benefits were actually substantive benefits to the child. *Id.* at 21. Similarly, careful scrutiny should reveal that speed, informality and flexibility are not substantive benefits to the child whose freedom is at stake. Also, *Gault* seemed to recognize that increased formality was not an objection to its holding, provided the role of the juvenile judge was not altered. *Id.* at 27. Second, *Winship* agreed with *Gault* that the relevant question was whether the reasonable doubt test would compel the states to abandon any of the *substantive benefits* of the juvenile process. 397 U.S. at 367. Third, Justice Harlan concurred in *Winship* but his approach differed considerably from the Court's. *See* note 75 *supra*. Justice Harlan would not impose standards which jeopardized the essential elements of the state's purpose in creating juvenile courts. 397 U.S. at 375. Consistent with that approach, standards are unacceptable if they make adjudications more time-consuming or rigid. The contrast between the Court's approach, which focused on protecting substantive benefit to the child and Justice Harlan's, which considers the state's purpose in creating juvenile courts, suggests that the Court will not apply the Harlan "rigid or time-consuming" test, nor the "speed, informality or flexibility" test.

if the Court intended to use "informality, flexibility, or speed" as a gloss on the "substantive benefits" test of *Gault*, then *Winship* must be regarded as a philosophical withdrawal from the policies of *Gault*. To apply the "informality, flexibility, or speed" test is to recognize the state's interests in brevity and expediency at the expense of the child's freedom. *Gault* regarded only benefits to the child, not benefits to the state, as "substantive benefits" worthy of preservation. If applied, the "informality, flexibility, or speed" test would militate against adoption of additional due process rights in juvenile proceedings, particularly the right to jury trial.[79]

Jury Trial

Before the *Gault* decision, most courts denied juveniles the right to a jury trial at the delinquency hearing, unless a statute provided otherwise.[80] Since *Gault* was handed down, numerous state and federal courts have grappled with the issue of whether a jury trial is a due process requirement in juvenile proceedings, and a wide majority have found it is not.[81] The Supreme Court confronted the issue in *DeBacker v. Brainard* but refrained from deciding.[82] The jury trial issue is still vigorously debated, and lower court decisions plus *Winship* and *Gault* offer some insight into how the Court might eventually resolve the question.

In denying juveniles the right to jury trial, many state courts have expressed fears that a jury would destroy the unique benefits derived from juvenile

[79] *See* note 87 *infra* and accompanying text.

It is interesting to note the stances of the justices who wrote separate opinions in *Winship*. Justice Harlan indicated he would object to procedural requirements which make adjudications more time-consuming or rigid. 397 U.S. at 375. Chief Justice Burger and Justice Stewart appeared to resent the imposition of any due process standards on the juvenile courts. *Id.* at 375–76. Justice Black could not agree with the Court because in his view the entire Bill of Rights applies to the states through the fourteenth amendment, but the reasonable doubt test is mentioned nowhere in the Bill of Rights. *Id.* at 377.

[80] *See* Annot., 100 A.L.R.2d 1241 (1965).

[81] Courts holding that the right to jury trial is not required in juvenile proceedings include the following: *In re* M., 70 Cal.2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969) (by implication); *In re* R., 12 Cal. App.3d 80, 90 Cal. Rptr. 530 (1970); *In re* C., 9 Cal. App.3d 255, 88 Cal. Rptr. 97 (1970); *In re* R.L., 3 Cal. App.3d 100, 83 Cal. Rptr. 81 (1969); *In re* T.R.S., 1 Cal. App.3d 178, 81 Cal. Rptr. 574 (1969); *In re* Presley, 47 Ill.2d 50, 264 N.E.2d 177 (1970); *In re* Jones, 46 Ill.2d 500, 263 N.E.2d 863 (1970); *In re* Fucini, 44 Ill.2d 305, 255 N.E.2d 380 (1970); Bible v. State, — Ind. —, 254 N.E.2d 319 (1970); Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968); *In re* Johnson, 254 Md. 517, 255 A.2d 419 (1969); *In re* Fletcher, 251 Md. 520, 248 A.2d 364 (1968); Hopkins v. Youth Court, — Miss. —, 227 So.2d 282 (1969); DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970); *In re* Burrus, 4 N.C. App. 523, 167 S.E.2d 454, *aff'd and modified*, 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970); *In re* Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970); *In re* State *ex rel.* J.W., 106 N.J. Super. 129, 254 A.2d 334 (Juv. & Dom. Rel. Ct. 1969), *aff'd per curiam*, 57 N.J. 144, 270 A.2d 273 (1970); *In re* D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970); *In re* Agler, 19 Ohio St.2d 70, 249 N.E.2d 808 (1969); *In re* Tsessmilles, 24 Ohio App.2d 153, 265 N.E.2d 308 (1970); State v. Turner, 253 Ore. 235, 453 P.2d 910 (1969); *In re* Zorner, — Ore. App. —, 475 P.2d 990 (1970), *petition for cert. filed sub nom.* Zorner v. Oregon, 39 U.S.L.W. 3403 (U.S. Mar. 10, 1971) (No. 1452); *In re* Terry, 438 Pa. 339, 265 A.2d 350, *prob. juris. noted sub nom.* McKeiver v. Pennsylvania, 399 U.S. 925 (1970); Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967); Estes v. Superior Court, 73 Wash.2d 263, 438 P.2d 205 (1970).

Cases indicating that the right to jury trial is required in juvenile proceedings include the following: Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508, *cert. dismissed*, 396 U.S. 28 (1969); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968); *In re* D., 34 App. Div.2d 41, 310 N.Y.S.2d 82, *rev'd*, 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970); *In re* Rindell, 2 BNA Crim. L. Reptr. 3121 (1968).

[82] 396 U.S. 28 (1969) (per curiam, petition for certiorari dismissed). The Nebraska Supreme Court had faced the issue of the constitutionality of the statute which provided that juvenile hearings be held without a jury. The court voted 4–3 that the statute was unconstitutional, but the Nebraska constitution requires the concurrence of five judges before an act can be held unconstitutional. DeBacker v. Brainard, 183 Neb. 461, 470, 161 N.W.2d 508, 513 (1968).

On appeal, the Supreme Court did not decide the jury trial issue because its decisions in Duncan v. Louisiana, 391 U.S. 145 (1968) and Bloom v. Illinois, 391 U.S. 194 (1968), applying the jury trial requirement to the states, were prospective only. *E.g.*, DeStefano v. Woods, 392 U.S. 631 (1968). DeBacker's juvenile hearing preceded the date of those decisions, so he was not entitled to a jury trial, 396 U.S. at 30.

The Court also declined to rule on the burden of proof issue because counsel for the juvenile admitted that the evidence in the case was sufficient even under the reasonable doubt standard. 396 U.S. at 31. Justice Black's dissent in *DeBacker* restated his objection to prospective-only rulings. He added his judgment that *Gault* requires that juveniles be given the right to jury trial because it is "one of the fundamental aspects of criminal justice in the English-speaking world." 396 U.S. at 33–34 (Black, J., dissenting). Justice Douglas' dissent agreed that *DeStefano* should have been retroactive and that a jury trial is required in juvenile proceedings. His opinion rejected the reasoning of state courts which denied the right to jury trial either because it was not a fundamental right applicable to the states, or because it was not consistent with the concept of the juvenile court. Further, Douglas reasoned that the jury trial is of such a fundamental nature that it should not be denied to juveniles, and concluded with a sweeping statement: "Where there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, *all* of the procedural requirements of the Constitution and Bill of Rights come into play." 396 U.S. at 38 (Douglas, J., dissenting) (emphasis added).

proceedings. Few courts, however, have attempted to define those benefits or to analyze thoroughly the effect a jury would have. Although the Supreme Court has not expressly undertaken an exhaustive listing of benefits which are endemic to the juvenile court setting, the *Gault* and *Winship* decisions mentioned some benefits which might be endangered by a jury trial.[83] First, it might be argued that the benefit derived from confidential proceedings is reduced if a jury is present. But that objection to a jury trial seems of little significance, because doubts were expressed in *Gault* whether the proceedings were confidential in fact[84] and because most courts refuse to admit the press. Second, a jury trial could be viewed as having a debilitating effect on the informal nature of the proceedings associated with the juvenile court. The Supreme Court, however, seriously questioned whether an informal proceeding followed by punishment had therapeutic value.[85] Further, the Court seemed unconcerned with the prospect of added formality, so long as nothing required "that the conception of the kindly juvenile judge be replaced by its opposite."[86] Third, it is possible that a court might regard *Winship's* phrase, "informality, flexibility, or speed"[87] as a benefit, and application of that test would render unlikely the extension of the jury right to juveniles.

In *In re Fucini*,[88] the Illinois Supreme Court held that the jury trial was not a constitutional requirement in juvenile delinquency proceedings.[89] The court found that *Gault* did not hold all adult rights applicable to juvenile proceedings because such a holding would strip those proceedings of their unique benefits.[90] Without naming any specific benefits which would be adversely affected by a jury trial, the court did state its objection to increased "formality" in the proceeding.[91] As an additional basis for its decision, the court referred to the Report of the President's Commission on Law Enforcement and Administration of Justice, and its Task Force Report, which cast doubt on the necessity of jury trials for juveniles.[92] The court was thus persuaded that *Gault* had gone far enough and, in light of Illinois' progressive juvenile court legislation, a jury trial would simply add undesirable formality to the proceedings.[93]

Apparently, *Fucini* was based primarily on a literal interpretation of *Gault* and an assessment that the added formality occasioned by a jury would serve no useful purpose.[94] The court interpreted *Gault* as a limited decision which attempted to work reform without stripping juvenile proceedings of their unique benefits. No inquiry was made, however, into the nature of those benefits, and the court was therefore unable to determine whether a jury trial would adversely affect the benefits derived from juvenile proceedings. An additional basis of *Fucini* was the finding that the added formality occasioned by a jury would serve no useful purpose. However, *Gault* intimated that added formality in the proceeding is unobjectionable provided it does not seriously impair the judge's role. In addition, the Illinois court apparently reached its conclusion without asking, as *Gault* requires, whether a jury is an "essential of due process" or

[83] In *Gault*, the state argued "that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process." 387 U.S. at 21. The Court agreed that substantive benefits should not be displaced, but undertook its own candid appraisal of these benefits. The Court mentioned: separate processing and treatment of adults and juveniles; children are classified "delinquent" and not "criminal"; the delinquency status does not operate as a civil disability or disqualification for civil service; the juvenile process protects the child from disclosure of his deviational behavior; and the juvenile benefits from informal courtroom procedure. *Id.* at 22–27. The Court cautioned against assessing any of these benefits at face value, particularly the benefit derived from informal courtroom procedure. *Id.* at 27.

For a list of the benefits mentioned in *Winship*, *see* text accompanying notes 76–77 *supra*.

[84] 387 U.S. at 24–25.

[85] *Id.* at 26.

[86] *Id.* at 27.

[87] 397 U.S. at 366.

[88] 44 Ill.2d 305, 255 N.E.2d 380 (1970). In *In re* Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1967), the same court held the reasonable doubt test applied to juvenile proceedings, anticipating the Supreme Court's decision in *Winship* by some three years. *See* text accompanying note 37 *supra*.

[89] 44 Ill.2d at 308, 255 N.E.2d at 381.

[90] *Id.* at 309, 255 N.E.2d at 382.

[91] *Id.*

[92] *Id.* at 309–10, 255 N.E.2d at 382.

[93] The court also rejected the argument that the juvenile confronted a constitutionally impermissible choice. It was argued that if in order to obtain a jury trial, the juvenile waived juvenile proceedings and was tried as an adult, he would be subject to a harsher penalty than if he elected to be proceeded against as a juvenile. It was this harsher penalty, petitioner continued, that caused him to reject the option of a criminal trial and with it his right to trial by jury. The court rejected the argument because it "didn't perceive" the coercive choice and because it felt the option "to be proceeded against criminally should not work to defeat the beneficial aspects of our [juvenile court] Act." *Id.* at 311, 255 N.E.2d at 383.

[94] The court recognized that one of *Gault's* aims was to avoid damaging the substantive benefits derived from flexible juvenile proceedings. *Id.* at 309, 255 N.E.2d at 382.

whether the reasons for a jury trial apply in the juvenile court setting.

Nonetheless, it should be noted that the result reached in *Fucini* is not necessarily inconsistent with *Gault*.[95] *Gault* can be adapted to arguments on either side of the jury trial issue.[96] By extending the logic of the Supreme Court's finding that commitment is a loss of liberty, it seems that the same constitutional guaranties must be extended to juveniles at the adjudicatory stage as are offered to adults in criminal trials. On the other hand, *Gault* quoted a passage from *Kent* which strongly suggests that juveniles are not entitled to the same protection as adults:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment.[97]

This uncertain limitation of the inevitable progression of the Supreme Court's logic is the source of *Gault's* internal tension. Resolving this tension means either limiting *Gault* to its holding, which incorporated only four due process standards, or extending *Gault* and disregarding any supposed limitations. The critical unanswered question is the nature of *Gault's* self-imposed limitation on the requirements for due process in juvenile proceedings. The tendency of most state courts facing the jury trial issue has been to treat the limitation as a strong prohibition against the extension of the jury right to juveniles, perhaps because these courts regard the jury as a serious encumbrance on the juvenile system.

Several other state courts have followed Illinois in denying the right to jury trial in juvenile proceedings. A particularly thorough examination of the jury trial issue was conducted by the Indiana Supreme Court in *Bible v. State*.[98] The Indiana court, alert to the rapid changes in juvenile court procedures, determined it would "re-examine the question in light of the rccent body of law." [99] The court first reviewed the history of the Indiana juvenile court and the current Juvenile Court Act, finding that the judge is intended to have great flexibility in dealing with the juvenile. This flexibility or informality was supposed to aid the child's understanding of the court proceeding and to promote a meaningful relationship with the judge as a compassionate authority figure. Further, it was assumed that informality enabled the child to discuss his problems freely.[100]

The Indiana court clearly regarded informality, including the absence of a jury, as a benefit, but each of its reasons for favoring informal procedure can be strongly challenged. There is a serious difference of opinion whether informal procedure has any therapeutic value.[101] Even if informal procedure is regarded as therapeutic, it may not be of sufficient importance to justify a denial of formal due process rights. Further, the court cited no authority for its assertion that youths develop meaningful relationships with the judge. Even if such relationships do develop, a jury trial would not necessarily destroy the opportunity for fatherly guidance because the dispositional phase of the proceeding seems well-suited to private discussions between judge and juvenile.[102] Finally, while the court correctly stated that informality may encourage the child to discuss his problems, such discussion is out of place at the adjudicatory stage where the sole issue is whether the youth com-

[95] *Gault* did not pass on the jury trial question. The Court gave consideration to only six issues and the right to jury trial was not considered. 387 U.S. at 10. It appears that petitioner did not raise the issue. *See* petitioner's brief at 18 L. Ed. 2d 1522. In DeBacker v. Brainard, 183 Neb. 461, 469–70, 161 N.W.2d 508, 513 (1968), the Nebraska court suggested that *Gault* may have ignored the jury trial issue because the juvenile was not charged with a serious offense.

[96] *See, e.g.*, Nieves v. United States, 280 F. Supp. 994, 1003 (S.D.N.Y. 1968), where the court questioned the dimensions of *Gault:*

> "It is not altogether clear whether the Court was referring to the same due process standards of the Fourteenth Amendment as are required for state criminal prosecutions, . . . or whether they were embarking upon a new course of selective incorporation of those procedural guarantees suitable for juvenile court proceedings."

[97] 387 U.S. at 30.

[98] __ Ind. __, 254 N.E.2d 319 (1970). Bible and another youth were charged with assault and battery and adjudged delinquent. Prior to the hearing, counsel for the youths requested a jury trial but the motion was denied. The sole issue raised on appeal was whether there is a constitutional right to jury trial in juvenile proceedings. *Id.* at __, 254 N.E.2d at 319–20.

[99] *Id.* at __, 254 N.E.2d at 322.

[100] *Id.* at __, 254 N.E.2d at 325.

[101] *Compare* the Indiana court's belief that simplified procedure has therapeutic value *with Gault's* statement that recent studies suggest "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26.

[102] *Id.* at 27, noting that due process standards do not apply at the dispositional stage.

mitted the act with which he is charged. Again, the dispositional stage seems to be the proper setting for such dialogue. Also, when a juvenile exercises his right to remain silent, [103] this reason to favor informality fails completely.

After setting out the benefits of an informal proceeding, the Indiana court weighed them against the considerations of *Gault* and *Kent*. Noting that *Gault* had left the jury trial issue undecided,[104] the court stressed the limitation of the *Gault* decision:

> [N]othing in that opinion expressly or impliedly says that *all* of the guarantees of the Bill of Rights need necessarily be applicable. . . .
>
> On the contrary, we note a careful effort on the part of that court to emphasize that it intended no wholesale incorporation of the rights of adults in criminal trials, into the juvenile system.[105]

The court gave two reasons for denying the right to a jury to juveniles. First, a jury trial would destroy the important father-confessor role of the juvenile court judge.[106] Second, a jury is not a demonstrably better fact finder than a judge.[107] The court summed up:

> This court takes the position that the presence of a jury would interfere with the proper administration of the juvenile system without adding any appreciable protection to the rights of the juvenile.[108]

The Indiana court, when faced with the choice of following *Gault's* limitation or its logic, chose to emphasize the limitation. Since the limitation of the *Gault* decision indicates no standards for determining whether the requirements in a criminal trial are compelled in a juvenile proceeding, the results in both *Bible* and *Fucini* could hardly be justified if the opinions had not stressed the benefits derived from informal proceedings. But if those benefits are illusory, the rationale for denying a jury trial in juvenile proceedings grows dim. In *Gault*, the Supreme Court said that the juvenile hearing need not conform with all the requirements of a criminal trial, but it also said that "the hearing must measure up to the essentials of due process and fair treatment." [109] Therefore, to the extent that the right to jury trial is deemed an essential of due process and fair treatment, it appears that the jury right in juvenile proceedings is not precluded but rather mandated by *Gault*.

The approach of the Maryland Court of Appeals in *In re Johnson*[110] also emphasized the limitation of the *Gault* decision. Johnson was charged with delinquency for allegedly kicking and striking a police officer. After a hearing, the master recommended Johnson be found delinquent. Defense counsel filed a motion for a jury trial, but the motion was denied and Johnson was placed on indefinite probation. The appeal challenged the constitutionality of the Maryland Juvenile Court

[103] This right was guaranteed in *Gault*, *id.* at 55.

[104] __ Ind. at __, 254 N.E.2d at 325.

[105] *Id.* at __, 254 N.E.2d at 326.

[106] The court cited authorities which merely restated the theoretical role played by the juvenile court judges. *Id.* at __, 254 N.E.2d at 327. *Gault*, however, suggested that the judge's role might not work benefit to the child. 387 U.S. at 26.

Gault's approach would also inquire into the actual as opposed to the theoretical performance of the judge's role. One might well ask whether crowded court calendars preclude the establishment of a parental relationship between judge and juvenile, at least at the adjudicatory stage. Recgonizing as *Gault* did that the concept of a kindly judge should be retained, the question is whether the presence of a jury would frustrate the development of a relationship between the judge and the child. The answer can be found in *Gault's* division of the juvenile proceeding into three clear-cut stages, the preadjudicatory, adjudicatory, and dispositional. Arguably, *Gault* envisions a small scale criminal trial at the adjudicatory hearing, because the goal of that hearing is to make a fair finding of fact. But at the dispositional stage, the judge is not bound by procedural strictures and fatherly interaction can take place at that point. A further answer can be seen in the Court's language:

> While due process requirements will, in some instances, introduce a degree of order . . . *nothing will require* that the conception of the kindly juvenile court judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

Id. at 27 (emphasis added). The Court's language suggests that the due process standard under consideration is acceptable if it makes no attempt to replace the judge's kindly role and that the dispositional hearings offer an opportunity for a fatherly relationship to develop.

[107] __ Ind. at __, 254 N.E.2d at 327–28. The court quoted from the Task Force Report, JUVENILE DELINQUENCY AND YOUTH CRIME 328 (1967): "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better factfinding process than trial before a judge." *See also* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 559 (1957), where the same suggestion is made. *But cf.* Paulsen, *supra* note 29, at 186, where it is acknowledged that some adult protections, perhaps including the jury trial, could be introduced without hampering the court's operation.

[108] __ Ind. at __, 254 N.E.2d at 328.

[109] 387 U.S. at 30.

[110] 254 Md. 517, 255 A.2d 419 (1969).

Act on the ground that it made no provision for jury trials.[111]

The Maryland court recognized that *Gault* held some fourteenth amendment due process standards applicable to juvenile proceedings but, "[w]hat the majority did not do was to say that *all* of the guarantees of the Bill of Rights need necessarily be applicable." [112] The court also observed that *Gault* specifically approved certain practices which distinguish adult proceedings from juvenile proceedings, although the court did not argue that a jury would interfere with any of those practices. The court cited cases which characterize *Gault* as a decision with a modest goal, which was to leave juvenile hearings essentially intact while making them "fairer" by applying only a limited number of due process standards.[113] The legislature was left with the task of granting juveniles the right to a jury trial.[114]

Two other state court cases deserve mention because they are under consideration by the Supreme Court. The approach used by the North Carolina Supreme Court in *In re Burrus*[115] was straightforward and uncomplicated. The court simply found that its earlier decisions had uniformly denied the right to jury trial and that no federal cases had held otherwise.[116]

In contrast to *Burrus*, the Pennsylvania Supreme Court in *In re Terry*[117] recognized the internal tension in *Gault*[118] and inquired whether *Kent*, *Gault*, or the Constitution indicated that there ought to be a jury trial in juvenile proceedings. Turning to *Duncan v. Louisiana*,[119] the court seemed to find support for the proposition that a jury was not necessarily required.[120] After several attempts at phrasing its inquiry, the court asked whether distinctions between adult and juvenile proceedings "render the right to a trial by jury less essential" in the juvenile context.[121] The court found that several factors distinguish the adult and juvenile court systems: the view juvenile judges take of their role differs from the view taken by criminal court judges; the juvenile system makes better use of diagnostic and rehabilitative services; the end result of a delinquency adjudication is less onerous than a finding of guilt; a jury trial would disrupt the traditional character of juvenile proceedings.[122] The court concluded that a jury is not constitutionally compelled in juvenile proceedings.

The *Terry* approach is considerably more subtle than the *Fucini* or *Bible* approaches, inasmuch as it stressed the logic of *Gault* as well as that decision's limitations. The Pennsylvania court found

[111] *Id.* at 519, 255 A.2d at 420.

[112] *Id.* at 524–25, 255 A.2d at 423.

[113] In Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967), the juvenile was charged with rape and apparently adjudged delinquent. On appeal, petitioner argued that the Pennsylvania constitution preserved the right to jury trial as it existed in 1790, and that a juvenile charged with rape was entitled to a jury trial in 1790. The court rejected that argument, as well as arguments based on the sixth and fourteenth amendments. The court interpreted *Gault* as a carefully limited opinion:

> "In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile system."

Id. at 74, 234 A.2d at 15.

The jury trial issue was also raised in Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968). The *Dryden* court recognized that *Gault's* logic seemed to require a jury trial, but was unwilling to follow mere logic. Instead, the court was of the opinion that a jury trial would have an ill effect on the child's mind, even though a bad experience before a jury is arguably insignificant if the jury preserves the child's freedom. The court also could not regard a jury as a better finder of fact than a judge. *Id.* at 461. For a discussion of this "better fact finder" contention, see Note, *supra* note 8, at 270–73.

[114] 254 Md. 531–32, 255 A.2d at 426–27.

[115] 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970). Barbara Burrus and some 45 other juveniles were taken into custody after they failed to vacate a street and let traffic pass. At the hearing, counsel demanded a jury trial but the request was denied. Each juvenile was adjudged delinquent and placed on probation.

[116] 275 N.C. at 528–29, 169 S.E.2d at 886.

[117] 438 Pa. 339, 265 A.2d 350, *prob. juris. noted sub nom.* McKeiver v. Pennsylvania, 399 U.S. 925 (1970).

[118] 438 Pa. at 343, 265 A.2d at 352.

[119] 391 U.S. 145 (1968). *Duncan* held that the right to jury trial in serious criminal cases is applicable to the states through the fourteenth amendment.

[120] 438 Pa. at 345–46, 265 A.2d at 353. The Pennsylvania court seemed to find in footnote 14 of *Duncan*, 391 U.S. at 149–50, a restriction on its holding that the right to jury trial applies to the states. However, the Pennsylvania court's finding is a strained interpretation of the *Duncan* footnote, because *Duncan* suggests only that some judicial system might not use juries if it provided alternative guaranties. Such guaranties, however, are not part of the juvenile court system.

[121] 438 Pa. at 348, 265 A.2d at 354.

[122] *Id.* at 348–50, 265 A.2d at 354–55. Justice Cohen's strong dissent in *Terry* challenged both the majority's reading of *Duncan* and its attempt to sort out the factors which justify denial of the right to jury trial. Two points made by the dissent are particularly significant. In response to the majority's assertion that juvenile courts use better rehabilitative services, Justice Cohen argued that rehabilitation is irrelevant at the adjudicatory stage where the issue is simply whether the child committed the act he is charged with. The majority favored a flexible and informal juvenile proceeding, but the dissent contended that the minimal benefit derived from informality could not outweigh denial of the right to jury trial. *Id.* at 352–54, 265 A.2d at 356–57.

in *Duncan* an acknowledgment that a juvenile court system which is separate from the criminal court system might offer alternative protections which replace the jury trial. Since the juvenile court offers no such alternative protections, the court inquired whether distinctions between the criminal and juvenile systems justify omission of a jury trial in the juvenile court. The distinctions mentioned by the court, however, are not very persuasive arguments for denial of the right to jury trial.[123] The court's strongest argument was that a jury trial would disrupt the unique nature of the juvenile process. But even if a jury trial makes the hearing more formal, increased formality is arguably irrelevant at a hearing with a purely fact-finding purpose. Also, the flexible role of the judge is fully retained at the dispositional stage. Thus, despite the *Terry* court's thorough analysis of the unique nature of the juvenile court, its basis for denying the juvenile offender a trial by jury is not compelling.

Since *Gault* was decided, only a handful of courts have held that a jury trial must be made available in juvenile proceedings.[124] Of these few decisions, the only original approach[125] to the issue is found in *Nieves v. United States*,[126] where the court accepted a coercive choice argument in a proceeding under the Federal Juvenile Delinquency Act.[127] Nieves was charged with violation of the federal marijuana laws. If convicted as an adult, he was subject to a term of imprisonment of five to twenty years, up to a $20,000 fine, would bear the stigma of a criminal conviction, and on a second offense could be imprisoned for ten to forty years.[128] Nieves' alternative was a maximum five year commitment as a juvenile delinquent, but he could elect that alternative only if he waived his right to a jury trial. The court felt the choice Nieves faced was "coercive":

> The alternatives presented exert strong pressure on any juvenile defendant to waive his Sixth Amendment right. Though he may well prefer to have the trier of facts be a jury of twelve, the cost of such an election is very nearly prohibitive.[129]

The court then held that because of the coercive choice, the Federal Juvenile Delinquency Act was unconstitutional to the extent that it required the juvenile to waive his right to jury trial in return for a juvenile hearing.[130] The court believed that *Gault* supported its position that the statute was unconstitutional. It reasoned that juvenile proceedings must be regarded as criminal for the purpose of the sixth amendment right to jury trial,[131] just as *Gault* had regarded the proceedings as criminal for the purpose of the privilege against self-incrimination.[132]

Turning to *Gault* and *Winship*, those opinions have produced few decisional guidelines which might be applied to the jury trial issue. Yet despite the absence of express standards, *Gault* and *Winship* do seem to offer two tests by which courts are to determine which procedural rules involved in the criminal court setting are to be adopted by the juvenile court. The first test expressed in

[123] *Id.* at 351, 265 A.2d at 356 (dissenting opinion of Coehn, J.).

[124] *See* cases cited in note 81 *supra*.

[125] The only state court case to rely on *Duncan* has been DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), discussed at note 82 *supra*. The court in *DeBacker* phrased the issue as whether the right to a jury trial is an essential of due process at the adjudicatory stage. Relying heavily on *Duncan*, the court refused to declare that the right to jury trial existed at every juvenile hearing. Instead, the court found that *Gault* could be interpreted to require a jury when a youth is charged with an offense which would be "serious" within the meaning of *Duncan*. *Id.* at 468–69, 161 N.W.2d at 512–13. For the latest word in Nebraska on the jury trial issue, *see* DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970) (jury not required).

[126] 280 F. Supp. 994 (S.D.N.Y. 1968).

[127] Nieves was arrested and charged with violating the federal marijuana law. After the Attorney General decided not to hold him for criminal trial, Nieves could elect between a criminal trial and a juvenile hearing. He chose the juvenile hearing and, as federal law dictated, thus waived his right to a jury trial. Shortly after Nieves pleaded in his delinquency proceedings, *Gault* was decided. Nieves' counsel then moved to convene a three judge panel, sought an injunction to prevent the government from trying Nieves without a jury, and asked for a declaratory judgment that 18 U.S.C. §5033 (requiring waiver of the right to jury trial) was unconstitutional. *Id.* at 996–97.

[128] *Id.* at 1000.

[129] *Id.*

[130] *Id.* at 1001.

[131] In *Nieves*, the government argued that *Gault* intended to incorporate only a limited number of procedural guarantees. Defense counsel argued that *Gault* intended to incorporate into juvenile proceedings all the fourteenth amendment requirements for state criminal trials. The court was not fully persuaded by either argument, but the court did utilize the *Gault* approach in finding that a delinquency proceeding which might lead to a loss of liberty must be regarded as a criminal prosecution for the purpose of the right to jury trial. *Gault* had said juvenile proceedings must be viewed as criminal for the purpose of the privilege against self incrimination. 387 U.S. at 49. If the adoption of a right turned on whether the proceedings were labelled "civil" or "criminal," the *Nieves* court was disposed to term them "criminal." The court was not swayed by the argument that a jury would destroy the informal atmosphere. Instead, the court noted that the hearing could still be private and most juveniles would probably waive their right to a jury anyway. 280 F. Supp. at 1003–06.

[132] 387 U.S. at 49.

Gault and *Winship* requires that an inquiry be made as to whether a given safeguard, here the jury trial, is an essential of due process and fair treatment. With respect to an individual's right to trial by jury, this inquiry is easily answered. In light of *Duncan v. Louisiana*,[133] which held the sixth amendment guaranty of trial by jury applicable to the states, it is incontestable that the jury right is "fundamental to the American scheme of justice" in serious criminal cases.[134] Certainly, the right to a jury is at least as "fundamental" as the rights mentioned in *Gault* and *Winship*, but the question remains whether the jury serves a useful purpose in the juvenile court setting. The jury's purposes, as articulated in *Duncan*, are to safeguard against arbitrary action by judge or prosecutor, to provide a check on the exercise of official power, and in general to make judicial and prosecutorial unfairness less likely.[135] Viewed in that light, the jury appears to perform a necessary and useful function in the juvenile court.[136] Therefore, one might conclude that the jury is essential to due process and fair treatment.

The second inquiry posed by *Gault* and *Winship* is whether the incorporation of a given standard would adversely affect the benefits derived from the juvenile proceeding. In both cases, the state argued that introduction of due process standards would be damaging[137] and in both cases the Court disagreed:

> It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards . . . will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised.[138]

Thus, although the Court indicated that the states need not give up the substantive benefits associated with the juvenile court, it nonetheless implied that those benefits must be weighed or "candidly appraised" in light of due process requirements. In *Gault*, the Court engaged in just such a weighing test. Responding to the argument that introduction of procedural safeguards into the juvenile court setting would undermine the informality of the proceeding, the Court suggested that due process is more important than informality and that some degree of order and regularity will not displace the image of the kindly juvenile court judge, particularly at the dispositional stage.[139] Thus, even if the juvenile derives some small rehabilitative benefit from informal proceedings, it appears that a jury trial would not destroy that benefit, nor does it seem that such small benefit can outweigh the possible disadvantage in terms of loss of liberty caused by denial of the right to jury trial.

The Court in *Winship* may have cast a shadow on the weighing test proposed in *Gault*, however. In *Winship* the Court stressed the fact that the adoption of the reasonable doubt test would in no way affect the "speed, informality or flexibility" of the juvenile hearing. If the Court intended that "speed, informality or flexibility" be non-negotiable benefits of the juvenile court, it is unlikely that the Court would be willing to extend the right to a jury to juveniles. For, unlike the reasonable doubt test, the jury trial would have substantial impact on the speed, informality and flexibility of the hearing. While the *Gault* and *Winship* opinions reflect a desire to preserve the juvenile court's substantive benefits, the Court has treated with skepticism arguments which simply assert that

[133] 391 U.S. 145 (1968). Duncan was convicted in Louisiana of simple battery, an offense punishable by up to two years in prison and a $300 fine. Duncan's request for a jury trial was denied because the Louisiana constitution granted the right to jury trial only in capital cases or cases in which hard labor was a possible punishment. Duncan's sentence was 60 days and a $150 fine. The Supreme Court held that the sixth amendment right to jury trial is embodied in the fourteenth amendment. *Id.* at 149. The opinion traced the history of the right to jury trial, noting the "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 155. The Court's view was that the jury protects against biased judges and corrupt or overzealous prosecutors, while lessening the fear of unchecked official power. Finally, the Court avoided defining a "serious criminal case" but did indicate that the penalty authorized is of major relevance. The Court merely decided that the penalty of two years in prison authorized by the Louisiana assault statute made the offense "serious." *Id.* at 161–62.

[134] *Id.* at 149.

[135] *Id.* at 156.

[136] *See, e.g.*, State v. Turner, 253 Ore. 235, 245, 453 P.2d 910, 915 (1969) (dissenting opinion of O'Connell, J.): "the danger of arbitrary, corrupt or biased action is just as great in juvenile proceedings as it is in adult proceedings."

[137] 387 U.S. at 21; 397 U.S. at 366.

[138] 387 U.S. at 21.

[139] *See* Note, *supra* note 8, at 270:

> A jury trial, however, would not affect the flexibility of the dispositional phase of the delinquency proceedings and would not interfere with the judge's relationship to the child in the determination of proper disposition of the case. An adjudicatory hearing is designed to make an accurate determination of the facts and not to begin rehabilitation of the youth.

given features are beneficial.[140] The states may argue that a jury trial would destroy the benefit derived from the juvenile court's informal procedures, but a candid appraisal should reveal that such benefit is not a sufficient justification for the denial of the important right to a jury trial.

While the *Winship* Court's emphasis on speed, informality and flexibility may be misplaced, there are nevertheless several reasons why the right to jury trial may not be applied to the juvenile court. For one, a jury trial can be time consuming and costly. This consideration is not articulated in the state court opinions, although it may be implicit in those opinions which express a reluctance to overburden or formalize the juvenile court. In view of the juvenile court's recurrent shortage of funds and overcrowded schedules, a jury trial requirement could impair the already limited effectiveness of the court's operations. However, in states which provide for a jury trial in juvenile proceedings, the right is usually waived.[141] Even if a large number of jury demands were anticipated, a jury might be made available only to juveniles charged with violation of a criminal statute.[142]

Another consideration which might influence the Court to deny juveniles the right to jury trial relates to the limited nature of the *Gault* decision. *Gault* did not mean to turn the delinquency hearing into a criminal trial,[143] but the Court has set no limits on the incorporation of due process rights in juvenile proceedings.[144] Therefore the Court could conceivably erect due process limits which would deny juveniles the right to jury trial. But the opposite result is more consistent with its previous decisions. Adding the jury requirement to the due process rights held applicable in *Gault* and *Winship* still would not make the adjudicatory hearing substantially the same as a criminal trial. *Gault's* announced purpose was to secure fairness at the adjudicatory hearing and a jury trial would promote that end. Above all, *Gault* emphasized that commitment amounts to a loss of liberty. Juveniles are therefore logically entitled to the protection afforded by those due process standards, such as a jury trial, which are solicitous of an accused's freedom.

[140] 387 U.S. at 21.

[141] Note, *supra* note 8, at 273–74; Note, *supra* note 17, at 793–94 (in one city where jury trials are available, they are rarely requested); Nieves v. United States, 280 F. Supp. at 1006.

[142] *See* Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968) (concurring opinion of Miliken, J.).

[143] 387 U.S. at 30.

[144] *Id.* at 13–14: "there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings."

Conclusion

The *Gault* decision counts among its progeny a wide variety of lower court cases, many of which have sought to discover the limits of the Court's opinion. One generalization to be drawn from state court cases interpreting *Gault* is that their emphasis is often on the limitation of *Gault*, even though that limitation was not clearly mapped by the Court. Rather, the Court has declared that some criminal trial requirements are compulsory in the juvenile court, others are not, but categorization of any particular requirement must wait for a case-by-case analysis. The Court's analysis applied requirements which are essential to due process and fair treatment and which do not offend the unique benefits derived from the juvenile proceeding. In *Winship*, the Court adopted the same approach, with the conceivable but crucial variation that it was willing to protect the state's interest in flexible and speedy proceedings from invasion by due process strictures. Both of the Court's decisions have applied solely to the adjudicatory stage of the juvenile proceeding.

Post-*Gault* decisions do not portend a return to criminal trials for children. Instead, the goal of the Court has been to achieve fairness in the hearing at which facts are found. The decisions have attempted to assure that no child will be declared delinquent and committed to an institution without a fair finding of fact. Beyond the fact-finding stage, the juvenile court judge retains wide latitude in determining the disposition and treatment for the youth who has been declared delinquent. Thus, it is at the dispositional stage that the unique flexibility of the juvenile court is still fully operative. Despite the well-documented failure of the juvenile court, its dispositional flexibility and the potential for improved treatment of youths mean that the court retains a hope of providing the type of rehabilitation sought by turn of the century reformers.

Editor's Note: After this article went to press, the Supreme Court handed down its decision in *McKeiver v. Pennsylvania*, 91 S. Ct. 1976 (1971), holding that a trial by jury is not constitutionally required in state court proceedings. The Court denied that the jury "is a necessary component of accurate fact finding" and expressed concern that the jury might impair the juvenile court's operation. *Id* at 1985.

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 62, No. 3

Printed in U.S.A.

"NO KNOCK" SEARCH AND SEIZURE AND THE DISTRICT OF COLUMBIA CRIME ACT: A CONSTITUTIONAL ANALYSIS

Before a police officer may break and enter a dwelling, he must reveal to the occupants his identity and the purpose of his entrance.[1] The recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970,[2] however, permits the police to disregard this customary rule of criminal procedure and carry out what has been labeled "no knock" searches and seizures; under certain circumstances, the police may break and enter a house without giving an announcement of their identity and purpose.[3]

Since announcement of identity and purpose is not a procedural nicety, but a rule fashioned to ensure the individual's privacy,[4] his safety and the safety of the police,[5] this attempt in the District of Columbia Crime Act to prescribe those circumstances in which announcement need not be given created a considerable division of opinion in Congress as to the constitutionality of the provision. Proponents of the Act felt the "no knock" search and seizure section did not change existing law, but rather codified it.[6] They argued that the provision was a safeguard which would actually protect the individual from unauthorized police intrusions by clearly defining those circumstances in which an unannounced entry can be made[7] and by requiring, if possible, prior judicial authorization for such an entry.[8]

On the other hand, some members of Congress felt the "no knock" provision was clearly unconstitutional. They believed the Act would greatly increase those circumstances in which unannounced

[1] *See* text accompanying notes 14–18 *infra*.

[2] Pub. L. No. 91-358 (July 29, 1970). [hereinafter cited as District of Columbia Crime Act].

[3] Pub. L. No. 91-358, §23-591(c) states:

> (c) An announcement of identity and purpose shall not be required prior to such breaking and entry—
>
> (1) if the warrant expressly authorizes breaking and entering without such a prior announcement, or
>
> (2) if circumstances known to such officer or person at the time of breaking and entry, but, in the case of the excecution of a warrant, unknown to the applicant when applying for such warrant, give him probable cause to believe that—
>
> (A) such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of,
>
> (B) such notice is likely to endanger the life or safety of the officer or another person,
>
> (C) such notice is likely to enable the party to be arrested to escape, or
>
> (D) such notice would be a useless gesture.

[4] Justice Brennan, speaking for the majority, in Miller v. United States, 357 U.S. 301, 313 (1958) (footnote omitted) stated:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in [18 U.S.C.] §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

[5] Justice Brennan noted that compliance with the announcement requirement safeguards law enforcement officers who might otherwise be mistakenly shot as prowlers. *Id.* at 313 n. 12; Ker v. California, 374 U.S. 23, 57–58 (1963). *Cf.* McDonald v. United States, 335 U.S. 451, 460–61 (1948) (concurring opinion of Jackson, J.).

[6] H.R. REP. No. 1303, 91st Cong., 2d Sess. 236 (1970) (Conference Report on the District of Columbia Crime Bill). *See* 116 CONG. REC. S12021 (daily ed. July 23, 1970) where Senator Symington stated:

> Police officers today, on their own authority, can enter premises to serve search or arrest warrants without first knocking and announcing their identity when justified by certain circumstances. The District of Columbia crime report provision on no-knock warrants does not give police officers this authority. They already have it.

[7] Senatory Tydings, sponsor of the bill in the Senate, stated:

> In the judgment of the Senate conferees, it is far better to have the limited exceptions to the knock-and-wait rule spelled out and frozen on the statute books, instead of leaving the exceptions to grow in a disordered fashion and to change in Federal and local case law. It is far better to have the limited exceptions spelled out clearly, statutorily, for the police to observe, instead of leaving police officers as at present to their own devices.

116 CONG. REC. S11685 (daily ed. July 17, 1970).

[8]

> In fact, this bill adds a very significant additional protection for privacy not contained in those prior (Supreme Court) decisions or in the law of the District of Columbia today: prior judicial supervision of no-knock entry in every possible case. It is a far better proposal insofar as the point of view of civil libertarians is concerned than presently exists under the law of the land as decided by the Supreme Court.

116 CONG. REC. S11569 (daily ed. July 16, 1970) (remarks of Senator Tydings).

entries would be permitted, thereby violating the fourth amendment's[9] protection from unreasonable search and seizure. They feared that such a statute would violate the individual's right of privacy,[10] increase violence,[11] and serve as a prototype for national legislation[12] which could be used to suppress dissent.[13]

[9] U.S. CONST., Amend. VI:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
The minority view in the House Report on the District of Columbia Crime Act stated:
The "no-knock" provision authorizing unannounced entry into homes of private citizens by policemen is a radical, unwarranted departure from existing law. Its need has been undocumented, its grant of authority too extensive, its language unconscionably vague, its standards undefined and its safeguards illusory. If enacted, it will effectively render Fourth Amendment guarantees against "unreasonable searches and seizure" null and void in the District of Columbia.
H.R. REP. No. 907, 91st Cong., 2d Sess. 202 (1970). *See* 116 CONG. REC. S11607 (daily ed. July 16, 1970) (statement by Senator Bayh); 116 CONG. REC. S12024 (daily ed. July 23, 1970) (Senator Nelson).

[10]
I am afraid I will acquire high blood pressure, because it almost gives me high blood pressure to hear it solemnly advocated in the Congress of the United States that we do away with the boast in our law that a man's home is his castle and that we allow officers of the law and make it legal for officers of the law to enter houses of our citizens in like manner to that in which burglars now and have already entered them.
116 CONG. REC. S11647 (daily ed. July 17, 1970) (remarks of Senator Ervin).

[11]
The no-knock proposal is couched in terms of prevention of violence. But think for a moment what will occur when policemen charge into citizens' homes, any time, day or night. Consider the deadly weapons and attack trained dogs available to many District of Columbia residents, and the likely response of an average citizen when someone he probably would not know who, breaks into his home in the middle of the night. No-knock means extreme physical danger to all of us, including the police.
116 CONG. REC. §11845 (daily ed. July 21, 1970) (remarks of Senator McGovern). *See* 116 CONG REC. S11829 (daily ed. July 21, 1970) (remarks of Senator Young).

[12] Subsequent to the passage of the District of Columbia Crime Act, the Controlled Substances Act of 1970 which provides no-knock search powers for federal narcotics agents was enacted. Pub. L. No. 91-513 §509(b) (Oct. 27, 1970).

[13]
It should be clear, moreover, that no-knock authority which they now intend to have used against the perpetrators of crime may someday be used, under a different administration, against them by those who would deny their elementary rights to dissent. This no-knock legislation, which serves as the potential prototype for national no-knock legislation, can be used to suppress the right of a citizen legitimately to keep arms, and to suppress the right of dissent of one who perceives his government drifting too much toward either the right or the left.
116 CONG. REC. S11751 (daily ed. July 20, 1970) (remarks of Senator Goodell.).

This comment will compare those circumstances in which it has been held that the police may dispense with the customary announcement of identity and purpose, under the fourth amendment, with those in which the District of Columbia Crime Act allows such an unannounced entry. It will be seen that the Supreme Court has not clearly specified what circumstances and what standard of proof can justify such an entry and that state and lower federal courts, while in agreement as to what exceptions exist to the rule of announcement of identity and purpose, also vary as to the standard of proof needed to support those exceptions. An examination of the statute itself will reveal that it has codified what various courts have found to be constitutionally permissible exceptions to the requirement of announcement of identity and purpose. The "no knock" search and seizure provision will likely be construed to be constitutional under the fourth amendment, with a properly narrow interpretation.

DECISIONS OF THE SUPREME COURT

The right to have a police officer announce his identity and purpose before breaking and entering a person's home has long been a part of the Anglo-American tradition of search and seizure.[14] As early as 1603, the English courts recognized this in *Semayne's Case*.[15]

In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify

[14] For a discussion of the English common law on this issue, *see* Miller v. United States, 357 U.S. 301, 306-09 (1958); Accarino v. United States, 179 F.2d 456, 459-62 (1949); Wilgus, *Arrest Without A Warrant*, 22 MICH L. REV. 798, 800-06 (1924); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 500-04 (1964); Note, *Announcement in Police Entries*, 80 YALE L. J. 139, 140-45 (1970).

[15] 77 Eng. Rep. 194 (Ex. 1603).

> the cause of his coming, and to make request to open doors.[16]

Either by judicial decision or by statute[17] the states have followed this common law requirement. Likewise, federal law makes announcement of identity and purpose a prerequisite to an entry.[18] But in spite of its long history and wide adoption, the giving of announcement has never been considered an absolute necessity for making a lawful entry. In the words of the Washington Supreme Court:

> To require strict compliance with a 'knock and wait' rule in the execution of search warrants, no matter what the circumstances, would hamper the orderly enforcement of criminal law.[19]

The Supreme Court has only recently considered the necessity of announcing authority and purpose befor entry in the leading cases of *Miller v. United States*[20] and *Ker v. California*.[21] While in *Ker* the Court concluded that the fourth amendment of the Constitution normally demands announcement of both authority and purpose before a search and seizure may lawfully be carried out by either state or federal officials, in neither case did the Court clearly delineate what circumstances or conditions would permit law enforcement officers to dispense with this constitutional requirement.

In *Miller v. United States*, petitioner was arrested by out-of-uniform Washington, D.C. police who entered his apartment at 3:45 a.m. on the belief that he was selling narcotics. In carrying out the arrest the police knocked and stated, "Police." Petitioner started to open his door, then attempted to shut it. The policemen ripped off the chain securing the door, entered the apartment, and arrested him. No announcement of purpose was ever made. Petitioner was subsequently convicted under federal narcotics laws.

The Supreme Court reversed Miller's conviction on the ground that the police had failed to announce their purpose as required by District of Columbia law.[22] The Court did not reach the constitutional problems raised by unannounced entry, however. Justice Brennan, speaking for the majority, recognized that at least one exception existed[23] to the requirement of 18 U.S.C. §3109

[16] *Id.* at 195.

[17] For a list of state requirements as to announcement of identity and purpose before entry, *see* 116 CONG. REC. S11922–23 (daily ed. July 22, 1970). *See, e.g.*, CAL. PENAL CODE §844, 1531; FLA. STAT. §933.09; MICH. STAT. ANN. §28-1259(6).

[18] The applicable federal statute is 18 U.S.C. §3109 (1964), which governs execution of warrants by federal officers:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Although the statute only refers to search warrants, it has been held that the validity of an entry to effect an arrest without a warrant is tested by identical criteria. Sabbath v. United States, 391 U.S. 585, 588 (1968); Miller v. United States, 357 U.S. 301, 306 (1965).

[19] State v. Young, 76 Wash.2d 212, 217, 455 P.2d 595, 598 (1969).

[20] 357 U.S. 301 (1958).

[21] 374 U.S. 23 (1963). On two other occasions, the Court considered the announcement issue. *See* Sabbath v. United States, 391 U.S. 585 (1968), note 39 *infra;* Wong Sun v. United States, 371 U.S. 471 (1963), note 23 *infra.*

[22] Justice Brennan began the decision by stating that the validity of an arrest by state officers for a federal crime is to be determined by state law. Therefore, the arrest of the petitioner ought to be governed by the law of Washington, D.C. as stated in Accarino v. United States, 179 F.2d 456, 465 (D.C. Cir. 1949). 357 U.S. at 305–06. In *Accarino* the court held that the common law was that before an officer can break open a door to a home, he must make known the cause of his demand for entry. The court therefore applied this rule to the District of Columbia. Brennan said that since the *Accarino* decision was identical to the federal statute, 18 U.S.C. §3109, the case warranted review in spite of the Court's policy not to interfer with local rules of law fashioned by the District of Columbia courts. *Id.* at 305–06.

[23] Brennan did acknowledge that some state decisions had held noncompliance with the announcement rule justifiable in exigent circumstances, such as when the officers in good faith believe "they or someone within" is in peril of bodily harm, or that the person to be arrested is fleeing or attempting to destroy evidence. The Court, however, refused to rule on any qualifications to §3109 as there were no exigent circumstances present in *Miller. Id.* at 309.

Any doubt whether the Court actually recognized the useless gesture exception is cleared up in Wong Sun v. United States, 371 U.S. 471 (1963) where the virtual certainty test was again used by the Court. Brennan, writing for the majority, stated that the facts did not create a virtual certainty or extraordinary circumstances which might have justified lack of announcement. Their narcotics agents had information that Blackie Toy, who operated a laundry on Leavenworth Street, was selling heroin. They went to a laundry owned by James Wah Toy (nothing indicated that the two were the same) and knocked. When Toy appeared at the door, the agent said he had come to pick up some laundry, to which Toy responded that he should come back later. The agent then announced he was an agent and showed his badge. Toy slammed the door and ran down the hall, and the agents entered and arrested him. Brennan said there was no extraordinary circumstances present, such as imminent destruction of evidence, and that Toy's flight was ambiguous conduct which did not create a virtual certainty. Justice Clark, joined by Justices Harlan, Stewart and White, dissented, saying the flight was evidence the agents' purpose was known and created exigent circumstances.

that notice of authority and purpose be given before entry.[24] He stated,

> It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that announcement would be a useless gesture.[25]

The Court concluded that the facts in *Miller* were not such as would justify the use of this exception to the general rule of announcement. It considered petitioner's attempt to shut the door after seeing the officers an ambiguous act, not one which would prove petitioner knew of their purpose. It was the expected reaction of any citizen having this experience at that hour in the morning, especially when the officers were not in uniform.[26]

Ker v. California[27] was the next leading decision concerning the announcement requirement. Los Angeles County sheriff's police believed petitioner was selling marijuana secured from one Ronnie Murphy. On the night in question, the police observed a meeting between these two. They then tried to follow petitioner until they lost him after he made a U-turn. The officers went to his apartment, obtained a passkey, and entered without announcing their identity or purpose. They claimed that they did this because it had been their experience that an announcement resulted in the suspected person's attempt to destroy the evidence.[28] Once inside the officers found the marijuana and arrested petitioner. Ker was convicted for possession of marijuana.

In this case, unlike *Miller*, the Court directed its attention to the constitutional questions raised by unannounced entry. Although petitioner's conviction was upheld, the Court, due to a 4-4-1 split,[29] did not clarify those circumstances which would constitutionally justify an unannounced entry. Eight of the nine justices did agree that some circumstances would necessitate breaking and entering without notice[30] but they divided 4-4 as to what they were.

Justice Clark, voting to affirm, noted that California law allowed exceptions to the notice requirement when exigent circumstances existed.[31] Citing *People v. Maddox*[32] as recognizing exceptions when announcement would endanger the officer or frustrate the arrest, Clark said:

> Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.[33]

Clark therefore held that the entry was not unreasonable under the fourth amendment as applied to the states through the fourteenth amendment.

Justice Brennan disagreed with this conclusion, but he recognized that there were certain instances when an unannounced intrusion by police would not violate the fourth amendment:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence

[24] It must be remembered that the Court was deciding this case in its supervisory capacity over a federal statute and not on constitutional standards. 357 U.S. at 306; Ker v. California, 374 U.S. 23, 39 (1963).

[25] 357 U.S. at 310.

[26] In a dissenting opinion Justice Clark, joined by Justice Burton, felt that the circumstances created a virtual certainty that petitioner knew of the officer's purpose. "Rather than attempting to psychoanalyze petitioner, we should measure his understanding by his outward acts." *Id.* at 318 (Clark, J., dissenting). This appears to be what Brennan required, also. The two apparently differed only about what circumstances create a virtual certainty. This disagreement over what factual situations would justify noncompliance with announcement had important repercussions in *Ker v. California*, 374 U.S. 23 (1963).

[27] 374 U.S. 23 (1963).

[28] *Id.* at 28.

[29] Justices Clark, Black, Stewart and White agreed that announcement was not needed. Mr. Justice Harlan concurred in the result only. Justice Brennan wrote a dissenting opinion in which Chief Justice Warren and Justices Douglas and Goldberg concurred, which stated the unannounced entry violated the fourth amendment.

[30] 374 U.S. at 40 (opinion of Clark, J.), 47 (opinion of Brennan, J.).

In concurring in affirmance of the conviction, Justice Harlan stated that state searches and seizures should be subject to the "fundamental fairness" test of the fourteenth amendment rather than the more rigid "reasonableness" test of the fourth amendment. Judging under such a standard, Harlan felt the search of Ker's apartment was within constitutional bounds.

[31] CAL. PENAL CODE §844 (West 1970) reads:

> To make an arrest . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

Judicial exceptions to this, however, were recognized in People v. Maddox, 46 Cal.2d 301, 294 P.2d 6 (1956).

[32] 46 Cal.2d 301, 294 P.2d 6 (1956).

[33] 374 U.S. at 40 (opinion of Clark, J.).

> of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[34]

Applying these exceptions to the facts of *Ker*, Brennan criticized Clark's opinion for allowing an exception based on the mere conjecture that those within might have been expecting the police. The U-turn made by petitioner while the police were following him, which Clark felt was reason to believe that petitioner might well have been expecting the police, could be no more than an ambiguous act.[35]

Brennan also attacked what he regarded as Clark's main ground for holding that lack of announcement was justified, the belief that someone within was destroying evidence.[36] He emphasized that the evidence showed that no one inside knew policemen were there and that there was no activity in the apartment to justify the officers' belief that someone was attempting to destroy evidence. To Brennan, the fact that it has been the officers' experience that other narcotic suspects had destroyed evidence when announcement of identity and purpose was made was not enough to meet fourth amendment requirements.[37]

Since *Ker*, the Supreme Court has only considered the issue of announcement in *Sabbath v. United States*.[38] Like *Miller* and *Ker*, *Sabbath* involved a conviction for violating narcotics laws. Customs agents followed Jones, an informer who was known to be carrying illegally imported narcotics, to the petitioner Sabbath's apartment. After knocking and failing to receive a response, the agents entered the unlocked door without announcement, arrested petitioner without a warrant, and found the narcotics.

Rejecting the Government's contention that announcement might have endangered informant Jones or the officers, the Court, per Justice Marshall, reversed the conviction and held that there was no evidence to show that petitioner was armed or would resist arrest. This reversal, however, did nothing more than demonstrate some circumstances which may not be used to justify an unannounced entry. The Court did not attempt to answer the more general question of what it considered to be possible exceptions to the announcement rule or reconcile the divided opinions in *Ker*.[39] Further, as in *Miller*, the Court confined its analysis to statutory intepretation and decided the case without reaching the level of constitutional adjudication.

Thus, the Supreme Court has never satisfactorily indicated what it considers to be constitutionally permissible exceptions to the requirement of announcing identity and purpose before entry. It is therefore necessary to look to what lower courts have held to be sufficient to justify an unannounced entry.

Lower Court Decisions

In general, the state and lower federal courts have recognized three basic categories of exceptions to the customary requirement that announcement of identity and purpose be made by police prior to breaking and entering. These are 1) where there is danger to the officer or another person, 2) where announcement would frustrate the purpose of entry either by destruction of evidence or escape, and 3) where authority and purpose are already known. These courts, however, have been inconsistent in defining what standard of proof is needed to justify one of these exceptions or what set of facts will satisfy this standard.

As early as 1822, state law recognized that when there was imminent danger to the officer, an exception existed to the general requirement of announcement of identity and purpose.[40] In *Read v.*

[34] *Id.* at 47 (opinion of Brennan, J.).
[35] *Id.* at 60.
[36] *Id.* at 61.
[37] *Id.* at 61–63.
[38] 391 U.S. 585 (1968).

[39] Justice Marshall did make a statement in a footnote on the announcement issue:

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker v. California* . . . (opinion of Brennan, J.) and there is little reason why those limited exceptions might not also apply to §3109, since they existed at common law, of which the statute is a codification.

Id. at 591 n. 8. But it is difficult to justify Marshall's comment that Brennan's exceptions to the requirement of notice of identity and purpose were recognized in *Ker*, a 4–4–1 decision. Certainly Brennan's view on those circumstances which justify an unannounced entry should be given no more weight than Clark's. Also, Marshall's footnote stated that the exceptions listed by Brennan in *Ker* were those that existed at common law, but a review of the common law as it has developed in lower courts shows that the courts do not completely agree as to what the common law is. *See* text accompanying notes 40–76 *infra*.

[40] There seems to be no question that an unannounced entry can be made where a party within is in danger. Even Brennan did not question this in *Ker*. 374 U.S. at 47. One such case is Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert denied*, 375 U.S. 860 (1963), which upheld an unannounced entry after

Case,[41] where the appellant resolved to resist custody even if it resulted in bloodshed, the court stated that the sheriff was not "obliged by law to make a demand, that would probably issue in the destruction of his life." [42] More recent cases,[43] of which *People v. Maddox*[44] is the leading decision, have held to the same effect. In *Maddox*, the police went to appellant's home on the strong belief that he was selling heroin. Upon knocking, the officers heard retreating footsteps. They kicked open the door and entered without stating their identity or purpose. Justice Trayner, in announcing that judicial qualifications had been engrafted onto the California statute[45] requiring notice of identity and purpose, said,

> since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose.... When as in this case, he [the officer] has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable.[46]

Thus, American case law does not require announcement of identity and purpose if it would endanger the officer, but his conclusion to make an unannounced entry must be based on some standard. Such phrases as "good faith belief" [47] or "reasonable belief" [48] have been used to denote what that standard is, but the facts of the cases which apply those tests demonstrate that a wide variety of circumstances have been held to justify an unannounced entry. For instance, suspicious sounds emanating from the apartment after the police had made their presence known was sufficient to warrant an unannounced entry in *Maddox*. Justice Traynor stated that the police could reasonably conclude, on hearing retreating footsteps after knocking, that their safety was in danger.[49] It should be noted that there was no evidence that appellant was armed or vicious. In other cases the violent nature of the crime for which the appellant was being sought was enough to cause the courts to conclude that there was probable cause for belief of increased peril.[50] On the other hand, a record for a non-violent crime or an unconfirmed report of an armed person inside the dwelling has been held not to create reasonable belief that the officer was in danger.[51]

The second exception recognized by lower courts is when the object of the entrance would be frustrated by announcement—that either the evidence sought would be destroyed or the person to be arrested would escape. The courts, however, have been unable to agree what evidence is necessary to demonstrate the exigent circumstances which permit an unannounced entry. Two different approaches have been developed. Some courts have concluded that an officer's prior experience and the nature of the evidence sought can lead to the reasonable conclusion that the evidence is likely to be destroyed, thereby excusing announcement.[52] Others have rejected this "blanket rule," [53] which could cover all easily destructible items, and have held that only the particular circumstances at the

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prolonged knocking when the victim of an illegal abortion was believed to be dying inside. *See* People v. Wojciechowski, 31 App. Div.2d 658, 296 N.Y.S.2d 524 (1968).

[41] 4 Conn. 166 (1822).

[42] The court assumed that this was true and stated that the jury should have been informed that if the safety of the sheriff was in danger, the lack of announcement was lawful. *Id.* at 170.

[43] Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert denied*, 388 U.S. 922 (1967) (defendant an armed murderer); People v. Hammond, 54 Cal.2d 846, 357 P.2d 289, 9 Cal. Rptr. 233 (1960) (Defendant had a gun and was under the influence of heroin); People v. Robinson, 296 Cal. App.2d 789, 75 Cal. Rptr. 395 (1969) (Shots had been fired in vicinity of appellant's apartment); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965) (appellant suspected of murder); State v. Johnson, 102 R.I. 344, 230 A.2d 831 (1967) (defendant convicted of a crime of violence).

[44] 46 Cal.2d 301, 294, P.2d 6 (1956).

[45] *See* CAL. PENAL CODE §844 (West 1970), the text of which is at note 31 *supra*.

[46] 46 Cal.2d at 306, 294 P.2d at 9.

[47] *Id.*

[48] United States v. Barrow, 212 F. Supp. 837, 846 (E.D. Pa. 1962), *cert. denied*, 385 U.S. 1001 (1967); United States v. Sims, 231 F. Supp. 251, 257 (D. Md. 1964); People v. Floyd, 26 N.Y.2d 558, 260 N.E.2d 815, 312 N.Y.S.2d 193 (1970).

[49] 46 Cal.2d at 306-07, 294 P.2d at 9.

[50] *See, e.g.*, Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967); United States v. Sims, 231 F. Supp. 251 (D. Md. 1964).

[51] United States v. Barrow, 212 F. Supp. 837 (E.D. Pa. 1962), *cert. denied*, 385 U.S. 1001 (1967).

[52] *See* People v. Hartfield, 94 Ill. App.2d 421, 237 N.E.2d 193, 197–98 (1968); Henson v. State, 236 Md. 518, 204 A.2d 516, 519–20 (1964); State v. Johnson, 102 R.I. 344, 230 A.2d 831, 836–37 (1967). Each case involved narcotics which could be easily destroyed.

[53] Justice Traynor used this term in People v. Gastelo, 67 Cal.2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967), to describe that rule which would allow an unannounced entry based merely on the type of evidence sought.

time of entry could lead the officer to reasonably conclude that evidence was being disposed of.[54]

A compromise approach as to when an unannounced entry may be made to prevent the destruction of evidence has been adopted by at least five states, New York,[55] Minnesota,[56] Nebraska,[57] South Dakota,[58] and Utah.[59] These states require that a warrant permitting an unannounced entry be obtained from a magistrate or judge before such an entry may be made. The result, however, appears to be that a "blanket rule" has been maintained as a matter of judicial instead of police discretion. This was demonstrated in *People v. DeLago*,[60] where the New York Court of Appeals upheld the constitutionality of section 799 of the New York Code of Criminal Procedure.[61] The court stated that the proof required by the statute to excuse announcement was shown merely by an affidavit describing the evidence, which was of such a nature that the court could take judicial notice that it could be easily destroyed.[62]

While state and lower federal courts disagree as to what facts are sufficient to warrant a conclusion that evidence may be destroyed, these courts appear to be more consistent as to when the possibility of escape would warrant a failure to announce. As with the destruction of evidence exception, suspicious noises emanating from the suspect's apartment[63] or unusual conduct by the suspect[64] have been held sufficient to allow a conclusion that an escape would be attempted. Therefore, the police could legally dispense with announcement. But unlike the destruction of evidence exception, it does not appear that the courts will condone an unannounced entry made on the basis of prior experience. A previous record of trying to

[54] *See* Meyer v. United States, 386 F.2d 715, 718 (9th Cir. 1967) (easily destructible gambling materials); United States v. Blank, 251 F. Supp. 166, 174 (N.D. Ohio 1966) (gambling materials); State v. Mendoza, 104 Ariz. 395, 399, 454 P.2d 140, 144 (1969) (narcotics); Commonwealth v. DeMichel, __ Pa. __, __, 277 A.2d 159, 164 (1971) (gambling materials); Commonwealth v. Newman, 429 Pa. 441, 448, 240 A.2d 795, 798 (1968) (gambling materials).

This approach, however, does not discount the nature of the evidence. In fact it would appear to be a necessary element in determining when an unannounced entry would be reasonable. Thus, if the evidence were such that it could be disposed of quickly and the officers heard suspicious movement after they had somehow made their presence known, courts would conclude that compliance was not necessary. But, if the evidence was not easily destructible, say a large piece of furniture, suspicious noises would not justify an unannounced entry. State v. Young, 76 Wash.2d 212, 215, 455 P.2d 595, 597 (1969).

The breadth of the "blanket rule" and the possibility of abuse under it have led at least one jurisdiction, California, to clarify its position as to what evidence is necessary in order to justify an unannounced entry. In *Maddox*, Justice Traynor had noted that the sound of retreating footsteps created a good faith belief that evidence would be destroyed. 46 Cal.2d at 306, 294 P.2d at 9. After that case, however, the appellate courts of California upheld unannounced entrances on no more basis than that experience had shown the evidence could be easily destroyed. Many of these cases were denied hearings by the Supreme Court of California. For a detailed list of cases, *see* People v. De Santiago, 71 Cal.2d 18, 25–26, 453 P.2d 353, 357–58, 76 Cal. Rptr. 809, 813–14 (1969). In People v. Gastelo, 67 Cal.2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967), Justice Traynor abruptly halted the growth of such a standard. He made it clear that compliance with California Penal Code §844 would not be excused by a "blanket rule" stating that announcement is unnecessary just because the evidence could be easily destroyed. Only where particular circumstances give rise to a reasonable belief that immediate action is necessary to prevent destruction would an unannounced entry be held lawful. *Id.* at 588–89, 432 P.2d at 708, 63 Cal. Rptr. at 12.

[55] N.Y. CODE CRIM P. §799 (McKinney 1964) provides:

> The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, (a) if, after notice of his authority and purpose, he be refused admittance, or (b) without notice of his authority and purpose, if the judge . . . issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge . . . may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed . . . or that danger to the life or limb of the officer or another may result, if such notice were to be given.

[56] Minnesota arrived at a similar result as New York by judicial decision. In State v. Parker, 283 Minn. 127, 166 N.W.2d 347 (1969), the court stated it would follow the New York rule requiring a warrant permitting an unannounced entry. The affidavit must provide substantial basis for believing evidence will be destroyed. Some relevant factors to be considered are, 1) the intensity of surveillance, 2) reliability of the informant, 3) corroborating evidence, and 4) criminal record of the defendant. *Id.* at 136, 166 N.W.2d at 353.

[57] NEB. REV. STAT. §29-441 (Supp. 1967).

[58] S.D. COMP. LAW §§39-17-125 (Supp. 1970).

[59] UTAH CODE ANN. §§77-54-9 (1967).

[60] 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1962), *cert. denied*, 383 U.S. 963 (1966).

[61] *See* note 55 *supra*.

[62] 16 N.Y.2d at 292, 213 N.E.2d at 661, 266 N.Y.S.2d at 356.

[63] People v. Maddox, 46 Cal.2d 301, 294 P.2d 6 (1956) (retreating footsteps after the police had knocked); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965) (noise in apartment after arrival of police in building).

[64] Vanella v. United States, 371 F.2d 50 (9th Cir. 1966), *cert. denied*, 386 U.S. 920 (1967) (Running out back door after police knocked and then going back in on seeing police gave belief that suspect would attempt to escape).

escape[65] or eluding an officer[66] has been held to be inadequate to justify an unannounced entry.

A third classification of circumstances which courts have held would justify noncompliance with the general rule requiring announcement of identity and purpose before entry is when announcement would be a useless gesture. Generally, circumstances which indicate that those within already know the identity and purpose of the officer have been required.[67] The rationale for such an exception is, as Judge Burger (now Chief Justice) stated, "To require that in these circumstances the police officer expressly state a purpose to apprehend the quarry he is pursuing would be to hamper law enforcement with a useless formalism." [68] The courts have found this exception to apply to a variety of circumstances, such as where the police heard a flurry of activity after announcing their identity,[69] where the police were in pursuit of two suspected robbers who had entered an apartment,[70] or where the defendant could see the police and knew of their purpose.[71] A further type of circumstance which has been classified as a useless gesture is where the police are certain that an announced entry would not be heard. This might be where the police had no reason to know that someone was inside[72] or where they could see that the defendant remained asleep and, despite repeated knocking, could not hear a statement of identity and purpose.[73]

The difficulty with the useless gesture exception is what degree of proof the police must have that their identity and purpose are already known or would not be heard. State and federal courts have not been consistent in their holdings. Some have required that the police be "virtually certain" [74] that their identity and purpose were known to the occupants before entry. Others have been less stringent and have allowed the exception where the facts created a "reasonable belief" [75] or that the police were "justified" [76] in believing that identity and purpose were known.

Examination of Section 23-591(c)

District of Columbia Code §23-591(c), which its supporters state is no more than a codification of current law,[77] authorizes police to break and enter,[78] without announcing their identity and purpose, by two means: 1) when the circumstances known to the officer at the time of entering, and unknown when applying for a warrant, give him probable cause to believe that an announcement is likely to result in one of three situations or be a useless gesture, or 2) when the warrant expressly permits it.[79] In light of the above review of Supreme Court decisions and those of the lower courts, it appears that this statute does provide exceptions to the normal rule of announcement which have been recognized by some courts, and furthermore, that these exceptions are permissible under the fourth amendment.[80]

One important criticism of both methods of making an unannounced entry under the District of Columbia Crime Act is the standard of proof used in the Act to determine when an unannounced entry may be made. The statute states that when there is "probable cause" to believe that one of the enumerated circumstances "is likely" [81] to occur, such an entry is permissible. Some members of Congress felt this standard did not meet the

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[65] People v. De Santiago, 71 Cal.2d 18, 453 P.2d 353, 76 Cal Rptr. 809 (1969).

[66] People v. Floyd, 26 N.Y.2d 558, 563, 260 N.E.2d 815, 817, 312 N.Y.S.2d 193, 195 (1970) (Defendant had once eluded an officer).

[67] Wilgus, *supra* note 14, at 802.

[68] Chappell v. United States, 342 F.2d 935, 938 n. 4 (D.C. Cir. 1965).

[69] Commonwealth v. McAleese, 214 Pa. Super. 228 252 A.2d 380 (1969).

[70] Chappell v. United States, 342 F.2d 935 (D.C. Cir. 1965).

[71] People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955).

[72] Howe v. Butterfield, 58 Mass. 302 (1849) (Sheriff had no reason to know that anyone was inside church when he broke in to serve a writ of attachment).

[73] Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970).

[74] Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961); United States *ex rel.* Ametrane v. Gable, 276 F. Supp. 555 (E.D. Pa.), *aff'd*, 401 F.2d 765 (1967); Commonwealth v. McAleese, 214 Pa. Super. 228, 252 A.2d 380 (1969).

[75] Dagamput v. United States, 352 F.2d 245 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966).

[76] United States v. Nicholas, 319 F.2d 697 (2d Cir.) *cert. denied*, 375 U.S. 933 (1963).

[77] *See* note 6 *supra*.

[78] Breaking and entering are defined in §23-591(e) as including any use of physical force or violence or other unauthorized entry but do not include entry obtained by trick or stratagem. This reflects current case law where entrance by deception, as long as force was not employed, has been held to be permissible. Smith v. United States, 357 F.2d 486, 488 n. 1 (5th Cir. 1966); Leaky v. United States, 272 F.2d 487, 490 (9th Cir. 1959).

[79] D.C. Code Encycl. Ann. §23-591(c).

[80] *See* Note, *supra* note 14 (Conlcudes the statute is constitutional but states its use must be stringently restricted if its administration is to meet constitutional standards).

[81] D.C. Code Encycl. Ann. §23-591(c).

fourth amendment's requirement of probable cause[82] but on examination this standard does not appear to violate the fourth amendment, as it has been interpreted by the Supreme Court. The phrase "probable cause . . . is likely to" was extracted[83] from Justice Clark's opinion in *Ker v. California*,[84] where, in justifying the unannounced entry in that case, he stated,

> The officers had reason to act quickly because of Ker's furtive conduct and the *likelihood* that the marijuana would be distributed or hidden before a warrant could be obtained. . . .[85]

Further, this phrase, as used by Clark and on which the statute is based, does not seem to differ from the definition of probable cause as defined in *Brinegar v. United States*.[86] There the Court stated that probable cause existed where

> the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant *a man of reasonable caution* in the belief that an offense has been or is being committed.[87]

In other words, all that is needed for fourth amendment probable cause is that there be a reasonable ground to believe that an event will occur,[88] or, to use the terminology of *Ker*, there is a likelihood that something will happen.

The District of Columbia Crime Act appears, therefore, to demand no less strict a standard then that defined in *Brinegar*. The Act requires that there be probable cause that evidence is likely to be destroyed, an individual's safety is likely to be endangered, or the suspect is likely to escape. Only a reasonable belief or likelihood that these enumerated situations will occur is required.

The first procedure authorizing unannounced entry under the District of Columbia Act may apply to one of four situations. The first such situation is when the "circumstances known to such officer or person at the time of breaking and entry . . . give him probable cause to believe that such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of."[89] Both the Supreme Court[90] and lower federal and state courts[91] have recognized this exception. The only constitutional difficulty with this part of the statute is the evidentiary question of whether the nature of the evidence alone is enough to warrant an unannounced entry. The statute itself does not indicate whether it would be, but only speaks in the general terms of "circumstances known at the time" of entry. The legislative history is likewise unclear on this issue.[92] If the statute could be construed, however, to mean that the nature of the evidence would be sufficient to justify an unannounced entry, such a construction would not violate the fourth amendment. There is authority both from the Supreme Court, in *Ker v. California*,[93] and in the lower courts[94] for a "blanket rule" which would permit an unannounced entry under such circumstances. There would seem to be no constitutional reason to declare an unannounced entry unreasonable under such a standard. Under modern conditions, the difference of a few seconds caused by announcement could mean that evidence such as narcotics

[82] Senator Goodell stated:

> Let it be clear that the standard created by the conjoining of probable cause with "likelihood" is a new one, a weaker one than that of "probable cause" conjoined with "will", and a departure from the intent of *Ker*.

116 CONG. REC. S11750 (daily ed. July 20, 1970). *See* 116 CONG. REC. S11829 (daily ed. July 21, 1970) (remarks of Senator Young).

[83] By using the words "probable cause" and "is likely to," the House Committee on the District of Columbia Crime Act felt it was complying with particularity standards set forth in *Ker*, 374 U.S. at 42. H.R. REP. No. 907, 91st Cong., 2d Sess. 107 (1970). This was also the opinion of the Conference Committee. 116 CONG. REC. S11607 (daily ed. July 16, 1970).

[84] 374 U.S. 23 (1963).

[85] *Id.* at 42 (emphasis added).

[86] 338 U.S. 160 (1949).

[87] *Id.* at 175–76 (emphasis added).

[88] *Id.* at 175.

[89] D.C. CODE ENCYCL. ANN. §23-591(c)(2)(A).

[90] Ker v. California, 374 U.S. at 40 (opinion of Clark, J.), 47 (opinion of Brennan, J.).

[91] *See* text accompanying notes 52–62 *supra*.

[92] The House Report on the District of Columbia Crime Act indicates that if it is the officer's experience that the evidence will be destroyed, he may make an unannounced entry. H.R. REP. No. 907, 91st Cong., 2d Sess. 106 (1970). On the other hand, Sen. Tydings stated:

> The Senate conferees did not recede from their original position that only particular facts . . . may serve as grounds for "no-knocking." The House conferees urged to the contrary that particular facts are unnecessary; they urged, for example, that "no-knocking" would be appropriate in nearly all narcotics or gambling cases, based on the destructibility of the evidence usually involved. The issue was resolved in favor of neutral language, adaptable to either the House or the Senate interpretation; but with the limitation of specific reference to the *Ker* case.

116 CONG. REC. S11607 (daily ed. July 16, 1970).

[93] 374 U.S. at 40 (opinion of Clark, J.).

[94] *See* note 52 *supra*.

or gambling materials[95] would be disposed of before the police would have time to reach them. As long as the circumstances surrounding the entrance are such that the type of evidence creates probable cause that announcement would enable the occupants to destroy it,[96] then the fourth amendment should permit an unannounced entry to be made.

The second situation which would excuse notice of identity and purpose before entry is when the "circumstances known to such officer or person at the time of breaking and entry ... give him probable cause to believe that such notice is likely to endanger the life or safety of the officer or another person." [97] There can be no constitutional objection to this provision. Reasonable conduct under the fourth amendment does not require that an innocent party be injured. Neither the Supreme Court[98] nor the lower courts[99] have indicated that announcement need be made if the safety of a third party would be endangered. Furthermore, lower court decisions since *Read v. Case*[100] have clearly held that if the officer has probable cause to believe that his safety is in danger, announcement may also be excused.

The third exception to the requirement of announcing identity and purpose before entry provided for by the District of Columbia Crime Act is "if circumstances known to such officer or person at the time of breaking and entry ... give him probable cause to believe that such notice is likely to enable the party to be arrested to escape." [101] There is no question that an exception of this nature exists if there is probable cause that the suspect will escape; again both the Supreme Court[102] and lower courts have so indicated.[103]

The final set of circumstances which would permit the police to enter without stating their identity and purpose is if such notice would be a "useless gesture." [104] Senator Tydings, chief sponsor of the District of Columbia Crime Act, defined this term as used in the Act as follows:

> The term "useless gesture" under the conference substitute is specifically utilized as a legal term of art, with narrow and exclusive reference to prevailing case law. In this way the term is restricted to situations as where the officers' identity and purpose are already known to the occupant of the premises to be searched, or as where the occupant has failed to respond to a knock on the door and is known to be asleep and incapable of being given notice.[105]

As so defined, this exception would be constitu-

[95] In 1962, for example, it was reported that less than 30 seconds were necessary to destroy all of the evidence of a wire service headquarters. McClellan, *Gambling and Organized Crime*, S. REP. No. 1310, 87th Cong., 2d Sess. Experience has shown that numbers bets are recorded on either "flash" paper which ignites on contact with fire or "water soluble" paper which dissolves on contact with water, and that the time spent by the executing officer in giving notice and waiting to be refused admittance is used by the gambler to destroy his work product. H.R. REP. No. 907, 91st Cong., 2d Sess. 108 (1970). In refering to narcotics, the House Report said:

> The same is true in the area of illegal narcotics activity. Experience has shown that the time consumed by the executing officers in announcing their authority and purpose and waiting to be refused admittance is used by the drug trafficker in disposing of his narcotics down the toilet.

Id. at 109. Several suggestions have been made as to how to stop this destruction. One commentator has expressed the opinion that announcement of identity and purpose has become outmoded with the technological revolution. He stated:

> the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed have made [18 U.S.C.] section 3109 a dangerous anachronism. In many situations today where bandits are captured only after long gun battles with police, a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous.

Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 502 (1961).

Another alternative was proposed by Rep. Gallagher. He introduced a "no flush" law which would ban indoor plumbing in the District of Columbia. In so doing, he stated, "I would rather opt for liberty than indoor plumbing." 116 CONG. REC. H2071 (daily ed. March 19, 1970).

[96] Senator Tydings gave an example of when an unannounced entry would be permissible based on the nature of the evidence.

> In gambling cases, if it is known ... that the prospective defendants regularly use water soluble paper, that they conduct their operations near a disposal facility, that they have defeated searches previously by immediately and effectively disposing of all evidence upon receiving preentry notice from the police, and that the prospective defendants are aware of the police surveillance and are primed to effect the disposal of the evidence [it may be permissible to depart from the knock and wait rule].

116 CONG. REC. S11685-6 (daily ed. July 17, 1970).

[97] D.C. CODE ENCYCL. ANN. §23-591(c)(2)(B).
[98] Ker v. California, 374 U.S. at 47.
[99] *See* note 40 *supra*.
[100] 4 Conn. 166; *see* note 42 *supra*.
[101] D.C. CODE ENCYCL. ANN. §23-591(c)(2)(C).
[102] Ker v. California, 374 U.S. at 47.
[103] *See* notes 63-64 *supra*.
[104] D.C. CODE ENCYCL. ANN. §23-591(c)(2)(D).
[105] 116 CONG. REC. S11685 (daily ed. July 17, 1970).

tionally acceptable. It has a precise meaning[106] which conforms to the common law definition.[107]

One problem, however, with the useless gesture exception, as used in the District of Columbia Crime Act, is whether probable cause is an adequate standard to determine when the exception applies.[108] The Supreme Court in *Miller v. United States*[109] used the term "virtual certainty" as the standard which must be met before an unannounced entry could take place under this exception[110] and lower courts have held likewise.[111] However, other courts have used what appears to be a less strict standard such as "might well have" known[112] or "reasonable belief." [113] These appear to be in accord with probable cause as used by the District of Columbia Crime Act and the fourth amendment.

The second procedure by which the police may make an unannounced entry under the District of Columbia Crime Act is if the warrant authorizing the search and seizure expressly states that the policeman may do so.[114] Authorization by warrant is the preferred procedure under the Act, since the officer can only make an unannounced entry without judicial approval if the circumstances permitting an unannounced entry were unknown at the time the warrant was applied for. However, the issuing judge cannot permit such an entry to take place at whim; he is held to the same standard as the policeman who makes an unannounced entry under the Act without a warrant. The judge must find there is probable cause that one of the four situations described above is likely to exist if announcement is given.[115]

By providing for judicial approval of unannounced entries, the Conference Committee on the District of Columbia Crime Act felt there would be additional protection to the individual from illegal entries.[116] This belief is based on the theory that it is better to have a neutral, detached judge determine when the privacy of the home may be invaded, rather than have a policeman do it.[117] Such an impartial judgment is obviously a wise policy when referring to whether a search and seizure can be made. However, the need for a judge's approval would seem to contradict the rationale for permitting unannounced entries, that they should only be made in exigent circumstances or where purpose and identity are already known.[118] Since exigent means calling for immediate attention, the term would seem to preclude those situations which are known far enough in advance to

[106] In Connally v. General Construction Co., 269 U.S. 385, 391 (1926), the Supreme Court commented on its criteria for certainty:

> the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.

The useless gesture exception would seem to meet this criterion.

[107] *See* text accompanying notes 67–73 *supra*.

[108] Senator Javits remarked:

> It seems apparent that the use of the words "virtually certain" by the Supreme Court meant to restrict the scope of the "useless gesture" doctrine. The conference bill dispenses with an announcement if the officer had probable cause to believe that it would be a "useless gesture," but says nothing about virtual certainty. This seems to go beyond the doctrine referred to in the *Miller* case.

116 CONG. REC. S11928 (daily ed. July 22, 1970).

[109] 357 U.S. 301 (1958).

[110] *Id.* at 310.

[111] *See* note 74 *supra*.

[112] 374 U.S. at 40.

[113] *See* note 75 *supra*.

[114] D.C. CODE ENCYCL. ANN. §23-591(c)(1)

[115] The applicable provision for search warrants is §23-522(c)(2):

> (c) The application for a search warrant may also contain — . . .
>
> . . . .
>
> (2) a request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set forth in subparagraph (A), (B), or (D) of section 23-591(c)(2) is likely to exist at the time and place at which such warrant is to be executed.

That for arrest warrants is found in §23-561(b)(1):

> If the complaint established probable cause to believe that one of the conditions set out in subparagraphs (A) through (D) of section 23-591(c)(2) is likely to exist at the time and place at which such warrant is to be executed, the warrant may contain an authorization that it be executed as provided in section 23-591.

[116] H.R. REP. No. 1303, 91st Cong., 2d Sess. 236 (1970).

[117] McDonald v. United States, 335 U.S. 451, 455–56 (1948); Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[118]

> I think if we authorize no-knocks under these circumstances, with advance determination by a court,. . . we shall be opening a Pandora's box. It will broaden the whole concept, at least temporarily until the courts decree it unconstitutional, of the limitation on no-knock entries.
>
> By definition, a court cannot, in advance, determine exigent circumstances. Exigent circumstances are circumstances that arise on the spot, observed and assessed by the officer on the spot.

116 CONG. REC. S11750 (daily ed. July 20, 1970) (remarks of Senator Goodell).

permit a warrant to be obtained. The fallacy of such an argument, however, lies in the fact that the underlying rationale of making unannounced entries is not exigent circumstances which require immediate action, but rather necessitous circumstances which require making an unannounced entry to avoid certain undesirable results. A judge would be able to determine whether a necessitous situation exists at a time prior to entry. For instance, he could tell if the evidence sought was of a nature which could be easily destroyed and whether there was a likelihood that it would be, or if it was known that the suspect was armed and the officer's life would be in danger.

Judicial authorization of unannounced entries is, therefore, an additional protection against unwarranted entries without notice and not an unconstitutional expansion of "no knock" search and seizure. It leaves the decision of whether to announce identity and purpose to the police only where a warrantless search is permissible or where the occupant's conduct at the time of entry would create a situation permitting an unannounced entry.

Conclusion

The "no knock" search and seizure section of the District of Columbia Crime Act is a controversial provision.[119] The controversy results from fear that §23-591(c) unconstitutionally extends the common law exceptions to the requirement of announcement of both identity and purpose before law enforcement officers can enter an individual's home. Whether these fears are well founded remains a questionable issue. At the present time the case law is inconclusive due to the even split of the Supreme Court in the leading case of *Ker v. California*[120] as to when the exceptions exist and a similar division among the state and lower federal courts.

Despite this inconclusiveness by the courts, the District of Columbia Crime Act seems to provide for entries permissible under the fourth amendment. Strong objection was raised that the "probable cause . . . is likely to"[121] standard of proof provided by the statute for determining when an unannounced entry may be made does not meet the fourth amendment's requirement of probable cause.[122] However, probable cause as defined by the Supreme Court in *Brinegar v. United States* appears to be consistent with this phrase.[123] Both state that there must be reasonable, but not certain, grounds for the officer's belief, and this is all that is required by the fourth amendment.

Those sections of the District of Columbia Crime Act which allow an unannounced entry when there is probable cause that notice is likely to imperil the officer or a third party or is likely to allow the suspect to escape are undoubtedly constitutional. These exceptions have long been recognized, and the proof needed to establish them is adequate under the fourth amendment.

The constitutionality of the destruction of evidence exception, the useless gesture exception and the judicial authorization provision seems less certain. These provisions, however, do meet fourth amendment standards. Opposition to the destruction of evidence exception centers around the question of whether the nature of the evidence itself is enough to justify an unannounced entry. Some lower courts, as well as Justice Clark in *Ker*, have felt that it could be enough in certain instances, and there is no constitutional reason why the so-called "blanket rule," as used in the District of Columbia Crime Act, should not be upheld. A reasonable man might well believe that announcement would result in certain kinds of evidence being destroyed.

The controversy over the useless gesture exception is likewise based on unfounded fears. Opponents to the Act felt that probable cause is not as strict a standard as the "virtual certainty" test used in *Miller v. United States*.[124] But the Supreme Court in *Brinegar*, as well as lower federal and state courts, has regarded the probable cause standard of proof sufficient for searches and seizures. The fourth amendment itself requires a no more demanding test before a search and seizure may be made.[125]

Lastly, the judicial authorization provision is constitutional. It merely takes the decision of when an unannounced entry may be made out of the hands of the police, leaving it with an impartial judge. The judge too must have probable cause to meet the requirements of the statute so the fourth amendment requirements are fulfilled.

The "no-knock" section of the District of Columbia Crime Act provides for unannounced entries which do not abridge the demand of the fourth

[119] *See* notes 6–13 *supra*.
[120] 374 U.S. 23 (1963).
[121] *See* note 82 *supra*.
[122] The fourth amendment states in part, "no warrants shall issue, but upon probable cause."
[123] 338 U.S. 160, 175–76.
[124] 357 U.S. 301 (1958).
[125] *See* note 122 *supra*.

amendment that all searches and seizures be reasonable. But since the terms of the statute are probably the broadest permitted by constitutional standards, the courts must take care that the Act is not abused. Its terms must be applied strictly and carefully, or else the individual's right to privacy may be made meaningless.[126]

[126] A warning on construing fourth amendment rights which should be remembered was issued by the Supreme Court in Boyd v. United States, 116 U.S. 616 (1886):

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprecation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.

Id. at 635; *see* Johnson v. United States, 333 U.S. 10, 17 n. 8 (1948).

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 62, No. 3

Printed in U.S.A.

NO PANACEA: CONSTITUTIONAL SUPERVISION OF EYEWITNESS IDENTIFICATION

Without any foreshadowing the Supreme Court announced three opinions in mid-1967 which radically extended the application of the sixth amendment right to counsel. In *United States v. Wade*,[1] the Court held that a pretrial, post-indictment lineup[2] at which the defendant was identified was a "critical stage" of the criminal proceedings. The Court ruled that absent an intelligent waiver by the accused, counsel for the accused must be present at the pretrial confrontation.[3] In *Gilbert v. California*,[4] decided the same day, the Court attached the sanction of *per se* inadmissibility to any identification evidence procured in violation of *Wade*. In the third case, *Stovall v. Denno*,[5] the Court held that the rules announced in *Wade* and *Gilbert* would not be applied retroactively. Nonetheless, the Court ruled that fourteenth amendment due process governs the conduct of pretrial identification proceedings.[6]

The justification given for the three decisions was the conflict between the enormous weight given eyewitness identification evidence at trial[7] and the documented frequency of erroneous identification.[8] The Court viewed the danger of suggestion by the police, by the circumstances, or by the defendant himself as subtle but great.[9] Moreover, there was felt to be little likelihood that the presence of prejudicial suggestion at a pretrial lineup would be brought to light at trial.[10]

In view of these considerations, the Supreme Court sought to prevent potential injury to the

[1] 388 U.S. 218 (1967).

[2] The term "lineup" has come to mean an identification confrontation in which at least one person other than the suspect participates. The term "showup" is most commonly associated with a one-to-one or face-to-face confrontation with the lone suspect.

[3] 388 U.S. at 237. The subject of waiver of the defendant's sixth amendment rights has been carefully examined in the lower courts. *See* Henry v. State, __ Ala. App. __, 239 So.2d 318 (1970) (Voluntary waiver established by signed form); People v. Keim, 8 Cal. App.3d 776, 87 Cal. Rptr. 597 (1970) (Half-hour wait for counsel insufficient to constitute waiver); Jaggers v. People, __ Colo. __, 484 P.2d 796 (1971); Redding v. State, 10 Md. App. 601, 272 A.2d 70 (1971) (no waiver where defendant's counsel was notified and did not attend); Walker v. State, 454 S.W.2d 415 (Tex. Crim. 1970). *See generally* Carnley v. Cochran, 369 U.S. 506 (1962). *See also* United States v. Ayers, 426 F.2d 524 (2d Cir. 1970) (Waiver can only follow adequate warning of rights independent of *Miranda* warnings); People v. Tribble, 4 Cal.3d 826, 484 P.2d 589, 94 Cal. Rptr. 613 (1971) (Effective waiver not contingent on warning of purpose of lineup); Commonwealth v. Guillory, __ Mass. __, 254 N.E.2d 427 (1970).

In some jurisdictions the practice of using substitute counsel has been undertaken. *See* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 368–75 (1969); Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65, 83 (1967). Use of substitute counsel was approved in United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970); Summerville v. State, 226 Ga. 854, 178 S.E.2d 162 (1970); State v. Griffin, 205 Kan. 370, 469 P.2d 417 (1970) (Substitute counsel is not required to further represent defendant).

[4] 388 U.S. 263 (1967).

[5] 388 U.S. 293 (1967).

[6] *Id.* at 302.

[7] *Id.* at 229. One commentator observes:

> Many people are completely nondescript in appearance. Others have poor eyesight, or dismal powers of observation. Yet even when the latter identify the former in a criminal trial, there is a special impact that sways jurors beyond almost anything else.

F. GRAHAM, THE SELF-INFLICTED WOUND 225 (1970). *See also* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 1–65 (1965). *But see* McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235 (1970) (Juries tend to be unimpressed by identifications occurring solely from the witness stand).

[8] *See generally* E. BORCHARD, CONVICTING THE INNOCENT (1961); J. FRANK & B. FRANK, NOT GUILTY (1957); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); WALL, *supra* note 7, at 1–65; G. WILLIAMS, THE PROOF OF GUILT (3d ed. 1968); Williams & Hammelmann, *Identification Parades*, 1963 CRIM. L. REV. 479, 543 (1963).

[9] 388 U.S. at 233–37.

The range of possible prejudicial suggestion is vast. Ordinarily, suggestion includes accentuation of the suspect in a lineup because of substantial differences in age, race, height, dress or physical characteristics among the participants. Using police officers or jail inmates in lineups may set the suspect apart because of subtle differences in attitude, bearing, or degree of nervousness. Police can by their conduct, such as turning their eyes towards the suspect, "tell" the witness who the suspect is. The mere use of the showup accomplishes the same result. It clearly tells the witness that the police suspect *this* man. Permitting witnesses to consult one another during an identification can mutually reinforce unsure identifications. If the defendant is particularly nervous, he may draw attention to himself. *See* 388 U.S. at 230–35; BORCHARD, *supra* note 8; WALL, *supra* note 7; Williams & Hammelmann, *supra* note 8, at 479–90; Note, *Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971).

[10] 388 U.S. at 234–35.

defendant caused by unfair identification procedures through the sixth amendment right to counsel. *Wade* and *Gilbert* therefore required defense counsel to be present at the pretrial confrontation. His presence there was intended to deter suggestive police conduct, and his personal observation was intended to enable him to reconstruct the confrontation and its alleged unfairness at trial.[11]

Interpreting *Wade*, *Gilbert*, and *Stovall* has proven to be a difficult task. There has been substantial judicial confusion in interpreting the cases, reluctance to apply *Wade* to all identifications,[12] and direct Congressional counter-legislation.[13] This comment will examine lower court application of *Wade*, *Gilbert*, and *Stovall* to determine the extent to which the application of these decisions has furthured the Supreme Court's intentions. This comment will also examine the question of whether *Wade* has achieved its objectives and will suggest alternate means of reaching them.

Wade, Gilbert, and the Right to Counsel

Lower court interpretation of *Wade* and *Gilbert* has resulted in three types of applications. A few courts have limited the right to counsel to post-indictment lineups. Most courts, however, have required counsel at any post-arrest lineup which was critical for sixth amendment purposes, though some of them have used this "criticality" test to exempt broad categories of pretrial police activity from *Wade*. Finally, the District of Columbia Circuit has simply held that *Wade* applies to any identification proceeding in the absence of urgency.

A handful of courts has restricted the application of the principle of *Wade* and *Gilbert* to their facts, thereby limiting the right to counsel to lineups conducted after indictment.[14] The opinions do not clearly reflect why these courts felt compelled to restrict the right to counsel in this manner. Some reliance seems to have been placed on the opening language of the Supreme Court in *Wade* which posed the question to be considered as involving a "post-indictment lineup."[15] Though this charac-

[11] *Id.* at 236.

[12] Some courts held the sixth amendment contention in little esteem before the Supreme Court decided *Wade*. Two years before *Wade*, Judge Burger (now Chief Justice) reacted to the increasing number of sixth amendment objections with:

> Such 'Disneyland' contentions as that absence of counsel at the police line-up voids a conviction are becoming commonplace. Some arise from the hard experience of court appointed lawyers, who, having served diligently without compensation, later find themselves subjected to vicious and unwarranted attacks by their ex-clients for failing to raise some bizarre point conceived by the 'legal experts' in prison. Having found that the indigent client's sense of gratification is readily dulled by incarceration, some court appointed counsel find it expedient to protect themselves by raising every point, however absurd, which indigent appellants suggest.

Williams v. United States, 345 F.2d 733, 736 (D.C. Cir. 1965) (concurring opinion).

Some courts still have reservations:

> If there be any such violation in this case, it is the violation of a right which did not exist at the time the Constitution was adopted or for more than a century and a half thereafter, during which time the document was interpreted by those great justices who were instrumental in promulgating it and urging its adoption originally as well as by those learned men who helped frame and interpret the various amendments thereto.
>
> It has been said that the Constitution of the United States was framed by men inspired by the Almighty Creator. If that be true, then the cases cited by the defendant, if valid, would seem to make it appear that the framers did not correctly understand their inspiration. Those cases also make manifest the fact that some 75 of the greatest justices of the Supreme Court never did know what the language of the Constitution meant. It would, therefore, seem that only God knew the true meaning, and He kept it to Himself for 175 years to reveal at long last to certain justices some strange and theretofore undreamed of meanings of the Constitution, all to the advantage and great joy of malefactors and to the utter horror and consternation of the great bulk of the law-abiding citizenry of the land.

State v. Spencer, 24 Utah 2d 361, 363-64, 471 P.2d 873, 875 (1970).

[13] Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197.

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

18 U.S.C. §3502 (Supp. IV, 1969). The Senate committee report accompanying the legislation resolves any doubt that this provision was intended to override *Wade* and *Gilbert*, and the "disastrous rule of evidence" created. *See* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). No court has yet ruled on this conflict. *See, e.g.*, United States v. Ballard, 423 F.2d 127, 129 n. 5 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969); United States v. Kinnard, 294 F. Supp. 286, 291 n. (D.D.C. 1968). *But cf.* Poole v. State, __ Miss. __, __, 216 So.2d 425, 426 (1968), *cert. denied*, 395 U.S. 965 (1969).

[14] *See* State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Robinson v. State, __ Fla. Supp. __, 237 So.2d 268 (1970); People v. Palmer, 41 Ill.2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970). *Cf.* Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970) (implicit).

The validity of this minority position is currently under review by the Supreme Court. Kirby v. People, 121 Ill. App.2d 323, 257 N.E.2d 589 (1970), *cert. granted sub nom.* Kirby v. Illinois, 39 U.S.L.W. 3520 (U.S. May 24, 1971) (No. 6401).

[15] 388 U.S. at 219:

> The question here is whether courtroom identifications of an accused at trial are to be excluded from

terization of the factual circumstances of the case was carefully preserved throughout *Wade*,[16] there is language in the opinion and in subsequent opinions which conspicuously fails to preserve that factual distinction.[17] The Court's inconsistency makes this interpretation of *Wade* a poor basis for decision.

A stronger argument for limiting *Wade* and *Gilbert* to post-indictment lineups is that this provides a clear standard for the police. To determine when a defendant's right to counsel firmly attaches, it is much easier to point to the securing of an indictment than it is to determine when the accusatory stage or probable cause for arrest has occurred. Such an arbitrary, though clear, dividing line can be justified only by the state's interest in avoiding unduly handicapping and confusing the police in their efforts to catch criminals.[18]

Most state and federal courts have permitted the application of *Wade* and *Gilbert* beyond their facts.[19] In a leading case applying *Wade*, *People v. Fowler*,[20] the California Supreme Court interpreted the rules in *Wade* and *Gilbert* to apply to lineups occurring before indictment. The California court offered three reasons for this decision which have persuasively influenced other courts. First, the court could not find any reason for strictly limiting the principles of *Wade* and *Gilbert* to their facts. The court felt that the prejudicial risks and consequences of a lineup were the same whether it occurred before or after indictment.[21] Secondly, *Wade* required an examination of the circumstances of every confrontation to determine whether it was a critical stage of the proceedings. Finally, the court expressed concern that restricting *Wade* to post-indictment lineups would permit the police to skirt constitutional rights by simply conducting all lineups before indictment.[22]

The application of *Wade* to pre-indictment lineups has not been uniform. Some courts have tested the criticality of each confrontation[23] in determining whether counsel's presence was required. In *Hayes v. State*,[24] the Wisconsin Supreme Court held *Wade* applicable to a stationhouse lineup conducted within three hours after the alleged offense. The basis for applying *Wade* was the critical nature of the confrontation. The court held that circumstances surrounding the lineup caused the police to focus unduly on the accused, thereby creating exceptional risks of improper suggestion at the confrontation.[25]

Though most courts have interpreted *Wade* and *Gilbert* broadly, practical and policy considerations have caused some of them to wholly exempt certain types of identification proceedings. Frequently the issue has been whether exigent circumstances justified a concededly improperly suggestive identification practice.[26] Further exceptions have been produced by applying notions of inherent reliability or circumstantial fairness to identify those identification confrontations which are not critical for sixth amendment purposes.

One type of confrontation which the lower courts

evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel.

See People v. Palmer, 41 Ill.2d at ___, 244 N.E.2d at 174; Robinson v. State, ___ Fla. Supp. at ___, 237 So.2d at 270.

[16] *See* 388 U.S. at 219, 237, 272.

[17] *See id.* at 227, 251 (White, J., dissenting), 298; Biggers v. Tennessee, 390 U.S. 404, 405–06 (1968) (Douglas, J., dissenting).

[18] *See* Hayes v. State, 46 Wis.2d 93, 107, 175 N.W.2d 625, 633 (1971) (concurring opinion). *See generally* 388 U.S. at 255 (White, J., dissenting); LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peter and Beyond*, 67 MICH. L. REV. 40, 119 (1968).

[19] *See, e.g.*, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970) (*Wade* applicable to photo identifications); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968); United States v. Clark, 289 F. Supp. 610 (E.D. Pa. 1968); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968); People v. Fowler, 1 Cal.3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); Billinger v. State, 9 Md. App. 628, 267 A.2d 275 (1970); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970) (Scrutinize any pretrial confrontation); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); State v. Isaacs, 24 Ohio App.2d 115, 265 N.E.2d 327 (1970); *In re* Holley, ___ R.I. ___, 268 A.2d 723 (1970) (extending *Wade* pre-indictment and to juveniles); Jones v. State, 47 Wis.2d 642, 178 N.W.2d 42 (1970) (Court interprets its warrant stage as correlative to federal indictment and extends *Wade* to pre-warrant).

[20] 1 Cal.2d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

[21] *Id.* at 342, 461 P.2d at 648–49, 82 Cal. Rptr. at 368–69.

[22] We cannot reasonably suppose that the high court, recognizing that the dangers of abuse and misidentification exists in *all* lineups, would announce a rule so susceptible of emasculation by avoidance.

Id. at 344, 461 P.2d at 640, 82 Cal. Rptr. at 370.

[23] *See, e.g.*, United States *ex rel.* Ragazzini v. Brierley, 321 F. Supp. 440 (W.D. Pa. 1970); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); State v. Royster, 57 N.J. 472, 273 A.2d 574 (1971); State v. Wilbely, 112 N.J. Super. 216, 270 A.2d 734 (1970); People v. Burwell, 26 N.Y.2d 331, 258 N.E.2d 714, 310 N.Y.S.2d 308 (1970); Proctor v. State, 465 S.W.2d 759 (Tex. Crim. 1971); Jones v. State, 47 Wis.2d 642, 178 N.W.2d 42 (1970).

[24] 46 Wis.2d 93, 175 N.W.2d 625 (1970).

[25] *Id.* at 97–98, 175 N.W.2d at 627.

[26] This was the situation in Stovall v. Denno, 388 U.S. 293 (1967).

have consistently held exempt from the strictures of *Wade* and *Gilbert* is one which occurs shortly after the commission of the crime.[27] In a typical holding, the District of Columbia Circuit approved "only those on-the-scene identifications which occur within minutes of the witnessed crime." [28] In reaching this decision, the court was concerned with the delay that would ensue if the *Wade* right to counsel were imposed. The court felt that such a delay would cause unnecessary detention of innocent suspects and the diminished reliability of a delayed identification.[29]

The first of these two concerns is the state's interest in exculpating innocent suspects as soon as possible in order to free the police to seek the real offender. If the suspect is not arrested at the scene of the crime, the chances of ever arresting him are slim.[30] The courts also agree that the state has an interest in avoiding the delay of securing counsel for an on-the-scene identification where such delay would reduce the reliability of the identifications. This concern, however, is more difficult to support. One-to-one confrontations, or showups, have long been condemned by commentators and by the Supreme Court in *Wade* as inherently suggestive.[31] The extent to which the showup may endanger the reliability of an identification depends upon the circumstances of the confrontation and upon the opportunity the witness had to observe the offender. Where the eyewitness had little opportunity or reason to note the features of an offender,[32] he is more open to suggestion. Furthermore, the witness' emotional state or age may render him unduly receptive to suggestion.[33] Nonetheless, the lower courts consistently hold

[27] How soon after the crime or how close to the scene of the crime is the main question courts have had to resolve. *See* State v. Meeks, 205 Kan. 261, 469 P.2d 302 (1970); Comment, *Right to Counsel at Scene-of-the-Crime Identifications*, 117 U. PA. L. REV. 916 (1969); Note, *United States v. Wade and On the Spot Identification*, 30 U. PITT. L. REV. 517 (1969).

> If such confrontations as this [fifteen minutes after the offense at the scene of the crime] violate our Constitution because they are 'suggestive,' then much of the evidentiary material which forms the grist of the fact-finding machinery in our courts should as well be constitutionally banned for unreliability.

State v. Boens, 8 Ariz. App. 110, 113, 443 P.2d 925, 928 (1968).

[28] Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969). The District of Columbia Circuit has recently held that a delay of 60 to 90 minutes after the crime did not merit the presence of counsel at the identification proceedings. *See* Perry v. U.S., 9 B.N.A. Crim. L. Reptr. 2220 (D.C. Cir. June 16, 1971).

[29] For an argument that the on-the-scene or field confrontation is no longer "investigatory" or more trustworthy than a lineup held later, *see* Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases*, 42 COLO. L. REV. 135, 144–47 (1970); Note, *supra* note 27, at 521, One court maintained that,

> The test of criticality is a functional test, based upon the *Wade* postulate that possible prejudice to the accused must be weighed against countervailing policy considerations. . . . We suggest that such countervailing policy considerations should not be limited merely to situations temporally and physically 'on the scene.'

State v. Jordan, 113 N.J. Super. 563, __, 274 A.2d 605, 608 (1971).

[30] *See* LaFave, *supra* note 18, at 117, 119–22.

> In the survey, there were 1,905 crimes examined, of which 482 (25 percent) resulted in arrests or other clearances. Of these, 70 percent involved arrests, 90 percent of which were made by the patrol force. More than half of the arrests were made within eight hours of the crime, many at or near the crime scene, and almost two-thirds of the arrests were within the first week after the crime. *If a suspect is neither known to the victim nor arrested at the scene of the crime, the chances of ever arresting him are very slim.* Of the 482 cleared cases, 63 percent involve 'named suspects.' In the 1,556 cases without named suspects, only 181 (or 12 percent) were solved later by arrest.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 58 (1967) (emphasis added). *See also* INSTITUTE FOR DEFENSE ANALYSIS, A REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY, ch. 2, app. B (1967).

[31] 388 U.S. at 234; *see, e.g.*, FRANKFURTER, *supra* note 8, at 31–32; WALL, *supra* note 7, at 27–40. *But see* State v. Spencer, 24 Utah 2d 361, 363, 471 P.2d 873, 875 (1970):

> [W]e are unable to see what purpose would be served by having an attorney present merely to watch the victim look at the defendant.

[32] Perhaps the clearest statement of the "fresh image" argument supporting the on-the-scene exception to *Wade* was articulated by the Indiana Supreme Court:

> [R]ecognition of a person or face would seem to be as much the product of a subjective mental image as of articulable, consciously remembered characteristics. A man may see clearly in his 'mind's eye' a face or a figure which he is hard put to describe adequately in words. Though the image of an 'unforgettable face' may occasionally linger without any translation into words, photographic recall is most often ephemeral. Vivid in the flash of direct observation, it fades rapidly with time. And the conscious attempt to separate the ensemble impression into particular verbalized features, in order to preserve some recollection, may well distort the original accurate image so that it is the verbalized characteristics which are remembered and not the face or the man.

McPhearson v. State, __ Ind. __, __, 253 N.E.2d 226, 229 (1969). *See* People v. Laurenson, __ Ill. App. 2d __, 268 N.E.2d 183 (1971).

[33] *See* Cotsirilos, *Meeting the Prosecution's Case: Tactics and Strategies of Cross-Examination*, 62 J. CRIM. L.C. & P.S. 142, 152 (1971).

that identifications secured at on-the-scene showups are inherently more reliable.[34]

The true reason for the on-the-scene exception seems to be necessity. This is analogous to the situation in *Stovall* where the showup was staged in the hospital room of the apparently dying victim of a stabbing. The Supreme Court approved the showup because of the compelling need to determine immediately whether the suspect was in fact the offender.[35] To the extent that on-the-scene identifications can be termed imperative, this exception to the dictates of *Wade* and *Gilbert* seems justified and sound.

Another frequent exception to the *Wade* criticality doctrine is identification during the investigatory stage of police activities. In *State v. Isaacs*[36] the court held that this stage continues until the prosecutive process "has shifted from the investigatory stage to the accusatory stage and focuses on the accused." Certain types of confrontations during the investigatory stage appear to be free from risks of suggestion. In a recent case,[37] the victim of an armed robbery toured the neighborhood where the crime had occurred with police and identified the defendant from a group of six to eight youths standing on a corner. Though the victim had given the police a description of the offender prior to the identification, it is difficult to perceive how the circumstances of the confrontation could have worked prejudicial suggestion where no suspect had yet been singled out by the police.[38] Consequently, in circumstances such as these, requiring the presence of counsel seems an unnecessary burden on police investigation.

A more frequent investigatory identification proceeding is the practice of "open crimes" confrontations. These confrontations generally involve placing the suspect, who is in police custody under charges or suspicion of other offenses, in a lineup to be viewed by witnesses to a number of unsolved crimes having a common *modus operandi* and geographical proximity.[39] A defendant objected to the inequities of this practice in *United States v. Allen*,[40] but the District of Columbia Circuit balanced the interests at stake and held that "the inherent suggestibility of a lineup is outweighed in this case by the reasonable suspicion that the appellant may indeed be responsible for the open crimes."[41] Despite the fact that the police had not focused on the suspect for a specific offense, the risks of misidentification and suggestiveness are as serious as

[34] On-the-scene identifications were approved in: Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Bates v. United States, 405 F.2d 1104 (D.C. Cir. 1968); People v. Anthony, 7 Cal. App.3d 751, 86 Cal. Rptr. 767 (1970) (within ten minutes); People v. Young, 46 Ill.2d 82, 263 N.E.2d 72 (1970); Parker v. State, — Ind. —, 261 N.E.2d 562 (1970) (within fifteen minutes); McPhearson v. State, — Ind. —, 253 N.E.2d 226 (1969); State v. Meeks, 265 Kan. 261, 469 P.2d 302 (1970) (within four hours); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968); State v. Hamblin, 448 S.W.2d 603 (Mo. 1970); State v. DiMaggio, 49 Wis.2d 565, 182 N.W.2d 446 (1971).

On stationhouse identifications, *see* State v. Smith, — Iowa —, 182 N.W.2d 409 (1970); State v. Bibbs, 461 S.W.2d 755 (Mo. 1970); Quinn, *supra* note 29, at 144–47; Comment, *supra* note 27; Note, *supra* note 9, at 784–87.

[35] The Court restated the Fourth Circuit's reasoning with approval:

> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long the victim might live.... Under these circumstances, the usual police lineup,... was out of the question.

388 U.S. at 302. *Compare* Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968) *with* Commonwealth v. Cooper, 356 Mass. 74, 248 N.E.2d 253 (1969). Other courts upholding showups and ensuing identifications include: United States v. Shannon, 424 F.2d 476 (3d Cir. 1970); United States *ex rel.* Williams v. LaVallee, 415 F.2d 643 (2d Cir. 1969); United States *ex rel.* Rutherford v. Deegan, 406 F.2d 217 (2d Cir.), *cert. denied*, 395 U.S. 983 (1969).

[36] 24 Ohio App.2d 115, 265 N.E.2d 327 (1970). *See also* Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); Wise v. United States, 383 F.2d 206, 209, 209 n. 9 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

[37] People v. Robinson, 46 Ill.2d 229, 263 N.E.2d 57 (1970).

[38] *But see id.* at 232. The court held that the trial court had improperly excluded questions by defense counsel put to the robbery victim at the trial hearing. The excluded questions were in part directed at whether police were sufficiently informed of the suspect's description to influence the victim's identification.

[39] *See, e.g.*, United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969); State v. Mentor, 433 S.W.2d 816, 818 (Mo. 1968); Lujan v. State, 428 S.W.2d 336 (Tex. Crim. 1968). The use of open crimes lineups is apparently widely employed. *See generally* Read, *supra* note 3, at 368–69 (discussing open crimes lineups in the District of Columbia as modified by Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968)); Comment, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830, 838 (1969).

[40] 408 F.2d 1287 (D.C. Cir. 1969).

[41] *Id.* at 1289. In the District of Columbia, however, a defendant has the right to have counsel present at such confrontations, and indeed, the court in *Allen* took pains to make suggestions to law enforcement as to the proper role of counsel at such confrontations. *See also* People v. Blumenshine, 42 Ill.2d 508, 250 N.E.2d 152 (1969) (disapproval of certain kinds of open crimes lineups); Read, *supra* note 3, at 369 n. 89 (noting the risks for non-suspects participating in lineups).

those in the confrontations specifically considered in *Wade* and *Gilbert*. Furthermore, requiring the presence of counsel at a formally organized lineup is hardly a substantial obstacle to police investigatory efforts.

Carving a wholesale exception from the application of *Wade* and *Gilbert* provides a rule of thumb, but does not address the dangers of suggestion present in each particular factual context. For instance, the courts have generally upheld identifications which occur at a chance or accidental encounter between a suspect and an eyewitness.[42] This exception to *Wade* seems justified because improper suggestion is unlikely. Yet a blanket exception for accidental encounters may, in certain circumstances, conceal highly prejudicical suggestion. Many accidental identifications, though seemingly spontaneous, are the result of staged encounters by the police.[43]

Many courts have similarly held *Wade* inapplicable to identifications occurring in a courtroom, observing that the conduct of such proceedings is solely within the trial court's discretion.[44] Yet the dangers of suggestion and the need to recreate the confrontation's circumstances at trial are as present here as at out-of-court confrontations in the accusatory stage of proceedings.[45]

The District of Columbia Circuit has interpreted *Wade* and *Gilbert* more broadly than any other court. Building on two earlier decisions,[46] the court held in *United States v. Greene*[47] that counsel was required at an informal pre-arrest confrontation. In *Greene*, the victims of a robbery asked to see the suspect "in the flesh" after making an uncertain photo identification. The police officer in charge, feeling there was no probable cause for arrest, simply summoned the suspect and the victims to the police station. Before the officer arrived, the victims had positively identified the suspect from a group of a dozen men standing in a waiting area. The court found the identification to be defective, holding that the presence of counsel was essential for later reconstructing the exact circumstances of the confrontation.[48]

The identification in *Greene* was investigatory, the suspect was not in custody, and the police could not legally compel the suspect to participate in a lineup. The District of Columbia Circuit nonetheless held *Wade* applicable,[49] ruling that the *Wade* right to counsel was a "threshold question to that of the fairness of the confrontation weighed in the due process scale of the Fifth Amendment." Under this view, enhanced reliability or circumstancial fairness does not vitiate the right to counsel. *Wade* applies to any identification confrontation absent circumstances importing necessity.[50]

The District of Columbia Circuit's interpretation of *Wade* and *Gilbert* seems soundest. Any identification is critical insofar as it initiates prosecution of the suspect. As long as courts continue to permit broadly-defined exemptions from *Wade*, they perpetuate many of the dangers of improper suggestion at identifications and they prevent the meaningful review of identifications at trial.

Stovall v. Denno and Due Process

Together with right to counsel in *Wade* and *Gilbert*, the Supreme Court announced a standard of due process in *Stovall v. Denno*[51] to which all pretrial identification confrontations must adhere. In *Stovall*, the Supreme Court held that the "total-

[42] *See* People v. Covington, 47 Ill.2d 198, 265 N.E.2d 112 (1970); Robertson v. State, 464 S.W.2d 15, 19 (Mo. 1971) (encounter at police station); State v. Turner, 81 N.M. 571, 469 P.2d 720 (1970) (no right to hearing on taint where confrontation inadvertant).

[43] The fact that the witness accidentally "bumped into" the suspect should perhaps itself arouse suspicion. Random encounters, where the victim identifies the handcuffed suspect in a police station prior to a formal lineup, may be the handiwork of the police. This ploy is known as the "Oklahoma showup" in police jargon. Graham, *supra* note 7, at 229. *See* United States *ex rel.* Ragazzini v. Brierley, 321 F. Supp. 440, 443 (W.D. Pa. 1970) (Dictum that accidental encounters are not immune from constitutional infirmity); People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378 (1971).

[44] *See, e.g.*, Allen v. Rhay, 431 F.2d 1160, 1166 (9th Cir. 1970).

[45] *See* Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970). In *Roth*, the court held that *Wade* applies to any identification where the witness was asked by the prosecutor to "walk through" the courtroom during recess to see if anyone resembled the offender.

[46] United States v. Long, 424 F.2d 799 (D.C. Cir. 1969); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969).

[47] 429 F.2d 193 (D.C. Cir. 1970).

[48] *Id.* at 196.

[49] *Id. But see* Butler v. Robbins, 434 F.2d 1009 (1st Cir. 1970) ("In the flesh" request minimizes danger of suggestion).

For a potential Congressional solution to the problem presented in *Greene*, *see* bill introduced by Senator Hruska, S. 3563, 91st Cong., 1st Sess. (1969). For a discussion of *Greene* by one of the judges who decided the case, *see* McGowan, *supra* note 7, at 242–44. *See generally* Carrington, *Speaking for the Police*, 61 J. Crim. L.C. & P.S. 244, 265–74 (1970) (Colorado rule compelling suspects to submit to fingerprinting).

[50] *See* United States v. Green, 436 F.2d 290, 291 (D.C. Cir. 1970).

[51] 388 U.S. 293 (1967). *See* Note, *Due Process Considerations in Police Showup Practice*, 44 N.Y.U. L. Rev. 377 (1969).

ity of the circumstances" surrounding the confrontation must be considered in determining whether "circumstances conducive to irreparable mistaken identity" are present. Beyond this terse elaboration of due process, the lower courts have been afforded little guidance by the Supreme Court[52] as to what constitutes an impermissibly suggestive and therefore unconstitutional identification proceeding.

In *Foster v. United States*,[53] the Supreme Court reversed a conviction where the police had hinted "this is the man" so often to the victim that the defendant had been denied due process. The Court observed that, while the reliability of an identification is ordinarily a jury question,[54] suggestion which undermines the reliability of an identification can, "past a line," infringe constitutional protections.

Lower court decisions[55] are inconsistent in their determination of which identification confrontations go "past a line" of constitutionally permissible conduct. In *People v. Laurenson*[56] an Illinois court found that the circumstances of a robbery witness' identification of the defendant at a preliminary hearing were so suggestive, in light of the totality of the surrounding circumstances, that the defendant was deprived of a fair trial and due process of law. The key circumstance which made the identification suspect was the eyewitness' wholly inadequate opportunity to observe the offender when the crime was committed.[57] The absence of sufficient original observation together with the conspicuous failure by the police to arrange a confrontation during the period of custody prior to the preliminary hearing was held to be ample justification for finding a due process violation.[58]

The *Laurenson* court also suggested that the length of time between the alleged crime and the corporeal identification may be a critical index of reliability.[59] Thus, suggested the court, the *failure* to hold a lineup within a certain time after a suspect has been apprehended may indicate a degree "of uncertainty on the part of the police." [60] Yet the District of Columbia Circuit[61] has recently upheld a conviction where the first corporeal identification of the defendant occurred at trial, some eleven months after the crime.

A similar problem exists where the witness to the crime views or otherwise senses only a portion of the offender's physiognomy. Such was the situation in a case where the victim was blindfolded, raped, and afterwards engaged in conversation by her assailant.[62] Faced with these circumstances, a district court granted the defendant's writ of habeas corpus, holding that the victim's identification of the defendant's voice as the voice of her assailant, in circumstances which resembled a showup, was constitutionally impermissible.[63] The court recognized that the practice of a one-to-one showup proceeding was inherently dangerous, and that where this practice was limited to the assailant's voice, the confrontation became unnecessarily conducive to irreparable mistaken identity.[64]

If a change in time may affect a witness' ability to identify the offender, it should likewise hold true that *any* substantial difference in appearance would undermine the reliability of an identification. But in *People v. Cesarz*[65] the Illinois Supreme Court discounted just such a change between a suspect's

[52] *See* Foster v. California, 394 U.S. 440 (1969); Biggers v. Tennessee, 390 U.S. 404 (1968); Simmons v. United States, 390 U.S. 377 (1968) (Identification by photographs held not violative of *Stovall*).

[53] 394 U.S. 440 (1969).

[54] *Id.* at 442 n. 2.

[55] Confrontation violated due process: Foster v. California, 394 U.S. 440 (1969); United States v. DeBose, 433 F.2d 916 (6th Cir. 1970) (height difference at lineup, picture of suspect in newspaper before lineup); United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968) (Only witness wore bifocals, over 70, first unsure of identification, and would not testify without corroboration); Roper v. Beto, 318 F. Supp. 662 (E.D. Tex. 1970) (voice identification); People v. Werner, 26 Mich. App. 109, 182 N.W.2d 18 (1970) (hospital confrontation); People v. Burwell, 26 N.Y.2d 331, 258 N.E.2d 714, 310 N.Y.S.2d 308 (1970) (defendant's counsel denied access); Proctor v. State, 465 S.W.2d 759 (Tex. Crim. 1971) (cellblock showup); Jones v. State, 47 Wis.2d 642, 178 N.W.2d 42 (1970) (Victims viewed suspect together).

Confrontation did not violate due process: Sears v. Sigler, 298 F. Supp. 1318 (D. Neb. 1969); Baker v. State, 3 Md. App. 251, 238 A.2d 561 (1968); Sertuche v. State, 453 S.W.2d 841 (Tex. Crim. 1970).

[56] __Ill. App.2d __, 268 N.E.2d 183 (1971).

[57] *Id.* at __, 268 N.E.2d at 185.

[58] *Id.* at __, 268 N.E.2d at 185–86.

[59] *Id.* at __, 268 N.E.2d at 186. *But see* United States v. Toney, 440 F.2d 590 (6th Cir. 1971); Thurman v. State, __ Ind. __, __, 262 N.E.2d 635, 637 (1970) (Dictum that absence of any pretrial confrontation would not render subsequent in-court identification violation of due process); Moye v. State, 122 Ga. App. 14, 176 S.E.2d 180 (1970) (Pretrial lineup not prerequisite to in-court identification).

[60] *Cf.* United States v. Gaines, 436 F.2d 150, 153 (D.C. Cir. 1970) (suggesting to police that lineup be held as soon as practicable after arrest).

[61] United States v. McNair, 433 F.2d 1132 (D.C. Cir. 1970). *See* WALL, *supra* note 7, at 127.

[62] Roper v. Beto, 318 F. Supp. 662 (E.D. Tex. 1970).

[63] *Id.* at 667. *But cf.* Hurst v. State, __ Miss.—, 240 So.2d 273 (1970).

[64] 318 F. Supp. at 665–66. This was a pre-*Wade* confrontation.

[65] 44 Ill.2d 180, 255 N.E.2d 1 (1969).

appearance at the scene of the crime and the identification proceeding, holding that the fact that the defendant was first chosen from a very large group of individuals certified an unimpeachably fair confrontation.[66]

An examination of the lower courts' application of *Stovall* reveals disagreement as to what constitutes circumstances conducive to irreparable mistaken identity. This is due to the fact that courts consider different things in determining the due process issue[67] because they fail to consider in each case all the possible dangers of eyewitness identification which the Supreme Court examined in *Wade*, *Gilbert* and *Stovall*.[68]

Wade-Gilbert Exclusionary Rules

The lower court interpretations of *Wade* and *Gilbert* have done more than improperly deny access to counsel and due process—they have also misapplied the *Wade-Gilbert* exclusionary rules. The exclusionary rules formulated by the Supreme Court for *Wade* and *Stovall* violations[69] require a two-step analysis. The court must first determine whether an identification violated the defendant's right to counsel or due process of law.[70] It must then exclude any evidence of that identification where such a violation has occurred. In addition, *Gilbert* undermines the reliability of any pre-trial or in-court identification secured subsequent to the excluded identification. To be admissible at trial, a subsequent identification must be shown not to be tainted by the illegally obtained identification through clear and convincing evidence that it was based on the witness' observation of the offender prior to the illegal proceeding.[71] Finally, the Supreme Court required that if evidence of the illegal confrontation or evidence of any subsequent identification which lacked an "independent source" was introduced, then the conviction must be reversed, unless the introduction of such evidence was harmless beyond a reasonable doubt.[72]

Despite the apprehensions of courts and commentators, the *Wade-Gilbert* exclusionary rules have not proven a difficult obstacle for the prosecution to overcome. Some courts have skipped the two-step analysis entirely by failing to test the constitutionality of an identification where the court was confident that the subsequent in-court identification had an independent source.[73] Without the two-step analysis, however, it cannot be decided on appeal whether the introduction of illegal identification evidence was harmless error. Thus, to the extent that the courts fail to find that the identification was not violative of the right to counsel, they preclude the operation of the exclusionary rule and defeat the Supreme Court's reasons[74] for creating it.

[66] *Id.* at 184, 255 N.E.2d at 4. The accused was wearing swimming trunks and sun glasses during the pool-side confrontation at a motel.

[67] *Compare* State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); People v. Cesarz, 44 Ill.2d 180, 255 N.E.2d 1 (1969); People v. Williams, __ Ill. App.2d __, 268 N.E.2d 730 (1971); Kirby v. People 121 Ill. App.2d 323, 257 N.E.2d 589 (1970), *cert. granted sub nom.* Kirby v. Illinois, 39 U.S.L.W. 3520 (U.S. May 24, 1971) (No. 6401); State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377 (1969) *with* United States v. Ganter, 436 F.2d 364 (7th Cir. 1970); People v. Tribble, __ Cal.3d __, 484 P.2d 589, 94 Cal. Rptr. 613 (1971); Proctor v. State, 465 S.W.2d 759 (Tex. Crim. 1971).

[68] 388 U.S. at 233–36, 241.

[69] *See* Foster v. California, 394 U.S. 440 (1969); Clemons v. United States, 408 F.2d 1230, 1247, 1254 (D.C. Cir. 1968) (Wright, J., dissenting); Comment, *Protection of Accused at Police Lineups*, 6 Col. J.L. & S.P. 345, 351–52 (1970). *But see* United States v. McKenzie, 414 F.2d 808, 810 (3d Cir. 1969) (Independent origin doctrine not applicable to confrontations violating due process).

[70] 388 U.S. at 273. In State v. Isaacs, 24 Ohio App.2d 115, 265 N.E.2d 327 (1970), the court held that a defendant may properly object to the illegality of identification evidence not directly identifying the defendant, which is admitted at his trial. *See also* People v. Bisogni, 4 Cal.3d 582, 483 P.2d 780, 94 Cal. Rptr. 164 (1971). *But see* Burton v. State, 442 S.W.2d 354 (Tex. Crim. 1969).

[71] 388 U.S. at 272.

[72] The Court cited Chapman v. California, 386 U.S. 18 (1967), on the standard for harmless error. *But see* Harrington v. California, 395 U.S. 250 (1969) (Four dissenting justices felt that *Chapman* was overruled by the majority). For an analysis of the doctrine of harmless error, *see* Comment, *A Multi-Rule Approach to Harmless Constitutional Error*, 18 U.C.L.A. L. Rev. 202, 212 (1970).

Admission of illegal identification evidence not harmless error: Commonwealth v. Guillory, __ Mass. __, 254 N.E.2d 427 (1970); People v. Werner, 26 Mich. App. 109, 182 N.W.2d 13 (1970).

Harmless error: United States v. Horton, 440 F.2d 253 (D.C. Cir. 1971); United States v. DeBose, 433 F.2d 916 (6th Cir. 1970); Fitts v. United States, 406 F.2d 518 (5th Cir. 1969); People v. Covington, 47 Ill. 2d 198, 265 N.E.2d 112 (1970); Redding v. State, 10 Md. App. 601, 272 A.2d 70 (1971); People v. Gonzales, 27 N.Y.2d 53, 261 N.E.2d 605, 313 N.Y.S.2d 673 (1970).

[73] *See* Butler v. Robins, 434 F.2d 1009 (1st Cir. 1970); Haskins v. United States, 433 F.2d 836 (10th Cir. 1970); United States v. Parker 432 F.2d 1251 (9th Cir. 1970); People v. Covington, 47 Ill.2d 198, 265 N.E.2d 112 (1970); State v. Hughes, 5 N.C. App. 639, 169 S.E.2d 1 (1969).

[74] The Supreme Court intended the exclusionary rules to serve as a deterrent to unlawful police conduct at pretrial identification proceedings. The failure to

Courts have also vitiated the effect of the exclusionary rules through leniency in the requirement that an in-court identification be based on observation other than at the illegal confrontation. This leniency is often evidenced by a court's failure to examine closely the circumstances of the witness' original encounter with the offender.[75] Generally, the most compelling factor in the court's eyes is the witness' opportunity to observe the offender at the scene of the crime.[76] While the length of time of the opportunity alone will not guarantee that a strong and enduring impression of the offender remains in a witness' mind,[77] some courts, in finding an independent source, have readily accepted the witness' word that he was positive of the identification.[78] Other courts, however, have explicitly broadened the scope of inquiry to include circumstances after the crime which reveal the adequacy of the original opportunity to observe.[79] Pertinent factors are whether the defendant was identified by more than one eyewitness, whether he failed to be identified, how positive these identifications were, and whether there was a serious discrepancy between the police description of the offender and the suspect's appearance. The Supreme Court implicitly approved the latter approach in *Wade* by asserting that no single factor, including the eyewitness' opportunity to observe the offender, should be deemed controlling.[80]

The Operation And Success of Wade

Though the Supreme Court in *Wade* carefully outlined its reasons for fashioning a new legal standard for identification practice, it did not offer any practical guidance to the day-to-day keepers of the *Wade* and *Stovall* rules: judges at trial, lawyers at *Wade-Stovall* hearings, and lawyers at lineups. In many respects, however, the uncertainty of these roles has provided the strongest challenge to the efficacy of the right to counsel and due process remedies created by those cases.

Wade and *Stovall* hearings are occasionally not held at trial. The failure to fully consider the validity of pretrial identifications and possible tainting of subsequent identifications at the trial level effectively precludes meaningful appellate review. Yet some appellate courts, instead of remanding the case for a hearing, proceed to resolve the issues themselves on the basis of an inadequate trial record.[81] Concerned with the dangers of this practice and the inefficiency of remanding the case to the trial court for a hearing, other courts have suggested that the trial judge should take the initiative and inquire into the need for a *Wade* or *Stovall* hearing where circumstances indicate that identification testimony will be important.[82]

A related problem is the latitude to be given defense counsel in questioning the circumstances surrounding a pretrial confrontation at a *Wade* or *Stovall* hearing. Many jurisdictions have asserted

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determine the legality of the proceeding would appear to defeat that purpose. In the absence of such a determination, the admission of the pretrial confrontation evidence would not affect the validity of the trial. But even if that evidence were not introduced at trial, the Supreme Court recognized that:

> The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference.... The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial.

388 U.S. at 240.

Thus the exclusionary rule against tainting of subsequent identification evidence is another facet of the Court's attempt to deter unlawful police conduct. But the issue of tainting will not be given full consideration, if any, if the first step, determining the legality of the pretrial confrontation, is brushed over. *See* United States v. Parker, 432 F.2d 1251 (9th Cir. 1970).

[75] *See, e.g.*, Robinson v. State, — Fla. Supp. —, 237 So.2d 268 (1970) (Rape victim and husband observed defendant for half hour); People v. Palmer, 41 Ill.2d 571, 244 N.E.2d 173 (1969); State v. McClain, — Kan. —, —, 479 P.2d 907, 909 (1971); Commonwealth v. Balukonis, — Mass. —, 260 N.E.2d 167 (1970) (opportunity prior to and during robbery to observe defendant); Duncan v. State, 454 S.W.2d 736 (Tex. Crim. 1970).

[76] *See, e.g.*, State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969) (three minutes observation and distinctive features).

[77] *See* Wall, *supra* note 7, at 16–17.

[78] *But see* Borchard, *supra* note 8, at 50; Wall, *supra* note 7, at 16.

[79] *See* Commonwealth v. Cooper, 356 Mass. 74, 248 N.E.2d 253 (1969); State v. Mershon, — Ore. App. —, 459 P.2d 551 (1969); Wall, *supra* note 7, at 90–130.

[80] 388 U.S. at 241.

[81] *See, e.g.*, United States v. Parker, 432 F.2d 1251 (9th Cir. 1970).

[82] If the essential facts concerning the pretrial confrontation are not preserved in the trial record, the appellate court is clearly not in a position to review its constitutionality, the first step of the analysis. The District of Columbia Circuit responded to this problem by suggesting that the district judges take the initiative and ask defense counsel whether a *Wade* or *Stovall* hearing is needed in cases where identification evidence figures prominently. Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969). *See also* United States v. Wright, 433 F.2d 671, 674 (8th Cir. 1970), approving the *Solomon suggestions:*

> Such a procedure would promote the orderly administration of justice so often disrupted by the questions belatedly raised for the first time on appeal or on motions collaterally attacking convictions.

a clear policy against using such a hearing for discovery purposes,[83] and have therefore been quick to limit the scope of defense counsel's inquiry. Moreover, some courts deny the defendant a right to a hearing altogether if his counsel attended the pretrial identification proceeding.[84]

The Supreme Court did not suggest in *Wade* what the proper role of counsel should be at lineups or other identification proceedings. Nor have many lower courts attempted to provide that guidance.[85] Several commentators have even argued the futility of counsel's presence at lineups, regardless of the degree of his participation.[86] These arguments point out that counsel is not schooled in the detection of improper suggestion, that his deterrence value is exaggerated, and that reconstruction of the lineup at trial may require that he testify on his client's behalf. Furthermore, the principles of *Wade* could be emasculated by defense counsel's calculated refusal to attend lineups.[87] This refusal may stem from counsel's belief that by attending the lineup he will increase the credibility of the identification evidence at trial and thereby work against the interests of his client.[88]

Conversely, the prosecution appears to have been advantaged by *Wade*. If counsel attends the lineup, the prosecution can use this fact to emphasize the identification's reliability before a jury. If counsel does not attend the lineup, substitute counsel may be provided,[89] insuring the credibility of the evidence. Finally, if the lineup is held in violation of defendant's right to counsel, the prosecution may have little difficulty obtaining the admission of a subsequent in-court identification.[90]

This discussion does not exhaust the very practical difficulties which remain unattended in the wake of *Wade*, *Gilbert* and *Stovall*. At present, the actual mechanics of investigating and attacking the fairness or reliability of pretrial identification proceedings remains unsettled, and the practical effectiveness of *Wade*, *Gilbert*, and *Stovall* in achieving the Supreme Court's objectives is doubtful.

Video-tape Recording: A Proposal

A possible solution to many of the problems of identification techniques is the replacement of live corporeal identification with videotape reproduction. The idea was suggested thirty-five years ago by Dean Wigmore regarding the use of sound films.[91] This idea has acquired practicability with the advent of the videotaping process,[92] and presents a viable alternative to the cumbersome practice of corporeal identifications. It offers the

[83] *Compare* Cefalo v. Fitzpatrick, 434 F.2d 187 (1st Cir. 1970) *with* United States *ex rel.* Brierly, 321 F. Supp. 440 (W.D. Pa. 1970); People v. Robinson, 46 Ill. 2d 209, 264 N.E.2d 484 (1970) (reversing where trial judge had improperly excluded questions at *Stovall* hearing).

[84] *See* State v. Bishop, __ Minn. __, 183 N.W.2d 536 (1971).

[85] Some courts and some police departments have attempted to permit a lawyer at a lineup some latitude of participation. *See* United States v. Allen, 408 F. Supp. 1287 (D.C. Cir. 1969) (suggestions for police to provide counsel with certain information). *See also* Thompson v. State, 438 P.2d 287, 289 (Okla. Crim. 1968); Comment, *Lawyers and Lineups*, 77 Yale L.J. 390, 398 (1967); Comment, *supra* note 69, at 355–60.

[86] *See, e.g.*, Read, *supra* note 3, at 375–77.

[87] This was expressed to this writer in an interview with Mr. Thomas Reynolds, an assistant public defender in Cook County, Illinois. Interview of Feb. 2, 1971. It was his experience that several private trial attorneys have avoided attending lineups in which their clients participated after being notified well in advance by police. They apparently contend that there is little or nothing they are permitted to do to stop prejudicial conduct, that by the time the police are ready to summon an attorney to view a lineup, there is small likelihood of intentional or careless police suggestion (*see* Graham, *supra* note 7, at 234), and that in any event, counsel's presence at the lineup effectively transforms him into an adjunct to the information-gathering and evidence-generating role of the prosecution.

[88] This point relates to the adversary role of counsel. The entire burden of prosecution ought to be borne by the government, and counsel for the defense should not have to aid the prosecution in securing more credible and compelling identification evidence. This is not an idle fear. Judge McGowan, of the District of Columbia Circuit, believes that the phenomenon of increased credibility when counsel attends the lineup, as it effects juries, may have caused the conviction ratio to increase. McGowan, *supra* note 7, at 241. *See also* Comment, *Right to Counsel During Pretrial Identification Proceedings—An Examination*, 47 Neb. L. Rev. 740, 753–54 (1968), discussing the relationship between *Wade* and Canon 31 of the A.B.A. Canons of Professional Ethics.

[89] *See* note 3 *supra*.

[90] *See* text accompanying notes 75–80 *supra*.

[91] J. Wigmore, The Science of Judicial Proof 541 (3d ed. 1937). Wigmore's approach considered the use of sound films as an alternative to live confrontations. He suggested using at least 100 films prepared of men from various occupations, races, heights, etc. These men, as well as the suspect, would be photographed in a series of standardized movements, such as with and without hat and coat. A number of these films would be shown in succession to the witness, and his response, if any, would be indicated through the use of electric buttons. Wigmore also suggested that the degree of certainty or hesitancy of the identification might be indicated by the number of presses. *Id.* at 540–41.

[92] The significant advantages of videotaping include: capturing a person's voice and motions at a feasible cost, instant replay, no development costs, ability to monitor the recording and quality, easy indexing for retrieval, ease in transmission to remote areas. Hicks, *Video Recording in Police Identification*, 59 J. Crim. L.C. & P.S. 295 (1968).

possibility of substantially reducing the risks of prejudicial suggestion which *Wade* condemned.

The Supreme Court itself invited the use of modern technology in identification practice. The Court suggested that anything which would:

> eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' [93]

The Court cited Wigmore's sound film proposal and suggested that "a more systematic and scientific" [94] process applied to lineups might remove them from the "critical" category of pretrial proceedings for sixth amendement purposes.[95] Recent proposals for legislation governing lineup practice, as well as present police departmental regulations,[96] do not purport to eliminate the need for the presence of counsel.[97] They do, however, substantially increase the difficulties in arranging lineups[98] and subject police to perhaps too inflexible a code of procedure.[99] Video-tape recording is a far more flexible means of ensuring fair identifications, and could well be the more systematic and scientific process the Supreme Court invites.[100]

Videotaping is mechanically simple and requires no expertise or special training for its operation.[101] While a definitive technique for the use of videotaping in identification work is beyond the scope of this comment,[102] some general suggestions can be outlined. The actual pretrial confrontation will consist of having the eyewitness view a series of videotaped "bits," each bit consisting of a sequence of actions, profiles, and spoken words by a single lineup participant. One of the bits, the se-

[93] 388 U.S. at 239.

[94] *Id.* at 239 n. 30.

[95] Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial.
Id.
But see Read, *supra* note 3, at 353–54, questioning whether the Court's statements regarding legislative or other safeguards which would "remove the basis for regarding the [lineup] stage as critical" were in fact subscribed to by a majority of the Court.

[96] *See* Comment, *supra* note 69, at 363. The regulations of the Detroit Police Department include the following cautioning language:
> The purpose of a lawyer's presence is not to interfere with the conduct of the lineup but to observe the procedure used by law enforcement officers. ... UNDER NO CIRCUMSTANCES MAY A LAWYER INTERFERE WITH THE CONDUCT OF THE LINEUP. Nor may a lawyer properly advise his client to refuse participation. Similarly, a lawyer may not properly advise the accused to refuse a voice test, a handwriting sample, to wear certain clothing, to assume a stance, to walk, to gesture, or to co-operate in other similar physical demonstrations. ... *If any lawyer should so advise his client, the Prosecuting Attorney's Office should be notified so that appropriate action may be considered.*

Id. at 365–66. The Detroit Police Department had conducted the largest number of lineups since *Wade* among the departments responding to the survey. *But see, e.g.*, People v. Williams, 3 Cal.2d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971), where the court held that counsel may observe the identification where it occurs outside the viewing room shortly after the lineup.

This writer viewed an open crimes lineup conducted by the Chicago Police Department in February, 1971. The only administrative guide to proper lineup procedure for the Chicago police at that time appeared to consist of a General Order dated August, 1968, and a Departmental Notice dated August, 1969. The General Order outlined requirements of composition and conduct of a formal lineup. It appeared that this order and the notice were wholly unknown to the officer conducting the lineup. The lineup did not appear to be unfairly conducted nor did an identification occur. But it was conducted somewhat informally, and it was clear that where the procedure employed was the most detached and fair, it was the result of common sense or coincidence, not the observance of administrative rules.

For an example of an identification conducted "on the sly," wholly avoiding *Wade*, *see* GRAHAM, *supra* note 7, at 241–42.

[97] *See, e.g.*, Comment, *supra* note 69, at 368–73; Comment, *supra* note 3, at 388–407.

[98] *See* Comment, *supra* note 69, at 370–71; Note, *supra* note 9, at 803–12.

[99] The salient characteristic of identifications is their factual diversity. The keynote to dealing fairly with the various possible kinds of confrontations would be flexibility. It would follow then that a legislative code of police conduct would provide the opposite of what is needed. One authority has argued:
> The more the police are hedged in by telling them exactly how they must conduct their work, the more they are likely to feel restricted in the exercise of their duties, and the greater the risk that, in their frustrations, they may depart from that very high degree of fairness which can and must be expected of them. Their chief difficulty, often perhaps the only one in their eyes, is to collect sufficient evidence to bring to trial a man whom they have every cause to believe responsible for the offense in question. This is a practical job, which the law should, if anything, facilitate, not hamper with stringent rules laid down in advance.

Williams & Hammelmann, *supra* note 8, at 547.

[100] *Cf.* People v. Fowler, 1 Cal.3d 335, 347, 461 P.2d 643, 652–53, 82 Cal. Rptr. 363, 372–73 (1969), where the court suggested that "scientific and systematic method" means something like Wigmore's idea, *not* detailed police regulations.

[101] This information, as well as the bulk of information herein about videotaping, was supplied to the author by Mr. Donald Altergott, field manager for Apēco Video Systems, division of American Photocopy Equipment Co., Evanston, Illinois.

[102] Wigmore's suggestions would seem to be largely applicable to videotaping as well as to film. *See generally* Hicks, *supra* note 92.

quence of which would be identical to the others, would involve the suspect. The identification, if any, would take place during such a viewing.[103]

A library of available bits, all with identical sequences, could be established by routinely videotaping persons at booking when fingerprints and other information are ordinarily taken. This method is already being employed by at least one major police department.[104] The library of bits would then be catalogued according to the type of features and characteristics of each "bit-participant." When a videotape confrontation is called for, several bits could quickly be selected on the basis of the bit-participant's resemblance to the suspect. All of this could be done at a quite modest cost.[105]

Videotaping for identification purposes offers significant practical advantages over present corporeal identifications. It would eliminate the present difficulty of procuring on short notice a group of lineup participants similar in age, height, race, and other characteristics to the suspect. The risk of an unfairly composed lineup would be minimized as far as possible.[106] Furthermore, videotape lineups could be arranged and presented to the witness of a crime as soon as the suspect himself could be taped.[107] This would tend to promote the use of lineup identifications in the ordinary case, rather than the inherently more prejudicial one-to-one showups. Videotaping would also preserve the confrontation itself for reproduction at trial, a primary objective of *Wade*.[108] This could be accomplished by merely showing the bits used at the identification in court. The need for counsel at videotape confrontations would therefore be diminished. An additional safeguard could be furnished by videotaping the confrontation between the eyewitness and the videotape bits.[109] In this manner, not only the composition of the lineup would be preserved for trial, but also police conduct during the confrontation and the actual occurrence of the witness's identification of the videotaped suspect.[110]

Videotape identification practice clearly provides a system more amenable to tight supervision than presently employed practices. In addition, because of its unique advantages, it provides the possibility of safeguarding identification confrontations from the kinds of prejudicial dangers to which *Wade*, *Gilbert*, and *Stovall* were addressed.

Conclusion

The Supreme Court in *United States v. Wade* pronounced pretrial identification proceedings critical in determining the outcome of a defendant's crimi-

[103] People v. Williams, 3 Cal.3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971).

[104] Miami, Florida.

[105] A basic videotaping unit can be purchased retail for under $2,000. A unit more appropriate for the needs of identification work would include two recorders, a monitor, and camera with zoom lens. A black and white system like this could be acquired for under $3,000, less than the price of one squad car. Hicks, *supra* note 92, at 297. Hicks reports that at $60 per tape, his initial cost per subject recorded (one bit) was 80¢. One-half inch, one hour tapes are presently available for $40. Furthermore, "Initial tape costs cannot be considered fully realistic since the possibility of reusing the tape would lower operational cost repeatedly." *Id.* at 296.

The addition of color or other sophistication in equipment would increase the initial cost substantially. The rather sophisticated system initially acquired by the Miami Police Department cost about $12,500. *Id.*

[106] Police should not be used as lineup participants because in cases of importance, they may be tempted to influence the witness into identifying the suspect by casting their eyes slightly towards the suspect. Where the suspect is ill at ease, he contrasts sharply with the calmer police officers. If the witness is asked to view a lineup several times, the faces of the officers may become familiar to him. Wall, *supra* note 7, at 58–59.

[107] This advantage apparently persuaded the Miami Police Department to use videotape recording. They found it disturbing that in many cases "the subject arrested for a crime had been released on bond before the victim was available for a lineup viewing." Hicks, *supra* note 92, at 295. Thus, the controversial practice of requiring arrested persons out on bail to submit themselves for lineups would no longer be necessary. *See* United States v. Scarpellino, 431 F.2d 475 (8th Cir. 1970); McGowan, *supra* note 7, at 245–47; Quinn, *supra* note 29, at 154; Read, *supra* note 3, at 368–69. *Compare* United States v. Williams, 421 F.2d 1166 (D.C. Cir. 1970) *with* Adams v. United States, 399 F.2d 574 (D.C. Cir. 1969).

[108] 388 U.S. at 231–32.

[109] *But see* Cox v. State, — Fla. Supp. —, 219 So.2d 762 (1969) (Counsel must be present at videotape confrontation). *Cox* may be explained by the court's reluctance to find sufficient scientific advantages to satisfy the requirements of the Supreme Court. *See* People v. Fowler, 1 Cal.3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969). It is also significant that the confrontation in *Cox* was not itself recorded, as suggested above. Whether this additional safeguard, together with responsible videotape identification practice, eliminates the need for the presence of counsel can only be answered by the Supreme Court.

[110] *See, e.g.*, People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971), where the identification took place shortly after the lineup and outside the viewing room. The California Supreme Court held that *Wade* required that the defendant's attorney, who was present at the lineup, be permitted to be present at the actual identification which occurred shortly after the lineup. This would seem to be the better view, and similarly, the use of video reproduction as suggested herein would require that an identification, if any, occur during the recorded encounter. *See* Quinn, *supra* note 29, at 149.

nal prosecution, concluding that the right to counsel must attach to these proceedings so long as they remained critical. *Wade* and its companion cases did not create a body of well-articulated rights for defendants at identification confrontations. Indeed, the application of *Wade* has been inconsistent and its policies avoided. Its effectiveness, where applied by the lower courts, is subject to continuing doubt. Assurance of fair and reliable identifications has not been seriously undertaken by law enforcement agencies, yet this goal is one which lies primarily, and perhaps exclusively, within their power. The lingering threat of further Supreme Court activity,[111] together with the availability of technological advances, will hopefully provide the initiative for law enforcement authorities to attend more seriously to the task of insuring sound identification practice.

[111] Kirby v. People, 121 Ill.App.2d 323, 257 N.E.2d 589 (1970), *cert. granted sub. nom.* Kirby v. Illinois, 39 U.S.L.W. 3520 (U.S. May 24, 1971) (No. 6401), restricting application of *Wade* to post-indictment lineups.

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 62, No. 3

Printed in U.S.A.

RECENT TRENDS IN THE CRIMINAL LAW

THE FEDERAL COURTS AND THE POLITICAL DEFENDANT

In *Younger v. Harris*, 91 S. Ct. 746 (1971), and five companion cases,[1] the Supreme Court invoked the doctrine of equitable jurisdiction to preclude federal interference in state criminal prosecutions. In so ruling, the Court foreclosed, in all but exceptional circumstances, federal interruption of state criminal proceedings which are alleged to be of a political nature.

In *Younger*, plaintiff successfully sought an injunction in a federal district court restraining the state's attorney from prosecuting him under the California Criminal Syndicalism Act. A three-judge district court held the Act to be violative of the first and fourteenth amendments, stating that both the Act's presence and the state's prosecution had an inhibiting effect on plaintiff's right of free speech.[2]

On direct appeal, a divided Supreme Court reversed the decision of the three-judge court on the ground that the lower court did not have jurisdiction to entertain plaintiff's constitutional challenge. Speaking for the majority, Justice Black emphasized the fact that federal courts have traditionally been forbidden from invoking their equitable powers to grant jurisdiction in a case where "the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." [3] This tradition is reinforced, according to Justice Black, by the notion of "comity" between state and federal courts: federal courts should interfere with state operations only in exceptional circumstances.[4] Furthermore, the Court stated that the irreparable injury with which plaintiff is threatened must be "both great and immediate" [5] before a federal court can intervene in a state criminal prosecution.

The Court held that a showing that a statute was unconstitutional on its face or had a "chilling effect" on first amendment rights would not constitute a threat of sufficient "irreparable injury" to justify equitable intervention by federal courts.[6] To gain federal relief the plaintiff must allege an infringement of federally protected rights and further show that this alleged infringement "cannot be eliminated by his defense against a single criminal prosecution." [7] The Court specifically limited its holding in *Dombrowski v. Pfister*[8] to the extraordinary situation in which a plaintiff is being harassed by state authorities who have no intention of bringing a good faith prosecution against him.

Beyond the special circumstances of *Dombrowski*, the Court noted two possible exceptions to the doctrine of non-intervention as expressed in *Younger*. The Court pointed out that a federal court may grant equitable jurisdiction where a challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph." [9] Thus, in some circumstances, an allegation that a statute is unconstitutional on its face may still be sufficient by itself to justify federal intervention. Further, the Court intimated that where plaintiff is effectively restrained from engaging in constitutionally protected conduct because there is substantial likelihood that he will be prosecuted by the state for engaging in such conduct, a federal court would have jurisdiction, to provide plaintiff an alternative to violating the law.[10] The threatened state prosecution, however, must be more than "speculative and imaginative." [11]

In cases following *Younger*, the lower federal courts, with one exception,[12] have exhibited a

[1] Boyle v. Landry, 91 S. Ct. 758 (1971); Samuels v. Mackell, 91 S. Ct. 764 (1971); Perez v. Ledesma, 91 S. Ct. 674 (1971); Byrne v. Karalexis, 91 S. Ct. 777 (1971); and Dyson v. Stein, 91 S. Ct. 769 (1971).

[2] Younger v. Harris, 281 F. Supp. 507, 517 (C.D. Cal. 1968).

[3] 91 S. Ct. at 750.

[4] *Id.*

[5] *Id.* at 751, quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926).

[6] 91 S. Ct. at 754.

[7] *Id.* at 755, quoting Watson v. Buck, 313 U.S. 387, 402 (1941).

[8] 380 U.S. 479 (1965).

[9] 91 S. Ct. at 755.

[10] *Id.* at 749.

[11] *Id.*

[12] Gray v. City of Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971). The court ignored *Younger v. Harris* and ruled against plaintiffs on the merits of their constitutional attack. The plaintiffs in *Gray* were not being prosecuted by the state, but they challenged the constitutionality of a statute which could have been applied against them for their previous violations. While *Younger* is not precisely in point, it contained strong language to the effect that speculative future state action does not justify the intervention of the federal courts.

willingness to follow *Younger* to the letter.[13] Of those courts which have applied *Younger* to the circumstances before them, in only one case has a federal court interrupted a state criminal proceeding to grant plaintiff relief.[14]

Probation and Parole Revocation

In *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970),[15] revocation of a state convict's probationary status without a hearing was held to be "state action inconsistent with the due process guarantees of the fourteenth amendment."[16] In denying the appellant's request for a review of the case the Supreme Court left undisturbed the Court of Appeals decision.[17]

The Seventh Circuit panel held that:

> The state need not grant probation, but if it does so, it should not be able to arbitrarily revoke such probation without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions upon which his probation was granted.[18]

Judge Kerner's opinion rejected the notion that due process requirements were determined by whether probation was considered a privilege or a right, relying heavily on *Goldberg v. Kelly*,[19] which held that welfare recipients were entitled to a hearing before benefits could be terminated. The threat of the loss of freedom to one subjected to the conditional liberty of probation was found to:

> [O]utweigh the added state burden of providing limited hearing to allow petitioner to be confronted with his probation violation and to be heard.[20]

In *Morrisey v. Brewer*, 9 BNA Crim. L. Reptr. 2083 (8th Cir. Apr. 21, 1971), the Eighth Circuit specifically rejected the arguments raised in *Hahn v. Burke* as applied to parole revocation hearings. Writing for the majority, Chief Judge Mathes held:

> While we recognize the importance which the individual parolee attaches to being allowed to remain outside the prison walls while serving his sentence, we are not constrained to hold that his interest in obtaining a hearing on revocation of that privilege is sufficient to override the interest of the state and the prison authorities in effectively managing internal disciplinary and custodial affairs.[21]

In *Goolsby v. Gagnon*, 8 BNA Crim. L. Reptr. (E.D. Wis. Feb. 9, 1971), however, *Hahn v. Burke* has been held to extend the right to a hearing to parole revocation proceedings. There the court asked:

> What salient differences are there between probation and parole that would have an impact upon petitioner's potential "loss" and the governmental "interest" in summary adjudication?[22]

No important differences were found between these two categories of conditional liberty, and parole revocation was held to require a hearing.

In *Hester v. Craven*, 322 F. Supp. 1256 (C.D. Cal. 1971), it was held that the California Adult Authority[23] could not extend the sentence of a parolee to a longer term than originally set, upon a determination of events outside the prison, without giving the parolee the right to confront the witnesses against him.[24] The court ruled that its decision did not disturb the Ninth Circuit's position that "there is no federally protected right to a hearing in a mere parole revocation proceeding."[25] The power of the Adult Authority to ex-

[13] Livingston v. Garmire, 9 BNA Crim. L. Rptr. 2166 (5th Cir. May 10, 1971); Veen v. Davis, 9 BNA Crim. L. Rptr. 2108 (C.D. Cal. Apr. 2, 1971); Sweeten v. Sneddon, 9 BNA Crim. L. Rptr. 2009 (D. Utah Mar. 23, 1971); Ascheim v. Quinlan, 9 BNA Crim. L. Rptr. 2026 (W.D. Pa. Mar. 19, 1971); Lewis v. Kugler, 9 BNA Crim. L. Rptr. 2008 (D. N.J. Mar. 9, 1971).

[14] Sweeten v. Sneddon, 9 BNA Crim. L. Rptr. 2009. The plaintiff, a parolee, was charged with the violation of the Utah assault statute which carried a jail term not exceeding six months. The court chose to intervene on plaintiff's behalf because it considered irreparable harm could come to plaintiff if he were convicted on the misdemeanor charge, since his parole would be revoked and he would be subject to serve a term of seventeen years, five months for violation of parole. The court held that the denial of plaintiff's right to counsel could not adequately be rectified in the course of defending his misdemeanor prosecution. *Id.* at 2010.

[15] The case has been noted at 24 Vand. L. Rev. 163 (1970).

[16] 430 F.2d at 103.

[17] Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970), *cert. denied*, 91 S. Ct. 1522 (1971).

[18] 430 F.2d at 104.

[19] 397 U.S. 254 (1970).

[20] 430 F.2d at 104.

[21] 9 BNA Crim. L. Rptr. at 2084. It was contended by the court that requiring parole boards to grant hearings would be adverse to the interests of state prisoners, since the result of such hearings "would actually be a decrease in the number of paroles granted due to the heavy burden placed upon the administrative process of supervision and investigation." *Id.*

[22] 8 BNA Crim. L. Rptr. 2403.

[23] *See*, Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 So. Cal. L. Rev. 158 (1954).

[24] 322 F. Supp. at 1266.

[25] *Id.* at 1259. *See*, Williams v. Dunbar, 377 F.2d 505 (9th Cir.) *cert. denied*, 389 U.S. 866 (1967).

tend the parolee's sentence was the factor differentiating this case from a "mere parole revocation proceeding." [26]

Federal Narcotics Laws and the Eighth Amendment

In *United States v. Watson*, 439 F.2d 442 (D.C. Cir. 1970), the court of appeals substantially undermined the application of the federal narcotics laws[27] to addicts who were not engaged in buying and selling drugs for profit. The defendant heroin addict was convicted of a violation of federal drug laws on the basis of his possession of thirteen caps of heroin.[28] Two prior felony convictions disqualified him from treatment under the Narcotic Addict Rehabilitation Act.[29] On appeal, the court of appeals, sitting *en banc*, offered strong language to the effect that under *Robinson v. California*,[30] federal narcotics law cannot apply to "non-trafficking" addicts.

The court reiterated the *Robinson* holding that to apply penal sanctions to persons for their mere addiction to drugs was cruel and unusual punishment, in violation of the eighth amendment.[31] Nonetheless, the court refused to reverse defendant's conviction on the grounds that the eighth amendment issue was not clearly raised at the trial court level.[32] The court did find certain disqualifying provisions of the Narcotic Addict Rehabilitation Act unconstitutional and remanded the case for rehearing with respect to the defendant's eligibility for the rehabilitation program.[33]

In two district court cases, *United States v. Ashton*, 317 F. Supp. 860 (D.D.C. 1970), and *United States v. Lindsey*, 324 F. Supp. 55 (D.D.C. 1971), *Watson* has been interpreted to clearly exempt non-trafficking addicts from the proscriptions of federal narcotics laws. In both cases, concern was expressed over the fact that a defendant addict not subject to criminal liability could not be made to take part in the rehabilitation program. Both courts resolved the dilemma on the particular facts before them. In *Ashton*, the court dismissed a narcotics indictment with knowledge that the defendant was also charged with bail jumping, and, if convicted, would be eligible for the federal rehabilitation program.[34] In *Lindsey*, the court circumvented the *Watson* decision by applying the narcotics statutes under the doctrine of *Powell v. Texas*.[35] The court found the defendant did not manifest an "utter lack of control" and could not therefore, be considered an addict.[36]

Indigent Imprisonment

In *Tate v. Short*, 91 S. Ct. 668 (1971), the Supreme Court extended the rule of *Williams v. Illinois*[37] to hold that imprisonment merely for inability to pay a fine is a denial of fourteenth amendment equal protection. Tate, the indigent, had accumulated $425 in traffic fines, and was jailed in lieu of payment of the fine at the statutory rate of five dollars a day.[38] The Court adopted the view of four concurring Justices in *Morris v. Schoonfield* that:

> the same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.[39]

Among the state courts which have interpreted *Tate*, the New Jersey Supreme Court in *State v. DeBonis*, 58 N.J. 182, 276 A.2d 137 (1971), examined the alternatives available to the sentencing court when the defendant was unable to pay the fine immediately. The defendant was assessed $705 plus $25 costs for several serious traffic offenses. Unable to pay this in a lump sum, he offered to pay in installments. The trial court refused the offer, ordering him to jail at the statutory rate of five dollars a day.[40] After studying several methods of payment, the New Jersey Supreme Court concluded that the installment system was the most practical alternative and that the defendant was therefore entitled to it by right.[41]

Justice Blackmun suggested in *Tate* that an alternative to fines, fair to all, would be a "jail only" policy.[42] The Hawaii Supreme Court, in

[26] 322 F. Supp. at 1265.
[27] 26 U.S.C. §4704(a) (1964) and 21 U.S.C. §174 (1964).
[28] 439 F.2d at 445.
[29] 18 U.S.C. §§4251 to 4255 (Supp. V. 1965–1969).
[30] 370 U.S. 660 (1962).
[31] 439 F.2d at 452.
[32] *Id.* at 454.
[33] *Id.* at 457.
[34] 317 F. Supp. at 863.
[35] 392 U.S. 514 (1968).
[36] 324 F. Supp. at 60.
[37] 399 U.S. 235 (1970).
[38] 91 S. Ct. at 669–70.
[39] *Id.* at 671, quoting Morris v. Schoonfield, 399 U.S. 508, 509 (concurring opinion of White, J.).
[40] 276 A.2d at 139.
[41] *Id.* at 145–47. *See* Tate v. Short, 91 S. Ct. at 671 n. 5.
[42] 91 S. Ct. at 672 (concurring opinion).

State v. Tackett, __ Hawaii __, 483 P.2d 191 (1971), emphatically rejected such a notion because it would reduce sentencing flexibility and would work an inverse discrimination against "the employed man with funds." [43]

Eyewitness Identification

In *United States v. Wade*,[44] the Supreme Court held that a post-indictment lineup was a critical stage of pretrial proceedings, invoking the sixth amendment right to counsel to assure the defendant a fair trial. Some state courts have restricted the *Wade* right to counsel to lineups after indictment.[45] These courts have observed that *Wade* and a companion case[46] involved post-indictment lineups, and have relied on language in both opinions which stressed this fact.[47]

Most courts, however, have extended the right to counsel to pre-indictment indentification proceedings.[48] In *State v. Isaacs*, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970), the court differentiated the investigatory from the accusatory stage of the prosecution process as marking the point when the right to counsel attaches. Some courts have adopted a test of "criticality" to determine which confrontations require the presence of counsel.[49] In *State v. Wilbely*, 112 N.J. Super. 216, 270 A.2d 734 (1970), the court held *Wade* applicable to a pre-indictment confrontation where the police knew that the arrested suspect was represented by counsel.

The federal courts have tended to apply *Wade* broadly. In *United States v. Greene*, 429 F.2d 193 (D.C. Cir. 1970), the police, lacking probable cause for arrest, informally arranged a gathering including the suspect and victims of the crime at the police station. The District of Columbia Circuit held that the suspect's identification at this confrontation violated *Wade*. The court recognized the problem of compelling a suspect not under arrest to participate in a lineup, but nonetheless felt that *Wade* compelled the presence of counsel at informal, pre-arrest confrontations.[50]

[43] 483 P.2d at 192.

[44] 388 U.S. 218 (1967).

[45] *See* State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Robinson v. State, __ Fla. Supp. __, 237 So.2d 268 (1970); People v. Palmer, 41 Ill.2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970). The Supreme Court will review the minority position, which restricts the right to counsel to post-indictment lineups, this term. Kirby v. People, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970), *cert. granted sub. nom.* Kirby v. Illinois, 39 U.S.L.W. 3520 (U.S. May 24, 1971) (No. 6401).

[46] Gilbert v. California, 388 U.S. 263 (1967).

[47] 388 U.S. at 219, 237, 272.

[48] *See, e.g.*, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); Billinger v. State, 9 Md. App. 628, 267 A.2d 275 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); *In re* Holley, __ R.I. __, 268 A.2d 723 (1970).

[49] People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Hayes v. State, 46 Wis.2d 93, 175 N.W.2d 625 (1970).

[50] The court emphasized that the presence of counsel was necessary to insure that the exact circumstances of the confrontation would be preserved for trial review. 429 F.2d at 196. *But cf.* Butler v. Robbins, 434 F.2d 1009 (1st Cir. 1970).