Journal of Criminal Law and Criminology

Volume 66 | Issue 3 Article 2

1976

Student Comments

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

Printed in U.S.A.

COMMENTS

Student contributors to this issue are Edward S. Garlock, Robert A. Merrick, Jr., Raymond C. Oleson, Jonathan Vegosen, Gary G. Grindler, Gary M. Ropski and James F. Gossett

THE USE OF PRIOR IDENTIFICATION EVIDENCE IN CRIMINAL TRIALS UNDER THE FEDERAL RULES OF EVIDENCE

INTRODUCTION

The hearsay rule and its many exceptions have troubled legal scholars and practitioners since as early as the sixteenth century.[1] One of the most controversial exceptions concerns the admission of prior identification evidence in criminal trials. Prior identifications are in essence a special sub-class of prior statements:[2] the declarant at some time prior to the trial[3] has identified the accused, and that statement is now being offered in court as evidence, generally to corroborate or impeach, either by the declarant himself or by a second person, often a police officer, who observed the declarant make the identification. The validity and accuracy of identifications in general has been seriously questioned by a number of scholars[4] and strongly supported by almost as many other scholars.[5] In addition, a number of works have appeared dealing with the problems of misidentification in actual cases.[6] Misidentification may not only lead to the conviction of the wrong person, but to failure to convict the right person.

At common law, such an identification would have been admitted, if at all, under the prior statement exception to the hearsay rule.[7] However, on January 3, 1975, President Ford signed into law the new Federal Rules of Evidence[8] to take effect on July 1, 1975. It is this statutory code which now governs admission of evidence in *federal* courts.

Congressional scrutiny of the proposed rules, the final stage in a journey begun nearly fifteen years ago, resulted in a number of amendments, many of which significantly changed

---

[1] 5 J. WIGMORE, EVIDENCE § 1364 (3d ed. 1940).

[2] R. MCCORMICK, EVIDENCE § 251 (2d ed. 1972). The statement may have been oral testimony at previous trial, a deposition, or a writing such as a letter, affidavit or accident report. Conduct as well which shows a belief inconsistent with or consistent with facts asserted on the stand is also classified as a "prior statement."

[3] Prior identification confrontations generally occur when law enforcement officials request an eyewitness to an offense, often the victim, to identify a suspect through one of the following procedures: (1) a lineup, where the suspect is observed in a group by the eyewitness; (2) a showup, where the suspect is presented alone; or (3) a photograph or photographs, where the eyewitness views the suspect's photograph. The photograph may show the suspect alone or in a group.

[4] Beaver & Biggs, *Attending Witnesses' Prior Declaration as Evidence: Theory v. Reality*, 3 IND. LEGAL F. 309 (1970); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973).

[5] Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 41 HARV. L. REV. 860 (1928).

[6] E. BORCHARD, CONVICTING THE INNOCENT (1932); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965).

[7] *See* 4 J. WIGMORE, EVIDENCE § 1130 (3d ed. 1940).

Evidentiary admissions in federal criminal trials had gone through two stages. Prior to 1933, the Court had concluded in United States v. Reid, 53 U.S. (12 How.) 360 (1851), that neither the Rules of Decision Act, Conformity Act, nor Competency of Witness Act applied because they were limited to "civil causes" or to "trials at common law." Thus, the rules of criminal evidence were to be taken from the law of the state in which the federal court was sitting. Logan v. United States, 144 U.S. 263 (1892). The Court overruled these decisions in Funk v. United States, 290 U.S. 371 (1933), and later Wolfle v. United States, 291 U.S. 7 (1934), holding that rules of criminal evidence were to be determined by the common law as interpreted by the federal courts in the light of reason and experience.

[8] Act of Jan. 3, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

the rules.[9] Rule 801(d)(1), as promulgated by the Supreme Court, excluded certain statements from the definition of hearsay which were clearly within the common law definition of hearsay; a prior statement of identification by a witness was one such statement.[10] One of the congressional amendments deleted this exclusion, thus making prior identification again subject to possible exclusion as hearsay from criminal trials in the federal courts.

Given the action by Congress, the question became: "Can such a statement of prior identification be admitted into evidence at all now?" There were a number of possible answers to this question: amend the rule formally; admit the prior identification under the "other exceptions" clauses of either rule 803(24) or 804(5);[11] or under rule 801(d)(1)(A) or (B);[12] or through the "present series" impression exception of rule 803(1).[13] Initially, given the action of Congress in deleting proposed rule 801(d)(1)(C), one might conclude that prior identification testimony should be excludable per se. However, Congress reversed itself soon after the time that the new Federal Rules of Evidence took effect and passed an amendment which put 801(d)(1)(C) back into the rules.[14] As it stands now, prior identification evidence can be introduced at trial in the prosecution's case in chief.

Congress, in effect, chose the first of the options listed above which, while having the virtue of establishing some degree of predictability as to future receipt into evidence of prior identification evidence, has a number of vices as well.

This comment will address Congress' action in expressly exempting statements of prior

---

[9] In the case of privileges, article V of the Federal Rules of Evidence, the Congress performed radical surgery on the proposed rules eliminating the Advisory Committee's carefully thought out and integrated set of nine rules and replacing them with a single rule which leaves the law of privilege in its present state. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230 (1972) [hereinafter cited as PROPOSED RULES]; Act of Jan. 3, 1975, Pub. L. No. 93-595, 88 Stat. 1933.

[10] The following definitions apply under article V, according to rule 801:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him. . . .

PROPOSED RULES, *supra* note 9, at 293.

[11] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (24) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EV. 803(24).

The identical wording is found in FED. R. EV. 804(5), which requires that the declarant be unavailable. *See* text accompanying notes 96-100 *infra*.

[12] The following definitions apply under this article:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence of motive. . . .

FED. R. EV. 801.

[13] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

FED. R. EV. 803(1). *See* text accompanying notes 101-108 *infra*.

[14] Pub. L. No. 94-113 (Oct. 16, 1975).

identification from the hearsay rule, and examine as well the alternatives had Congress not acted as it did. The comment will first address the Advisory Committee's attitudes and goals in fashioning the federal evidence rules, focusing on the hearsay rule in general, and on the rule with respect to prior identifications in particular.[15] A part of this assessment will be a discussion of the wisdom of admitting prior identifications at all.

Development of the Federal Rules of Evidence

For over four decades there has been increasing pressure for the Supreme Court to promulgate uniform federal rules of evidence. Among the most vocal advocates were the legendary John Henry Wigmore,[16] as well as Cleary (reporter to the Advisory Committee), Green, Todd, McCormick, and Morgan.[17] Finally, in 1961, the Judicial Conference authorized Chief Justice Earl Warren to establish an ad hoc committee to study and analyze the evidence rules and their effect on federal trials. In 1963, the Judicial Conference approved the special committee's finding that "... the formulation of uniform rules of evidence for the federal courts is both feasible and desirable," [18] and authorized the Chief Justice to name an Advisory Committee on Rules of Evidence.[19]

As a result of comments from both the bench and the bar, the preliminary draft of the rules of March 1969,[20] was reconsidered, revised, published as the revised draft of March 1971,[21] and again circulated, although to a smaller segment of the bar. The Supreme Court returned the draft for further consideration; final revisions were made, and on November 20, 1972, the Supreme Court promulgated the Federal Rules of Evidence, reporting them to Congress on February 5, 1973, with an effective date of July 1, 1973.[22]

The basic philosophy of the rules is that all relevant evidence is admissible *unless* constitutional, statutory, or strong public policy considerations dictate that the relevant evidence should be excluded.[23] The rules therefore place the burden on the one who seeks to exclude relevant evidence to demonstrate to the court that exclusion is dictated by such weighty considerations. In addition, the *sine qua non* of the rules is uniformity, described by one member of the Advisory Committee as "one of the most, if not *the* most compelling reason for promulgation of uniform Federal Rules of

---

[15] The Advisory Committee published notes with each rule of evidence presenting the Committee's view with respect to the particular rule and relevant sources of information. *See* Proposed Rules, *supra* note 9, at 288–92 for the introductory note on the hearsay problem, and at 295–97 for the note on hearsay statements specifically excluded from the federal hearsay rule.

[16] Dean Wigmore, in 1936, characterized the law of evidence prior to the Federal Rules of Civil Procedure as being in a deplorable condition. "It is *inferior* to that of any of the fifty States and Territories—I say, inferior to *any* of them, and not only inferior but far inferior." Wigmore, *A Critique of the Federal Court Rules Draft,* 22 A.B.A.J. 811, 813 (1936).

[17] *See* R. McCormick, Evidence xi (1954); Cleary, *What's Wrong with the Rules of Evidence,* 15 Ark. L. Rev. 11 (1960–61); Green, *To What Extent May the Court Under the Rulemaking Power Prescribe Rules of Evidence,* 26 A.B.A.J. 482 (1940); Ladd, *A Modern Code of Evidence,* 27 Iowa L. Rev. 213 (1942); Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 Vand. L. Rev. 725 (1961).

[18] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73, 114 (1962).

[19] The Advisory Committee on the Rules of Evidence was composed of: Albert E. Jenner, Jr., Esq., Chairman; Judge Simon E. Sobeloff; Judge Joe Ewing Estes; Judge Robert Van Pelt; Professor Thomas F. Green; Professor (now Judge) Charles W. Joiner; Professor (now Judge) Jack B. Weinstein; David Berger, Esq.; Hicks Epton, Esq.; Robert S. Erdahl, Esq.; Egbert L. Haywood, Esq.; Frank G. Raichle, Esq.; Herman F. Selvin, Esq.; Craig Spangenberg, Esq.; Edward Bennett Williams, Esq.; Professor Edward W. Cleary, Reporter.

[20] Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

[21] Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1964).

[22] Proposed Rules, *supra* note 9, at 183–86.

[23] All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. Fed. R. Ev. 402.

Evidence." [24] One result is that the rules, in attempting to reach those goals, either modified[25] or abolished outright[26] well-established common law rules. In part because of this, congressional opposition forced an initial delay[27] which finally turned into quite drastic legislative action requiring affirmative congressional approval of the rules before they could go into effect.[28] In fact, the rules of evidence would be congressionally formulated rather than the judicially formulated rules which the Supreme Court originally sent to Congress.[29]

Over the next twenty-one months, significant revisions of many rules, or subdivisions of rules, occurred as the bill moved first through the House, then the Senate, and finally the House-Senate Conference.[30] In the process, though one-half the rules remained "substantially unchanged," [31] retaining their basic style and form, the central thrust of the rules was deflected. As proposed, the rules were cautiously innovative; as passed, they are little more than a codification of the common law rules of evidence.

[24] *Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. at 89 (1973) (statement of Albert E. Jenner, Jr.) [Hereinafter cited as *Hearings on H.R. 5463*].

[25] *See* FED. R. EV. 607: Who May Impeach. This is a departure from the rule in many states in that it eliminates the prohibition against impeaching one's own witness.

[26] *See* PROPOSED RULES, *supra* note 9, at 240, art. V, Privileges: Rule 504, Psychotherapist-Patient Privilege. The rules as promulgated by the Supreme Court eliminated the physician-patient privilege substituting a psychotherapist-patient privilege in its stead.

[27] S. Res. 583, 93d Cong., 1st Sess. (1973) would merely have postponed the effective date.

[28] The House of Representatives amended S. Res. 583, 93d Cong., 1st Sess. (1973), in H.R. 4958, 93d Cong., 1st Sess. (1973), to require affirmative Congressional approval. The Senate approved this on March 19, 1973, and President Nixon signed it into law on March 30, 1973. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

[29] The House of Representatives decided after an initial set of hearings that there should be an evidence code, but that because the rules of evidence were largely substantive in nature or impact, they were not within the scope of the enabling acts authorizing the Supreme Court to promulgate rules of practice and procedure. 1975 U.S. CODE CONG. & AD. NEWS 66 [hereinafter cited as RULES-LEGIS, HIST.] *Accord* PROPOSED RULES, *supra* note 9, at 185 (Douglas, J., dissenting).

[30] RULES-LEGIS. HIST., *supra* note 29, at 41.

[31] *Id.* at 66.

THE HEARSAY RULE AND THE NEW FEDERAL RULES OF EVIDENCE

Much of the controversy centered on article VIII, Hearsay.[32] The Advisory Committee in its attempt to bring some order to a bulky, complex, and overly rigid aspect of evidence at common law, had prepared a number of innovations aimed at providing greater flexibility in dealing with hearsay evidence. The committee began by setting out a few basic premises. First, the factors of perception, memory, and narration must be considered in evaluating a witness' testimony. Second, Anglo-American law, in order to test out these factors, developed three conditions under which witnesses will *ideally* be required to testify: (1) under oath; (2) in the personal presence of the fact-finder; and (3) subject to cross-examination.[33] Third, even though the logic of the preceding discussion suggests that no evidence be admitted unless fully complying with these three conditions, no one advocates that position. In fact, given the choice between evidence which is less than "ideal," and no evidence at all, it would be ridiculous to dictate across the board exclusion when such evidence is often inherently superior to evidence given under the ideal conditions.[34] The problem is one of reaching "a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions." [35]

Therefore, the committee, in developing the federal hearsay rules, examined three possible alternatives, rejected the first two and chose the third. The committee decided not to abolish

[32] *Hearings on H.R. 5463, supra* note 24, Supp. at 68, 88, 91, 125. This is not surprising considering that it has been estimated that over one-third of all evidence problems in court involve hearsay. *See*, Note, *Erosion of the Hearsay Rule*, 3 U. RICHMOND L. REV. 89, 92 (1968).

[33] Today, emphasis centers on the condition of cross-examination which Dean Wigmore has characterized as "beyond doubt the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, EVIDENCE § 1367, at 29 (1940). It has become, to say the least, a vital part of our legal system.

[34] Even if, in any given case, the hearsay evidence is not inherently superior, it is "in the ordinary affairs of life . . . a well recognized source of information, not of course to be implicitly depended upon but often helpful as one of the signs in an investigation:" A. OSBORN, THE MIND OF THE JUROR 52 (1973).

[35] PROPOSED RULES, *supra* note 9, at 289.

the hearsay rule[36] primarily because this would mean an abandonment of the traditional requirement of some particular assurance of credibility as a condition to admitting the hearsay declaration, and also because there would be an undesirable split between civil and criminal evidence due to the sixth amendment right of confrontation in the latter.[37] More practically, such efforts in the past had met with scant success. Not a single jurisdiction adopted the Model Code of Evidence which abolished the hearsay rule outright,[38] and only a few jurisdictions have adopted the more cautious and conventional Uniform Rules of Evidence.[39]

The committee also rejected the alternative of case-by-case analysis, even though accompanied by procedural safeguards. Admissibility would be determined by weighing the evidence's probative force against the possibility of prejudice, waste of time, or availability of better evidence. The committee considered that too much judicial discretion would be required, and the problems of predictability of rulings and the difficulty in trial preparation would only be magnified.[40]

Instead, the committee chose to follow the general outlines of the common law approach: a general rule excluding hearsay followed by two rules delineating the basic exceptions—one where the availability of the declarant is immaterial,[41] and the other where the unavailability of the declarant is a condition of the admission of the hearsay.[42] The traditional exceptions to the hearsay rule provide the content of these two rules. In addition, each rule concludes with an "other exceptions" clause affording admission of particular hearsay not encompassed by any of the specifically enumerated exceptions, yet offering similar guarantees of reliability and trustworthiness.[43]

Finally, the Advisory Committee expressly excluded from the definition of hearsay several types of statements, including prior identification, which otherwise would literally fall within it.[44] The committee is somewhat cryp-

[36] *See,* Comment, *Abolish the Rule Against Hearsay,* 35 U. PITT. L. REV. 609 (1974). The author proposes to abolish the hearsay rule because in its present form it is overly complicated and difficult to apply and does not distinguish effectively between reliable and unreliable evidence. Rather, receipt of hearsay evidence should be determined on a case by case method with adequate safeguards applied. This is similar to a thesis put forward by Professor Weinstein. *See* Weinstein, *Probative Force of Hearsay,* 46 IOWA L. REV. 331 (1961).

[37] PROPOSED RULES, *supra* note 9, 289–90.

[38] Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination. MODEL CODE OF EVIDENCE rule 503 (1942).

Dean Wigmore was a consultant on the project; the code was considered too radical and though no jurisdiction accepted it, it had its effect on the Federal Rules of Evidence. *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 173–81 (1969). For a general discussion of the model code see Broderick & Broden, *Future of the Model Code of Evidence,* 23 NOTRE DAME LAW. 226–32 (1948); Davis, Cox, & Marion, *Discussion of ALI's Model Code of Evidence,* 21 TEX. L. REV. 13–41 (1943); MCCORMICK, *The New Code of Evidence of the American Law Institute,* 20 TEX. L. REV. 661 (1942).

[39] Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

> (1) Previous Statements of Persons Present and Subject to Cross-examination. A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by Declarant while testifying as a witness.

UNIFORM RULE OF EVIDENCE 63(1).

The Uniform Code of Evidence contained seventy-two rules and basically codified existing cases save for two important changes: prior inconsistent or consistent statements made out of court were now admissible as substantive evidence, and statements of recent perception were recognized. The uniform rules have been enacted in Kansas (KAN. STAT. ANN. §§ 60.401–470 (Cum. Supp. 1973)), the Virgin Islands (V. I. CODE ANN. tit. 5 §§ 771–956 (1967)), and the Canal Zone (C. Z. CODE tit. 5 §§ 2731–2996 (1963)). California (CAL. EVID. CODE ANN. §§ 1–1605 (West 1966) and New Jersey (N. J. REV. STAT. §§ 2A: 84-A-1 to 47 Cum. Supp. 1973)), borrow heavily from the uniform rules.

[40] PROPOSED RULES, *supra* note 9, at 290.

[41] *Id.* at 300 (Rule 803. Hearseay exceptions; availability of defendant immaterial).

[42] *Id.* at 320 (Rule 804. Hearsay exceptions; declarant unavailable).

[43] Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness. PROPOSED RULES, *supra* note 9, at 303, 322 (Rules 803(24) and 803(6)).

[44] *See* PROPOSED RULES, *supra* note 9, at 293. (Rule 801(d)).

The statements would be classical hearsay if offered for the truth of the matter asserted therein because they were not made under oath, in the presence of the fact-finder, and subject to cross-examination.

tic in setting forth its reasoning here and the basic question of whether or not prior identification evidence should be admitted at all needs to be explored in greater depth than the cursory treatment given it in the Advisory Committee's notes.[45]

THE RELIABILITY OF A PRIOR IDENTIFICATION

There is no consensus as to whether a prior identification should be admitted as substantive evidence, or whether it should be admitted at all. A number of writers have taken the position that a prior out of court identification is more reliable than one made in court because it contains characteristics making it inherently trustworthy, and thus there is some necessity for the admission of the hearsay evidence.[46] The theory is that, unlike most hearsay evidence, the risks of lack of memory, misperception and the problem of misinterpretation are not present, especially where the witness and the declarant are the same.[47] Such identifications are made nearer in time to the criminal event involved when the recollection of the witness is fresher and less likely to have been influenced by distracting external influences, not the least of which is that inherent in the courtroom environment.[48] Such surroundings are quite suggestive of affirmative identification, increasing the danger that the courtroom identification is based on the impression made at the time of the prior identification rather than on an impression made at the time of the offense.[49]

The principal objection to admitting prior identifications either collaterally (as corroboration or as rebuttal) or as substantive evidence is the lack of opportunity to cross-examine at the time the identification was made. However, proponents of admission counter that where the declarant is available as a witness, cross-examination is available at the trial and is an adequate safeguard of reliability.[50] In addition, legal and psychological authority, coupled with experimental data, are often used to demonstrate that the statement made nearer in time to the offense is generally more reliable.[51]

On the other hand, the more modern trend has been to criticize as erroneous the long-standing assumption about the reliability of human perception and memory upon which admission of prior identification testimony has been based.[52] In addition, the situation in which such identifications are obtained, lineups and showups in general, have come under increasing attack as being prejudicial and suggestive.[53] Considering that no evidence, other than an outright confession, probably carries as much weight, not only with lay jurors but with many law enforcement officials as well, such criticisms are by no means academic.[54]

The principal thrust of the attack centers on the questionable reliability of human perceptions and memory necessary to making any identification, especially in the stress-filled environment in which the victim or witness of a

[45] *See* PROPOSED RULES, *supra* note 9, at 26–97.

[46] 4 J. WIGMORE, EVIDENCE § 1130, at 210 (3d ed. 1940); Brown, *An Experience in Identification Testimony*, 25 J. CRIM. L.C. & P.S. 62 (1934); Gardner, *The Perception and Memory of Witnesses*, 18 CONN. L.Q. 391 (1933); Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 41 HARV. L. REV. (1928).

[47] *See* notes 53–57 and accompanying text *infra*.

[48] Wigmore denigrated the in-court identification because of the "violently suggestive" conditions existing there. 4 J. WIGMORE, EVIDENCE § 1130, at 210 (3d ed. 1940).

[49] Wigmore hypothesized that after all the time that has intervened between the initial, prior identification and the in-court identification it would seldom happen that the witness would not come to believe in the person's identification. 4 J. WIGMORE, EVIDENCE § 1130, at 210 (3d ed. 1940).

[50] *See* McCormick, *The Turncoat Witness: Previous Statements or Substantive Evidence*, 25 TEX. L. REV. 573 (1947).

[51] See the discussion and authorities cited in R. MCCORMICK, EVIDENCE § 251 (2d ed. 1972). *See also* Vickery & Brooks, *Time-Spaced Reporting of a "Crime" Witnessed by College Girls*, 24 J. CRIM. L. C. & P. S. 371 (1938).

[52] Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory v. Realty*, 3 IND. LEGAL F. 309 (1970); Buckhart, *Eyewitness Testimony*, SCIENTIFIC AMERICAN, Dec. 1974, at 23 [hereinafter cited as SCIENTIFIC AMERICAN]; Levine & Tapp, *The Psychology of Criminal Identification:* REV. 1079 (1973) [hereinafter cited as PSY-CRIM. IDENT.]; Rothstein, *The Proposed Amendment to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973); Steward, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1 [hereinafter cited as PERCEPTION-MEMORY]; Comment, *Due Process in Extra-Judicial Identifications*, 24 WASH. & LEE L. REV. 107 (1967).

[53] *See* Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261 (1971); Comment, *Erroneous Eyewitness Identification at Lineup—The Problem and the Cure*, 5 U.S.F.L. REV. 85 (1970).

[54] PSY-CRIM. IDENT., *supra* note 52, at 1081.

crime finds himself or herself. Too often, critics charge, the law appears disproportionately concerned with deliberate falsification as compared with its concern over honest errors in perception and memory produced by the "normal" operation of our five senses. Until recently, the assumptions underlying testimonial reliability were based on little more than a subjective and unsystematic study of human testimony based upon a "highly rationalistic view of man." [55] But, with more scientific studies it is urged that the observer is an active recorder rather than a passive or photographic recorder; the eye, the ear, and the other sense organs are "social" organs as well as physical organs. Perception and memory, in effect, are decision-making, not copying processes and are therefore subject to error. The observer, inundated with an overabundance of information, is influenced by a principle of economy into perceiving and remembering by formulating a general over-all impression. The result is that stereotypes exert an important influence,[56] and people may in the end testify to the occurrence of events or the identity of a person that they have not in fact witnessed.[57]

Robert Buckhart has written in *Scientific American* of the sources of unreliability. Some are implicit in the original situation, including, for example, the insignificance—at the time and to the observer—of the events, the length of time of observation, and the less than ideal observation conditions which generally apply (distance, poor lighting, fast movement, or crowds).[58] The witness himself is a major source of unreliability, due to the effect of observing under stress (especially applicable in the case of observers who are the victims as well), or often to defects in physical condition such as age, sickness, or fatigue.[59]

Finally, critics of the validity of prior identification evidence challenge the identification process itself. If the lineup, showup, or photographic array are conducted unfairly either because of suggestion, hints, or pressure by the law enforcement authorities, or because they are carelessly conducted or even rigged,[60] the trustworthiness of the observer's identification correspondingly suffers.

The federal courts, like the commentators, are divided in the admission of this evidence, with varying positions being taken by the circuits.[61] Most frequently, prior identification evidence has been admitted to rehabilitate a witness' in-court identification which has been impeached as the product of recent contrivance.[62] Less frequently, it has been admitted to corroborate the witness' in-court identification prior to any impeachment of the witness.[63] The Ninth Circuit, in a 1938 case, rejected as too prejudicial the use of prior identification evidence.[64] The Second Circuit, however, has taken the lead in *allowing* the use of prior identification testimony in the prosecution's case in chief when the person making the prior identification is present and testifying.[65] No circuit, though, has admitted as substantive

[55] PERCEPTION-MEMORY, *supra* note 52, at 8.

[56] *Id.* at 17. *See also* SCIENTIFIC AMERICAN, *supra* note 52, at 25–26.

[57] Brown, *An Experience in Identification Testimony*, 25 J. CRIM. L.C. & P.S. 62 (1935).

[58] SCIENTIFIC AMERICAN, *supra* note 52, at 24–25.

[59] *Id.* at 75.

[60] Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966); People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963).

[61] *See* 4 J. WIGMORE § 1130 (3d ed. 1940) for a complete citation of federal and state cases and the difference between jurisdictions on this point.

[62] Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925).

[63] Williams v. United States, 338 F.2d 530 (D.C. Cir. 1964); United States v. Forzano, 190 F.2d 687 (2d Cir. 1951); Winniger v. United States, 77 F.2d 678 (8th Cir. 1935); Bolling v. United States, 18 F.2d 863 (4th Cir. 1927).

[64] Poole v. United States, 97 F.2d 423 (9th Cir. 1938). In *Poole*, the person making the identification, a co-defendant, was seated in the same room as the defendant and a number of other people; the defendant had his back to her. In response to a question by government agents, she identified the defendant who then denied the accusation. The prosecution argued that protesting without knowing that he was the one accused was some evidence of guilt on the defendant's part. Given the age and particular facts of this case and the trend in the other circuits away from across the board, outright rejection, the precedential value of this case is doubtful.

[65] United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964). The defendant was convicted of hijacking a truckload of imported goods. The appellate court, speaking through Judge Friendly, held that a prior sworn identification of the defendant by the truck driver before a grand jury and at a former trial, and an unsworn identification therein adopted, were admissible as substantive evidence, and with other evidence, sustained his conviction despite doubts as to his identity expressed by the driver on cross-examination. However, the holding in *De Sisto* has been rejected in Boyd v. United States, 342 F.2d 939 (D.C. Cir. 1965) and United States v. Crowder, 346 F.2d 1 (6th Cir. 1964), *cert. denied*, 382 U.S. 909 (1965).

evidence the testimony of a third person who observed an *unavailable* declarant's out-of-court identification.

The Advisory Committee and Prior Identifications

In its exclusion of prior identification evidence from the hearsay rule, the Advisory Committee's proposed rules of evidence would have in effect allowed its use in the prosecution's case in chief and would therefore have been in line with the Second Circuit's rule, and the view of those in favor of in-court use of prior identifications as substantive evidence.[66] The Advisory Committee in its brief notes on the subject did not discuss the arguments for and against the use of such evidence, but rather assumed the Wigmore theory that court room identifications are "generally unsatisfactory and inconclusive" as compared to previous out of court declarations made under "less suggestive conditions."[67] Earlier, in the notes dealing with "prior statements by witness," the committee addressed the arguments put forth for treating prior statements in general as hearsay, that: "[The] conditions of oath, cross-examination, and demeanor observation did not prevail when the statement was first made and cannot adequately be supplied by the later examination."[68] The Advisory Committee in the notes minimized the problem of the lack of oath; its mere presence had never been sufficient to remove a statement from hearsay, and only the hearsay exception for prior testimony requires the hearsay utterance to have been made under oath.[69] Indeed, it would seem highly unlikely that the original sanction of the oath, the wrath of God, would have much vitality in the present day and age. Even though it may be granted that the penalties for perjury carry weight, it is surely debatable as to just how much weight.[70]

Likewise, the committee concludes that the problem of the lack of opportunity to observe the witness' demeanor at the time he made the identification is more apparent than real. As Judge Learned Hand had stated many years before:

> If from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.[71]

The committee concludes its cursory treatment of the subject matter with the conclusion that even though there appears to be a stand-off between the case law and the commentators over the use as substantive evidence of prior statements, and that the committee is generally unwilling to allow such statements to be so used: "particular circumstances call for a contrary result. The judgment is one more of experience than of logic."[72]

The committee dismisses the problem of subsequently conducting a successful cross-examination in rather bold fashion by declaring that the "decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement."[73] Lurking in the background is the problem of the conflict between the sixth amendment rights of counsel and confrontation, and the now expanded admissibility of hearsay in general under the Federal Rules of Evidence. The law is in a state of flux in this area; thus ascertaining the constitutional dimensions of the confrontation-

---

[66] *See* notes 44–49 and 63 and accompanying text *supra*.

[67] Proposed Rules, *supra* note 9, at 296–97.

[68] *Id.* at 295.

[69] R. McCormick, Evidence § 251 (2d ed. 1972); 6 J. Wigmore, Evidence §§ 1827, 1831 (3d ed. 1940); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948).

[70] *See generally* Black, *A Report on Perjury*, 49 Ill. B.J. 574 (1961); McClintock, *What Happens to Perjurers*, 24 Minn. L. Rev. 727 (1940); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573, 576 (1947); Purrington, *Frequency of Perjury*, 8 Colum. L. Rev. 67 (1908); Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 Dick. L. Rev. 127 (1968); Comment, *Perjury: The Forgotten Offense*, 65 J. Crim. L. & C. 361 (1974).

[71] Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

[72] Proposed Rules, *supra* note 9, at 296.

[73] 205 Minn. 358, 285 N.W. 898 (1939). *See also* People v. Johnson, 68 Cal.2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). All three cases deal with prior inconsistent statements and exclude them, emphasizing the lack of timely cross-examination.

hearsay aggregate is somewhat difficult.[74] Under earlier decisions the confrontation clause may simply have been the constitutional counterpart of the hearsay rule, but recent decisions clearly indicate the impact of the clause goes beyond the application of rules of exclusion and in the direction of curbing undesirable prosecutorial behavior.[75] Decisions in *United States v. Wade,*[76] and *Gilbert v. California,*[77] turned on practices used by law enforcement agencies to identify accused persons prior to trial. The Court held the prior identification to be such a decisive aspect of the case that the accused, as a matter of right, should have counsel present as a prerequisite for "meaningful confrontation at trial."[78] However, in *Gilbert,* though the witness testified to an earlier identification in such a manner that the decision was susceptible of being decided on hearsay grounds,[79] the Court refrained from excluding the testimony with respect to the lineup identification on the ground that it violated the hearsay rule or confrontation right because not made under oath, subject to immediate cross-examination and in the presence of the fact-finder. Instead, the exclusion was required because the accused had not had the assistance of counsel. The Court then observed:

> There is a split among the States concerning the admissibility of prior extra judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 ALR 2d Later Case Service 1225–1228. . . .[80]

Thus, the committee, recognizing the distinction between the hearsay rule and confrontation clause, and to avoid "inviting collisions" between them, or between the hearsay rule and other exclusionary principles, stated the exclusion of prior identification evidence and the

[74] Until recently, decisions involving the confrontation clause were few, partly because the clause did not apply to the states until Pointer v. Texas, 380 U.S. 400 (1965), and in part because the hearsay rule occupied much of the same ground. The pattern of the earlier criminal cases is generally that of the hearsay rule: the accused has a right to have witnesses against him testify under oath, in the presence of himself and the fact-finder, and subject to cross-examination. Exceptions to the hearsay rule applied, though. For example, prior testimony of an unavailable declarant was admissible in a later proceeding. Mattox v. United States, 156 U.S. 237 (1895). Beginning with Snyder v. Massachusetts, 291 U.S. 97 (1934), confrontation became part of procedural due process; its applicability to state cases and federal civil cases was extended, through that mechanism. PROPOSED RULES, *supra* note 9, at 291.

[75] In Douglas v. Alabama, 380 U.S. 415 (1965), a confession implicating the accused was presented to the jury by mailing parts of it to the witness and then inquiring whether he had made the statement. When the witness refused to answer, the Court ruled this was a denial of cross-examination and thus confrontation. Though the confession can be seen as hearsay, the opinion is more aptly explained as curbing highly questionable behavior by the prosecutor.

[76] 388 U.S. 218 (1967).

[77] 388 U.S. 263 (1967).

[78] 388 U.S. at 236.

[79] It should be noted that *Wade* did not involve any evidence of the fact of a prior identification and therefore is not conducive to a decision on hearsay grounds.

[80] 388 U.S. 263, In the aftermath of *Wade,* lower federal courts tended to apply its teachings regardless of whether or not the defendant had been indicted. *See* Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases,* 42 U. COLO. L. REV. 135, 143–44 (1970). However, a number of lower federal courts seemed to admit just about anything, given external factors indicating the identification was correct. *See* Note, *Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball,* 55 MINN. L. REV. 779 (1971). Nonetheless, the Supreme Court in Kirby v. Illinois, 406 U.S. 682 (1972), brought a halt to the *Wade-Gilbert* line of cases by ruling that the right to counsel does not attach at a *pre*-indictment hearing, which would include prior identification. The case opened up a loophole that all but enveloped the *Wade* ruling, reducing what effect it did have to the minimum. Logically, this distinction makes absolutely no sense and one is tempted to ascribe it to the change in personnel in the Court more than anything else.

The third case in the *Wade* trilogy, Stovall v. Denno, 388 U.S. 293 (1967), does provide a partial remedy. The case was decided on fourteenth amendment due process grounds in which the *total* context of the circumstances must be considered when testing the identification situation against due process standards of essential fairness. The due process approach is more pervasive than the sixth amendment confrontation rationale which only reaches weakness arising from want of the opportunity to confront the witness in the identification situation.

other exceptions to the hearsay rule, "in terms of exemption from the general exclusionary mandate of the hearsay rule rather than in positive terms of admissibility." [81]

Given the division of authority among commentators and among the circuits of the federal court system, and the potential problems with the confrontation clause of the sixth amendment, nevertheless prior identification evidence should be admissible into evidence in the prosecution's case in chief especially where the person making the prior identification is present and available to testify.[82] This is not to ignore the very real problems inherent in prior identification evidence, but rather to emphasize that not *all* such evidence is unreliable. In part this is a reflection of the fundamental purpose of a trial. It is not only a search for truth but an attempt as well to reach the most satisfactory solution in the most reasonable amount of time. This, in turn, requires the admission of the most relevant evidence possible, given appropriate circumstances. Wigmore strongly believed that the rule against admitting hearsay should not be taken to mean exclusion per se, but rather exclusion so long as better evidence exists.[83] If better evidence does not exist and the hearsay evidence, here the prior identification, is sufficiently relevant and probative of the issue, it should be admitted to take its place with the other evidence to be given the weight it deserves by the fact-finder. Application of mechanical rules that automatically lead to exclusion is not the best way to sort out the unreliable evidence from the reliable evidence.

Nor is this any less true because it is a criminal and not a civil trial. Insistence upon reliable evidence as the basis of adjudication is of the highest priority in our legal system's effort to achieve the ideal that no innocent person be punished. At the same time, our legal system seeks to ensure that those who are guilty are brought to justice. The following suggestions are put forth to achieve these two goals.

The conduct of lineups, showups, or photographic arrays by law enforcement agencies must be coupled with adequate safeguards[84] which are rigorously applied to ensure fairness and to avoid any prejudicial suggestion by word or action.[85] Courts have not and should not be reluctant, therefore, to exclude prior identification evidence if improperly obtained.[86] In addition, there is little evidence to show that judges are incapable of assessing the probative force of such hearsay or its potential for prejudice. And jurors, on the whole better educated and informed than their predecessors, are capable of assessing the hearsay evidence without giving it undue weight. Granted that testimony with respect to prior identification *may* be as damaging as an outright confession, a forceful and effective defense counsel,[87] and proper judicial caution from the bench should furnish sufficient guidance to the jury. Finally, Professor Weinstein, in an article on the probative force of hearsay,[88] urged the following

[81] PROPOSED RULES, *supra* note 9, at 292.

[82] With respect to the receipt in evidence of testimony by a third person observing an identification being made. *See* text accompanying notes 98–105 *infra*.

[83] *See* 1 J. WIGMORE, EVIDENCE § 8(c) at 278 (3d ed. 1940).

[84] Professor Jon Waltz has given a version of the ideal lineup: at least six participants who closely resemble each other in height, physical characteristics, and attire; presented simultaneously to the witness(es) with no undue attention drawn to any particular participant. Although witnesses would request participants to repeat a bodily movement or words of the criminal, all lineup participants would do so; finally, witness reactions would be conveyed to law enforcement officials separately with the question being: "Is the criminal in the lineup?" and not: "Which lineup member is the criminal?" J. WALTZ, CRIMINAL EVIDENCE 161 (1975). *See also* 4 DEFENDER NEWSLETTER 55 (1967) (Clark County, Nevada guidelines), and the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § A 5.09 (Study Draft No. 1, 1968).

[85] Note that in a jurisdiction where the prior identification evidence is hearsay, there is little pressure on law enforcement officials or the prosecutor to conduct fair identification procedures, because whether fair or not, the evidence is not admissible in the case in brief. Where the hearsay objection is overruled, the court can then consider the circumstances surrounding the identification. Comment, *Prior Identification Evidence and the Hearsay Objection*, 30 ROCKY MT. L. REV. 332, 338 (1958).

[86] *See, e.g.*, State v. Cooper, 237 N.E. 2d 653 (C.P. Ohio 1968).

[87] Considering the criticism that the legal profession has received from some of its own members, notably Chief Justice Warren E. Burger, over the low aptitude of lawyers in the courtroom situation, forceful and effective counsel may not be enough.

[88] Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961). Professor Weinstein's article is well-reasoned and readable. He argues for admissibility based on probativeness with certain procedural safeguards to insure fairness. His thesis

procedural safeguards. In addition to judicial comment on the evidence, greater control by the trial court over the jury, and greater discretion by the trial judge in determining whether or not to admit such evidence, he proposed that there be notice to opposing counsel of the intention to use the hearsay and more rigorous review on the part of the appellate courts.

Admission of Prior Identification Evidence: Alternatives

Proposed rule 801(d)(1)(C) in essence strives to compromise these competing considerations, striking a balance between the unprepared but possibly suggestive out-of-court identification and the unemotional but probably prepared and possibly coached in-court identification.[89] Congress originally deleted in quite concise fashion the prior identification exception because it feared that too many innocent people might be convicted if such evidence is introduced as substantive evidence bearing directly on the issue in controversy.[90] However, in amending the rules and thereby again expressly exempting prior identifications from the hearsay rule, Congress merely reversed itself, adopting the Advisory Committee's reasoning as its own.[91]

The rule, however, suffers from a number of defects. Basically, the rule as it now stands *may* allow the admission of prior identification evidence which is unreliable because it does not expressly provide for certain safeguards. First, corroboration of the prior identification should be required as a type of check on the conduct of the prior identification and to ensure that the fact-finder in weighing the prior identification has before it all relevant information concerning the circumstances surrounding it. Who would provide the corroboration is the next question. Rather than the law enforcement officials alone, who may be conducting the prior identification situation, this would be a role which the defense attorney, who is present at a post-indictment lineup under the *Wade* rule, might also assume.[92] In addition, the rule should provide, or Congress should at least indicate in the legislative history of the amendment, that there could be no conviction based on prior identification alone. The point is that while a prior identification may properly be admitted so that it may take its place with *other* evidence to be weighed by the fact-finder, to allow conviction on such evidence alone would be to give it too much weight, given the problems of reliability already discussed. Thus, the solution requires a more delicate balance than the one created by Congress.

Three possible alternatives exist which might have allowed admission of prior identification evidence had Congress not acted to exempt such evidence from the hearsay rule. However, in terms of providing the safeguards which rule 801(d)(1)(C) lacks, only the first alternative could effectively meet that deficiency. The three possible alternatives were:

(1) under the "other exceptions," or residual clauses of either rule 803 or rule 804, as amended by Congress;[93]

involves, in essence, a case-by-case approach with heavy emphasis on judicial discretion.

[89] Rule 801(d)(1)(C), it is noted, does not apply to the testimony given by a third party who observed the identification being made. But, given that the declarant is present and testifies to the prior identification, there would seem to be little problem with the hearsay risks to receipt of the third person-observer's testimony; however, it might be challenged as cumulative.

[90] Rules-Legis. Hist., *supra* note 29, at 53.

The only reason given for the deletion of the prior identification exception appeared in the Senate Report; the House had not changed the section at all. More important, this is a concern more naturally associated with the problem of the weight to be given to the evidence rather than whether or not it is admissible.

[91] 121 Cong. Rec. 7128-29 (daily ed. Apr. 30, 1975) (remarks of Senator Hruska). One gets the idea that the provision was first deleted and then put back in more as the result of congressional politics than anything else.

[92] *See* notes 72-79 and accompanying text *supra*. Professor James Strazzela has written an article in which he discusses the possible roles which identification counsel might play. Strazzella, *Ineffective Identification Counsel: Cognizability Under the Exclusionary Rule*, 48 Temp. L. Q. 241, 253-58 (1975).

To make this safeguard effective, however, would require that *Kirby v. Illinois* be overturned so that the right to counsel would attach at a *pre*-indictment hearing as well. This is a major obstacle since neither the Supreme Court nor Congress appears inclined to make such a change.

[93] *See* note 11 *supra*. This is an example of poor draftsmanship on the part of the Advisory Committee. It would have been better to eliminate rules 803 (24) and 804 (5) and promulgate a separate rule for the "other exceptions." As it is now, a lawyer would be foolish to seek to have evidence received under 804 (5), where he must show the unavailability of the declarant, when he

(2) under rule 801(d)(1)(A) or (B);[94]
(3) under the "present sense" exception of rule 803[95] (for testimony by a third person-observer of an identification).

Under the first alternative, prior identification evidence might have been admitted, though with less predictability, through the "other exception" clauses of either rule 803 or rule 804.[96] Under the proposed rules, evidence could be admitted under the "other exceptions" clause if not specifically covered in any of the enumerated exceptions but having comparable circumstantial guarantees of trustworthiness.[97] The Congress felt that this was too open-ended and narrowed the residual clauses through various amendments.[98] In addition, the Senate report cautioned that the "other exceptions" clauses should be used but rarely and "only in exceptional circumstances," [99] quite frankly asserting that the residual exceptions clause was not meant to authorize major judicial revisions of the hearsay rule; "such revisions are best accomplished by legislative action." [100] Aside from giving effect to congressional intentions, the cautious and conservative nature of the judiciary would itself have inhibited free use of this exception. It should not be expected that forty years' experience in dealing with such evidence in one way would evaporate overnight.

In addition, the "other exceptions" clause might have, in operation, required safeguards, *e.g.*, corroboration, which are stiffer than the present rule 801(d)(1)(C). There would be no reason not to admit it. If the prosecution could demonstrate to the court's satisfaction that the prior identification statement would meet the requirements of rules 803(24) or 804(5), and the requirements of any other applicable exclusionary rule, the evidence should be admitted to take its place with the other evidence.

Admission of prior identifications under either 801(d)(1)(A) or (B) would actually be of only partial value. Under subsection (A), it could only be admitted if inconsistent with the in-court identification and if it had been given under oath. Under (B), if the prior identification would be consistent with the in-court identification, it could be admitted only to rebut a charge of recent fabrication or improper influence or motive. Thus, in either case the prior identification statement could be offered in the prosecution's case in chief as substantive evidence only to impeach or to rehabilitate the in-court identification. In addition, the requirement of the oath in subsection (A) would make that avenue all but useless. Theoretically, it would be possible to meet the oath requirement at a staged prior identification conducted by a law enforcement agency. But, the probable cost would be so prohibitive that it is unlikely to occur in any event.

Perhaps the most novel alternative would be to use the "present sense" exception under rule 803.[101] Statements describing an event

---

can utilize the exact same procedure in 803 (24), where the availability of the declarant is immaterial.

[94] *See* note 12 *supra.*

[95] *See* note 13 *supra.*

[96] *See* note 11 *supra.*

[97] Congress changed "comparable circumstantial guarantees of trustworthiness" to "equivalent circumstantial guarantees of trustworthiness." It is questionable whether there is any measurable difference between the two; more likely, it is a manifestation of the desire of Congress that judicial discretion not be exercised too freely.

[98] In the Senate report, the members expressed strong disapproval of the wording of the proposed drafts of proposed rules 803(24) and 804(6) [804(5) as amended], arguing that it was so broad as to emasculate the rule or vitiate the rationale behind the whole codification effort. RULES-LEGIS. HIST., *supra* note 29, at 56.

[99] . . . Congress must ensure that the rule-making process is not delegated to the unbridled discretion of the courts—not because of any distrust of the courts but because of the dictates of sound government.

RULES-LEGIS. HIST., *supra* note 29, at 45.

This was certainly an understatement, and might reflect the concern with the activist bent of the Warren Court often expressed by some congressmen. Some members of Congress felt that the Supreme Court and the judicial branch were "legislating" in the rules. *See Hearings on H.R. 5463, supra* note 24, at 5: "Congress alone has the right to set rules or specifically delegate authority to set rules." (Testimony of Congressman Podell).

[100] In order to establish a well-defined jurisdiction, the specific facts and circumstances which in the court's judgment, indicate that the statement has a sufficient degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

RULES-LEGIS. HIST., *supra* note 29, at 56.

[101] *See* note 12 *supra.*

made while, or immediately after, the declarant was perceiving the event may be admitted despite their hearsay nature. This is a relatively new exception to the hearsay rule, whose origin lies in the murky fringes of *res gestae*.[102] Professor Morgan strongly endorsed it[103] while Dean Wigmore was probably its most notable critic.[104] In the case of a prior identification, the "event" is the identification situation, generally a lineup,[105] and the "statement" is the declarant's verbalization of the identification: "It is the second man on the left. He's the one who stole my bag."

Certain requirements must be met before a statement will qualify under the exception. First, the event described must be relevant. This does not pose unusual problems since it is the baseline requirement for the receipt of all evidence. Second, the statement must be descriptive of, and not merely relate to, the event. Third, the statement must be made contemporaneously with the perception of the event, or immediately thereafter. This insures freedom from any error of memory and provides protection against calculated misstatement. Fourth, the declaration should be made in the presence of at least one other person who would be in a position to observe the situation himself and thus provide a check on the accuracy of the declarant's statement.[106] In the case of staged prior identifications, the observers will almost always be law enforcement officials in attendance.

The declarant may or may not be available to testify and be cross-examined, but under rule 803 the availability of the declarant is immaterial. Theoretically, therefore, it would be possible for one of two observers (here, law enforcement officials) to describe the "event" —an unavailable declarant's identification of the accused—with the other observer acting as a check. However, in a criminal case, other considerations are brought to bear, including the problem of lack of confrontation and cross-examination by the accused and the potential for abuse through the manipulation, or even manufacture of the prior identification. In such a situation where the declarant would be unavailable and the only testimony with respect to the prior identification would be that of an observer or observers, the testimony should be excluded.

There would be additional problems with receipt of prior identification evidence under the present sense exception. In the first place, though the statement ("That's him, that's the one who terrified me.") is contemporaneous with the "event" (the identification situation), it is not contemporaneous with the event which the fact-finder would be primarily interested in —the robbery or rape, for example. In such a situation, the problems of memory and perception, to the extent they are relevant, would still exist and would have to be dealt with. The potential for calculated misstatement would also be greater in the identification situation. In addition, the "observer" would probably be a law enforcement officer or officers, and the identification situation would probably be one which those same officers control. The problems inherent in such situations are obvious and courts have not been reluctant to exclude such evidence if the circumstances warrant it.[107]

[102] Initially *res gestae* denoted the words which accompanied the principal litigated fact; such as the robbery, murder, or accident which was the subject of the action.

Res gestae has enjoyed a long and varied career in the history of evidence, but its imprecision and vagueness, which served it well in the beginning, is more a source of confusion today than anything else. McCormick suggested that it be jettisoned with due acknowledgement for its contribution. R. McCORMICK, EVIDENCE § 288 (2d ed. 1972).

[103] Morgan, *Res Gestae,* 12 WASH. L. REV. 91 (1937); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae,* 31 YALE L. J. 229, 236–38, (1922).

[104] 6 J. WIGMORE, EVIDENCE §§ 1745–57 (3d ed. 1940). Dean Wigmore saw not the contemporaneousness but the nervous excitement produced by exposure to the exciting event as providing for the requisite reliability.

[105] However, the identification situation may also occur immediately after the criminal event if, in "hot pursuit" the police apprehend the accused and the victim at the time makes the identification. This would be similar to a showup in the sense that a single person is being presented to the witness.

[106] Note, R. McCORMICK, EVIDENCE § 298, at 710 (2d ed. 1972); Note, *Spontaneous Exclamations in the Absence of a Startling Event,* 46 COLUM. L. REV. 430 (1946).

[107] *See* note 60 *supra.* In addition, see J. WALTZ, CRIMINAL EVIDENCE 153 (1975), and WESTON & WELLS, CRIMINAL INVESTIGATION 204–07 (2d

With regard to present sense impressions, such observers might not provide the sort of impartial, unbiased check on accuracy which the exception must require in order to be seriously considered in any criminal trial. Finally, because the present sense exception is a relatively new phenomenon, only one jurisdiction, Texas, has specifically recognized it and applied it.[108] In sum, the present sense exception would prove to be of limited utility both because of problems inherent in its application to the criminal side, and because of its lack of acceptance within the legal community.

In conclusion, prior identification evidence, once seemingly subject to absolute exclusion under the hearsay rule is now admissible as evidence, not only as corroboration or as rebuttal, but as substantive evidence bearing directly on the issue involved. As passed by Congress, however, the rule lacks necessary safeguards, including corroboration of the prior identification and a requirement that no conviction be based solely on a prior identification. Congress did not distinguish itself in failing to explore adequately the problems and potential of rule 801(d)(1)(C) and in failing to provide these safeguards in the rule. But, rule-making is a job for which Congress is not suited either by experience or expertise.

There is no doubt, of course, that Congress by statute[109] does, and should, play a *general* supervisory role in the promulgation of federal rules. If Congress was not satisfied with the Federal Rules of Evidence as promulgated, however, it should have made its view known and then sent the rules back to the Judicial Conference and the Advisory Committee for revision.[110] Instead, Congress undertook to make the revisions itself with mixed results.

In the process, the Congress has created needless problems for the lower courts who must attempt to thread their way between the cryptic Congressional desires on the one hand, and seemingly opposite action by the Supreme Court on the other. Twice the Supreme Court has indicated its view on the question of prior identification evidence. First, and most important, in sending the rules to the Congress, it placed its imprimatur on them.[111] Second, in *Gilbert v. California*,[112] the Court noted the modern trend in admitting prior identification evidence substantively.

Alternatively, admission into evidence might have been achieved through the "other exceptions," or residual clause of either rule 803 or rule 804, most probably the latter. Despite the fact that considerable controversy surrounds prior identification testimony, with proper safeguards adhered to such evidence should take its place among the other evidence to be given the weight it deserves by the fact-finder. Those safeguards include fair and impartial conduct by law enforcement officials in conducting lineups and an alert judiciary ready to exclude prior identification evidence obtained from an improperly conducted lineup. In addition, forceful and effective defense counsel and

---

ed. 1974), for examples of lineups that did not pass muster on review.

[108] Only the Texas courts have specifically recognized this exception, though other courts have admitted evidence of the type under *res gestae* language. *See* R. McCormick, Evidence § 298, at 710 n.70 (2d ed. 1972). The leading case is Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), in which the witness' testimony that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up" was admitted. The Texas Supreme Court said, "[The statement] is sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement." *Id.* at 6, 161 S.W.2d at 476.

[109] *See* 28 U.S.C. § 2072 (1970). In addition, the Congress limited the Supreme Court's rule promulgation power in passing 28 U.S.C. § 2076 whereby an extended period of study is allowed to the Congress (180 days) in which either House or Senate may by resolution defer the effective date of any amendment or disapprove of any amendment. Any rule whether proposed or in force may be amended by act of Congress. In the past, only in rare circumstances has Congress seriously amended rules promulgated by the Supreme Court. *See* Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 Yale L.J. 1, 9 (1974); Moore & Schaeffer, *Congress and the Proposed Federal Rules of Evidence*, 4 Memphis St. U.L. Rev. 1 (1973); Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L.J. 125 (1973).

[110] Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 Yale L.J. 1 (1974).

[111] Justice Douglas specifically noted this in his dissent to the promulgation of the rules. Proposed Rules, *supra* note 9, at 185. The point is well taken in the sense that the Supreme Court's role in writing or supervising the writing of the rules was at best de minimus.

[112] 388 U.S. 263, 272 n.3(1967).

proper judicial caution from the bench should furnish sufficient guidance to the jury.

The primary goal of the American legal system has been, and should be, that no innocent man be convicted of a crime which he did not commit. At the same time, the legal system has sought to ensure that the guilty are not allowed to go free. The proposed rule of the Supreme Court and the alternatives outlined in this comment seek to fulfill those two goals.

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

Printed in U.S.A.

THE "CRIME" OF MENTAL ILLNESS: EXTENSION OF "CRIMINAL" PROCEDURAL SAFEGUARDS TO INVOLUNTARY CIVIL COMMITMENTS

INTRODUCTION

American society traditionally has dealt with its mentally ill population on the basis of expediency. A person classified as mentally ill was simply removed from society as efficiently as possible and placed in an institution designed both to keep him in custody and to provide him with minimal care. In recent years the confrontation between expediency and constitutional rights has led to the extension of what are commonly assumed to be criminal procedural safeguards to involuntary civil commitment procedures. The historical foundation and present status of the extension will be analyzed in this comment.

Government intervention into the affairs of the mentally ill historically has been based on two foundations:[1] the doctrine of *parens patriae*[2] and/or the police power of the sovereign to protect the health, safety, welfare, and morals of its citizens.[3] In England, the King, as *parens patriae,* had long been regarded the "general guardian of all infants, idiots, and lunatics" and was responsible for the care and custody of "all persons who had lost their intellects and become . . . incompetent to take care of themselves."[4] With the state now assuming sovereign responsibilities, the doctrine refers to the "inherent power and authority of the state to provide protection of the person and property of a person *non sui juris.*"[5] The state, as *parens patriae,* becomes a benevolent benefactor with a moral responsibility to protect and care for mentally ill persons and their property.[6]

Historically, the concept of *parens patriae* had an economic basis. The King was only interested in protecting the person and property of those persons who could afford to be cared for; persons without means of support were left to fend for themselves.[7] Over time the doctrine expanded to include the protection and care of a person without property or other means.[8] Under the modern concept, the state may, within constitutional limitations, enact statutory provisions for the protection of all mentally ill persons.[9] Such provisions have

[1] *See, e.g., In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated & remanded on other grounds,* 414 U.S. 473 (per curiam), *modified,* 379 F. Supp. 1376 (1974).

[2] The use of *parens patriae* to detain the mentally ill is said to stem from *In re* Oakes, 8 Law Rep. 122 (Mass. 1845). However, the *Oakes* reasoning seems more applicable to the police power rationale for confinement of the mentally ill. *See* notes 4–12 and accompanying text *infra.* For a discussion of the *parens patriae* concept as applied to the mentally ill see N. KITTRIE, THE RIGHT TO BE DIFFERENT 2–23 (1971); *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1207–1222 (1974) [hereinafter cited as *Developments*]. The distinction between the *parens patriae* and police power rationales may be more clearly seen if the former is viewed as the state's moral responsibility and the latter is cast as the state's duty.

[3] The state's police power has been described as the "inherent power to protect the public." *Developments, supra* note 2, at 1222. *See* notes 13–14 and accompanying text *infra.*

[4] Beverley's Case, 76 Eng. Rep. 118, 1125–26 (K.B. 1603).

[5] Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948) (statutory provision enables minor to disaffirm contract). *Non sui juris* means "not his own master" and is the phrase used to refer to the legal status of a mentally ill person.

[6] Shapley v. Cohoon, 258 F. 752 (D. Mass. 1918) (habeas corpus action seeking release from commitment); *In re* Sariyanis, 19 N.Y.S.2d 431, 173 Misc. 881 (1940) (right of state to secure welfare of foreign-born incompetent within the state's borders).

[7] A. DEUTSCH, THE MENTALLY ILL IN AMERICA 40–41 (1949) [hereinafter cited as DEUTSCH]; AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 3 (rev. ed. S. Brakel & R. Rock 1971) [hereinafter cited as BRAKEL & ROCK].

[8] The provisions relating to those persons without means of support usually dictated confinement in a prison or poor house. This was true at least until the development of institutions designed specifically for the mentally ill, and these were not great improvements over the former institutions. *See* DEUTSCH, *supra* note 7, at 41–54; BRAKEL & ROCK, *supra* note 7, at 5–8.

[9] *In re* Andrews, 192 N.Y. 514, 85 N.E. 699 (1908) (authority of state to enact guardianship provision for incompetent person).

typically amounted to procedures for involuntary commitment to a mental health facility for treatment or care and custody.[10] This authority to commit is not unbridled but must have a reasonable regard for the rights of the persons and property affected.[11] It is this latter aspect of commitment in which dramatic change has occurred over the past decade as procedural due process safeguards have been applied to the commitment process.[12]

The other foundation for involuntary commitment is the police power of the state.[13] Here the state seeks to protect societal interests rather than the interests of the mentally ill individual.[14] The sovereign body historically has had the authority to deal with the "violently insane." The few public provisions that existed in colonial times with respect to the mentally ill were usually directed toward the safe disposition of violent individuals.[15] Reliance on means similar to those employed for criminals constituted the most common approach to care during this period.[16] Repression of unwanted elements of society was the theme underlying early legislation. The first Massachusetts statute dealing specifically with the "insane," enacted in 1676, provided, for example:

> Whereas, There are distracted persons in some tounes, that are unruly, whereby not only the familyes wherein they are, but others suffer much damage by them, it is ordered by this Court and the authoritye thereof, that the selectmen in all tounes where such persons are

---

[10] *See, e.g., In re* Ballay, 482 F.2d 648, 658–59 (D.C. Cir. 1973) (dictum); R. ROCK, M. JACOBSON & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 5–8 (1968).

State standards for commitment vary depending on the possible consequences of mental illness. Some state statutes allow commitment if the mental illness renders the individual in need of care or treatment or makes him a subject fit for hospitalization: ALA. CODE tit. 45, § 210 (1958); HAWAII REV. STAT. § 334–53 (1968); IOWA CODE § 229.19 (1971); KAN. STAT. ANN. § 59–2902 (Cum. Supp. 1974); MO. ANN. STAT. §§ 202.797, .807 (Vernon 1972); NEB. REV. STAT. § 83–328 (1971); N.J. STAT. ANN. § 30:4–23 (Supp. 1974); N.Y. MENTAL HYGIENE LAW § 31.01 (McKinney Supp. 1974); PA. STAT. ANN. tit. 50, § 4406 (1969); R.I. GEN. LAWS ANN. §§ 26–2–8 to –12 (1968), *as amended*, (Supp. 1973); VA. CODE ANN. § 37.1–1 (1970); WIS. STAT. § 51.02 (1971), *as amended* (Supp. 1974).

The following states allow commitment to protect the welfare of the individual or the welfare of others: COLO. REV. STAT. ANN. § 27–9–102 (1973); CONN. GEN. STAT. ANN. § 17–176 (Supp. 1975); IND. CODE § 16–14–9–1 (1973); MINN. STAT. ANN. § 253A.07 (Supp. 1974); OKLA. STAT. ANN. tit. 43A, § 3 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 5547–52 (1958).

These states provide for commitment if the mentally ill person is dangerous and/or is in need of mental treatment: ALASKA STAT. § 47.30.070 (1971); ARK. STAT. ANN. § 59–408 (1971); DEL. CODE ANN. tit. 16, § 5125 (Cum. Supp. 1970); FLA. STAT. ANN. § 394.467 (1975); KAN. STAT. ANN. § 59–2902 (Cum. Supp. 1974); KY. REV. STAT. ANN. § 202.135 (1972); MISS. CODE ANN. §§ 41–21–13, –23 (1972); N.M. STAT. ANN. § 34–2–5 (Supp. 1973); N.D. CENT. CODE § 25–03–11 (Supp. 1973); OHIO REV. CODE ANN. § 5122.01 (Baldwin 1974); S.C. CODE ANN. § 32–963 (1962); S.D. COMPILED LAWS ANN. § 27–7–18 (1967), § 27.7A–1 (Supp. 1974); TENN. CODE ANN. § 33–604 (Supp. 1974); UTAH CODE ANN. § 64–7–36 (Supp. 1975); VT. STAT. ANN. tit. 18, § 7607 (1968); W. VA. CODE ANN. § 27–5–4 (Supp. 1974); WYO. STAT. ANN. § 25–60 (1967).

The following states authorize commitment if the person is mentally ill and dangerous to himself or others, or unable to care for his physical needs: ARIZ. REV. STAT. ANN. § 36–524 (1974); CAL. WELF. & INST'NS CODE §§ 5260, 5300 (West 1972); D.C. CODE ANN. § 21–545 (1973); GA. CODE ANN. §§ 88–506.1 (1971); IDAHO CODE § 56–237 (Supp. 1974); ILL. REV. STAT. ch. 91½, § 1–11 (1973); LA. REV. STAT. ANN. §§ 28:52–53 (West Supp. 1974); ME. REV. STAT. ANN. tit. 34, § 2334 (Supp. 1974); MD. ANN. CODE art. 59, § 3 (Cum. Supp. 1974); MASS. GEN. LAWS ANN. ch. 123, §§ 1, 8 (1972); MICH. STAT. ANN. § 14.800(401) (Supp. 1975); MONT. REV. CODES ANN. § 38–208 (Supp. 1974); NEV. REV. STAT. § 433.695 (1973); N.H. REV. STAT. ANN. § 135–B:26 (Supp. 1973); N.C. GEN. STAT. § 122–58.1 (Supp. 1974); ORE. REV. STAT. § 426.005 (1973); WASH. REV. CODE ANN. § 71.05.020(2) (1975).

[11] *See, e.g.*, State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918) (defendant acquitted on basis of insanity defense must be released because court has no authority for continued detention).

[12] *See, e.g.*, Bell v. Wayne County Gen. Hosp. 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). *See also* notes 85–137 and accompanying text *infra*.

[13] *See* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). This case includes an excellent judicial summary of the police power in the commitment process.

[14] For discussions in the legal literature of the police power concept as applied to the civil commitment process see Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1, 28–29 (1971); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 956 (1959); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1293 (1966); *Developments, supra* note 2, at 1222–45.

[15] DEUTSCH, *supra* note 7, at 41.

[16] *Id.*

> hereby empowered and injoyned to take care of all such persons, that they doe not damnify others.[17]

During the early colonial period the sovereign police power provided the authority to regulate the dangerous mentally ill person.[18] The doctrine of *parens patriae* authorized the state to care for those nonviolent mentally ill unable to care for themselves, although as stated above, initially this doctrine was seldom applied to mentally ill persons without visible means of support.[19] As colonial society developed and became more structured and self-supportive, care for mentally ill persons expanded and institutions were established for their care and custody.[20] Commitment to these institutions was easily initiated upon the request of a relative, friend, or other interested party made to a member of the institution's staff. The order for admission was quite informal, consisting of little more than a piece of paper containing a few scribbled words.[21] Today the procedures may be somewhat more complex, but the basic rationales for commitment remain the same. Contemporary legislation commonly provides for involuntary commitment if the person is dangerous to others,[22] dangerous to himself,[23] or unable to care for himself.[24]

The first of these justifications for commitment, danger to others, is a traditional utilization of the state's police power, while the latter two, pertaining to the individual's person, stem from a mixture of the police power and the doctrine of *parens patriae*.[25] Some commentators have asserted that advances of psychiatric science in the areas of diagnosis and treatment make the distinctions between the reasons for commitment unimportant because regardless of the basis for commitment, a person will receive the care and treatment needed for rehabilitation. Unlike the past where commitment meant institutionalization for custodial purposes, the committed person now receives beneficial services which help him along the "road to recovery." To these commentators the state is not only a benevolent benefactor, but also a *successful* benevolent benefactor.[26] The assumption that society is capable of providing care and treatment by means of psychiatric services is ill-founded, however. Although techniques have improved, these more effective methods have not been successfully implemented on a mass scale. Indeed, some committed persons may have a better chance of improving their condition if left alone. The end result of commitment now is similar to the care and custody

[17] RECORDS OF THE COLONY OF THE MASSACHUSETTS BAY, vol. 5, p. 80.

[18] BRAKEL & ROCK, *supra* note 7, at 34.

[19] *Id.* at 4–5; DEUTSCH, *supra* note 7, at 43.

[20] In 1751, at the petition of Benjamin Franklin, the Pennsylvania Assembly established the first general hospital in America which was in part mandated to receive the mentally ill. DEUTSCH, *supra* note 7, at 58–65. The first institution devoted solely to the care of mentally ill persons was established in Williamsburg, Virginia in 1773. *Id.* at 66–71.

[21] DEUTSCH, *supra* note 7, at 62, 420. It seems that commitment was a convenient method for getting rid of the unwanted persons in the community during this time period—or at least there was a danger that commitment proceedings could be used for this purpose.

[22] Protection of members of society against a threat to their persons or property is the primary justification for flexing the police power. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905). *See also* statutes cited in note 10 *supra*.

[23] *See* statutes cited in note 10 *supra*.

[24] *Id.*

[25] In these two standards the police power overlaps with the state's *parens patriae* authority since both are concerned with the individual's health and welfare. The state's interest in protecting its citizens from a mentally ill person is fairly clear, but controversy exists as to whether a state should have the authority to protect a person from himself or to care for him against his wishes. Some critics argue that a state is never justified in committing a person under either of the latter rationales for the same reasons a state cannot force a physically ill person to accept medical treatment. *Cf. Developments, supra* note 2, at 1223–28. Other critics assert that a state is justified in committing a mentally ill person under such circumstances so long as he is provided with sufficient procedural safeguards to protect his interests. *See, e.g.*, Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction*, 5 SETON HALL L. REV. 64, 71–75 (1973). The judiciary does not seem ready to accept the radical leap required by the former approach which would do away with most involuntary commitment procedures. The latter represents the present trend, which is a definite improvement over past practice. *See, e.g.*, Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

[26] *Cf.* Goldstein & Katz, *Dangerousness & Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 237 (1960); Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 92–95 (1968).

provided a century ago; conditions are simply more comfortable.[27]

Recently, some commentators have argued that affording care and custody to a mentally ill person may not, in itself, be sufficient justification for the deprivation of that person's liberty.[28] Even acting as a benevolent benefactor, the state may not deprive an individual of his rights and liberty provided by our constitutional framework without affording him due process of law.[29] Under this premise, the commitment of a person alleged to be mentally ill by civil process is similar to the incarceration of a person accused of a crime under the criminal law. In both situations, the person is stigmatized, making his re-entry into society (if given the opportunity) difficult at best.[30] Furthermore, he faces the loss of liberty to come and go as he pleases, to do what he wants, and to exercise the rights traditionally guaranteed a citizen.[31]

Civil commitment and criminal incarceration are thus not significantly different in their result, but they do differ in the process leading to that result. In the criminal system a person who faces deprivation of his fundamental right to liberty is afforded the Constitution's due process safeguards;[32] a person facing loss of liberty by civil commitment is not always afforded similar protection.[33] The injustice of this anomaly has led to a slow but steady extension of procedural safeguards to civil commitment of the mentally ill,[34] and it can be safely said that the civil system has begun to acquire what were traditionally considered criminal safeguards.[35]

Development of Safeguards

Statutory Procedures

In early colonial times no legislative procedures existed to regulate formal commitment of mentally ill persons, probably because there were no institutions or hospitals to which such persons could be sent for care or custody.[36] In the absence of legislation, common law practices determined procedures, allowing restraint under the police power of a mentally ill person

[27] Some commentators assert that advances in psychiatric science are still far short of providing successful treatment, and thus commitment remains essentially custodial. *See, e.g.,* Katz, *The Right To Treatment—An Enchanting Legal Fiction?,* 36 U. Chi. L. Rev. 755 (1969). At the same time, many persons considered mentally ill improve by spontaneous remission without any intervention whatsoever, which means that their chances of improvement would be as good uncommitted as committed. *See* S. Rachman, The Effects of Psychotherapy 7–18, 40–41, 108–09 (1971).

[28] B. Ennis, Prisoners of Psychiatry; Mental Patients, Psychiatrists, and the Law 214 (1972); N. Kittrie, The Right to Be Different 97–101 (1971); T. Szasz, Law, Liberty, and Psychiatry 58 (1963).

[29] Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1927).

[30] *See, e.g.,* Farina & Ring, *The Influence of Perceived Mental Illness on Interpersonal Relations,* 70 J. Abnormal Psychology 47 (1965); Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Towards Mental Illness,* 35 J. Consulting & Clinical Psychology 159 (1970).

[31] *See Developments, supra* note 2, at 1198–1200, where the authors point out that civil commitment in the past has resulted in the "loss of custody of one's children, loss of rights to vote, be a candidate for public office, serve on a jury, practice a profession, obtain a driver's license, and make a contract or will . . ." (footnotes omitted).

[32] *See, e.g.,* the applications of the fourth, fifth, and sixth amendment guarantees in the following: Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to appointed counsel in all criminal prosecutions involving a deprivation of liberty); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation and cross-examination of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination).

[33] *See generally* Kittrie, *Compulsory Mental Treatment & the Requirements of "Due Process,"* 21 Ohio St. L.J. 28 (1960); Kutner, *Illusion of Due Process in Commitment Proceedings,* 57 Nw. U.L. Rev. 383 (1962); Comment, *A Constitutional Right to Court Appointed Counsel, supra* note 25; Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications,* 42 Fordham L. Rev. 611 (1974).

[34] Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972).

[35] *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967). In *Gault,* the Supreme Court rejected the criminal-civil distinction in holding that due process safeguards apply to a civil juvenile commitment proceeding in which an individual's liberty was at stake, since the adolescent involved was sent to an institution for juvenile delinquents. In *Winship,* the Court relied on the *Gault* rationale to hold that due process requires that the standard of proof of beyond a reasonable doubt be applied to civil juvenile proceedings as well as to criminal cases. These two holdings, more than any others, demonstrate the extension of due process safeguards into non-criminal proceedings.

[36] *See* note 20 *supra.*

without legal process when imminent danger to persons or property in the community was present.[37] This practice was codified shortly after the American Revolution,[38] and subsequent legislation added the provision that confinement of the mentally ill was incidental to, and necessary for, proper medical treatment,[39] thereby embodying the *parens patriae* concept that the state was actually confining the person for his own good, as well as for the good of society. This attitude that the state is a "benevolent benefactor" acting on the individual's behalf has remained the basic assumption underlying most of the legislation since that period. This assumption led logically, if not realistically, to the rationale that a person protected by the state did not need legal safeguards to protect himself from the state.[40] Confinement acquired a curative purpose in addition to its traditional goals of protection and custody,[41] although at the time, the knowledge of etiology and treatment of psychiatric disorders was much less extensive than it is today.[42] The "benevolent benefactor" role was coupled with the assertion that the mental state of the mentally ill individual was such that he could not be deprived of any rights he might possess because he was not capable of understanding he possessed those rights in the first place. This argument could be appropriately labelled the "vegetable theory" of civil rights and continues to appear in more subtle forms today.[43]

The development of legislative criteria for involuntary commitment has been grounded on such general assumptions. As stated earlier, the *parens patriae* notion is embodied in those codifications which allow commitment of a mentally ill person who is unable to care for himself as the result of his mental condition.[44] The traditional police power notion of "dangerousness" or likelihood of harm due to mental illness is also present in some form in most state codes.[45] The difficulty in using these criteria, however, is that they are based on a concept of mental illness which has not significantly changed since the seventeenth century[46] and which has been found to be of little use today in the determination of whether any particular criteria applies.[47] Many states have solved this problem by stating that mental illness is a condition justifying commitment and then legislating that mentally ill persons can be committed.[48] This circular solution hardly alleviates the confusion and makes all the more mandatory the provision of sufficient safeguards. If the determination of mental illness is based on an ambiguous foundation, some means are necessary to ensure only appropriate

[37] BRAKEL & ROCK, *supra* note 7, at 36 n.16; Flaschner, *Analysis of the Legal & Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1185 (1947).

[38] *See, e.g.*, ch. 31, [1788] N.Y. Sess. Laws.

[39] *See, e.g.*, ch. 135, §§ 18–23, [1842] N.Y. Sess. Laws.

[40] This argument is based on the assumption that since the objective of a commitment proceeding is ostensibly therapeutic, all parties to the proceeding have a common purpose and thus there is no need for an adversary process; indeed, there is not even a deprivation of liberty. *See* Prochaska v. Brinegar, 251 Iowa 834, 102 N.W.2d 870 (1960).

[41] The prevailing moral, social and economic climate influences which of these three goals is stressed most at any particular time. *See* BRAKEL & ROCK, *supra* note 7, at 39.

[42] As stated in note 27, *supra*, many contemporary critics argue that the state of psychiatry today is insufficient to justify deprivation of an individual's liberty. Since efforts at treatment are only minimally successful, state confinement of a person for treatment still remains essentially custodial as patients are not rehabilitated but merely cared for. *See* Suchotliff, Steinfeld & Tolchin, *The Struggle for Patients' Rights in a State Hospital*, 54 MENTAL HYGIENE 230 (1970).

[43] *See* Howard v. Howard, 87 Ky. 616, 623, 9 S.W. 411, 413 (1888); *In re* Oakes, 8 Law Rep. 122, 125 (Mass. 1845). *See generally* Comment, *Liberty and Required Mental Health Treatment*, 114 U. PA. L. REV. 1067 (1966). Such arguments fail to realize that even the incapacitated mentally ill may "not be indifferent to their physical freedom or to the environment in which they live." *Developments, supra* note 2, at 1211.

[44] *See* statutes cited note 10 *supra*.

[45] *Id.*

[46] Blackstone said that a mentally ill person, then referred to as a lunatic or *non compos mentis*, is "one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason." 1 BLACKSTONE, COMMENTARIES *304 Lord Coke's decision in Beverley's Case, 76 Eng. Rep. 1118 (K.B. 1603) gives a detailed description of the development of the common law and early legislation relating to the guardianship of the mentally disabled and the protection of their property.

[47] *See, e.g.*, T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 46 (1963). Szasz is recognized as one of the most outspoken critics of the deprivation of individual rights and liberty based on psychiatric intervention. Among other things, he asserts that the concept of mental illness is far too ambiguous in terms of its predictive ability to justify such deprivation.

[48] *Developments, supra* note 2, at 1202, n.5.

persons are subjected to commitment proceedings.

The statutory commitment procedures themselves have been divided into various categories depending upon their manner of implementation.[49] One basic distinction is made between emergency and non-emergency procedures. Emergency procedures allow for the rapid confinement of an individual after an ad hoc determination of dangerousness.[50] These procedures tend to be summary and the standard usually employed requires that impending harm to self or others be either more likely or more serious than would be the case under a non-emergency procedure.[51] Often emergency detention will be for a pre-determined period of time for purposes of observation and diagnosis, followed by further non-emergency procedures.[52] The non-emergency procedures are generally based on dangerousness (although not as imminent as that involved in emergency detention), or need for mental treatment, or lack of ability to care for one's self. These procedures may take the form of a non-judicial determination[53] or a judicial hearing,[54] although the two are not necessarily exclusive.[55]

Until recently, the enactment of statutes authorizing commitment far out-paced the enactment of safeguards protecting the person whose liberty is threatened.[56] A much cited illustration of the lack of safeguards is the 1960 Duzynski incident. Mr. and Mrs. Duzynski

---

[49] *See* BRAKEL & ROCK, *supra* note 7, at 41–59.

[50] *Id.* at 43. The following are some of the various state statutory provisions dealing with emergency commitment: ALA. CODE tit. 45, § 205(4) (Supp. 1971); ALASKA STAT. § 47.30.030 (1971); ARIZ. REV. STAT. ANN. § 36–524 (1974); ARK. STAT. ANN. § 59–406 (1971); CAL. WELF. & INST'NS CODE § 5150 (West Supp. 1974); COLO. REV. STAT. ANN. § 27–9–104 (1973); CONN. GEN. STAT. ANN. § 17–183 (Supp. 1975); DEL. CODE ANN. tit. 16, § 5122 (Cum. Supp. 1970); D.C. CODE ANN. § 21–521 (1973); FLA. STAT. ANN. § 394–463 (1975); GA. CODE ANN. § 88–504.2 (1971); HAWAII REV. STAT. § 334–54 (1968), *as amended*, (Supp. 1974); IDAHO CODE § 56–237 (Supp. 1974); ILL. REV. STAT. ch. 91½, § 7–1 (1973); IND. CODE § 16–14–9–22 (1973); KAN. STAT. ANN. §§ 59–2908, –2912 (Cum. Supp. 1974); KY. REV. STAT. ANN. § 202.027 (1972); LA. REV. STAT. ANN. § 28:57 (1969); ME. REV. STAT. ANN. tit. 34, §§ 2333, 2333-A (Supp. 1974); MD. ANN. CODE art. 59, § 22 (Cum. Supp. 1974); MASS. GEN. LAWS ch. 123, § 12 (1972); MICH. STAT. ANN. § 14.800(438) (Supp. 1975); MINN. STAT. ANN. § 253A.04 (Supp. 1974); MO. ANN. STAT. §§ 202.800, .803 (Vernon 1972); MONT. REV. CODES ANN. § 38–208.1 (Supp. 1974); NEV. REV. STAT. §§ 433.671, .673 (1973); N.H. REV. STAT. ANN. § 135-B:19 (Supp. 1973); N.J. STAT. ANN. § 30:4–26.3 (Supp. 1974); N.M. STAT. ANN. § 34–2–18 (Supp. 1973); N.Y. MENTAL HYGIENE LAW §§ 31.39, .41 (McKinney Supp. 1973); N.C. GEN. STAT. §§ 122–58.3, –58.4, –58.18 (Supp. 1974); N.D. CENT. CODE § 25–03–08 (1970); OHIO REV. CODE ANN. § 5122.08 (Baldwin 1974); OKLA. STAT. ANN. tit. 43A, § 55 (Supp. 1974); ORE. REV. STAT. §§ 426.175, .215 (1973); PA. STAT. ANN. tit. 50, § 4405 (1969); S.C. CODE ANN. § 32–956 (1962); TENN. CODE ANN. § 33–603 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 5547–28 (Supp. 1974); UTAH CODE ANN. § 64–7–34 (Supp. 1975); VT. STAT. ANN. tit. 18, §§ 7504, 05 (1968), *as amended*, (Supp. 1975); WASH. REV. CODE ANN. § 71.05.150 (1975); W. VA. CODE ANN. § 27–5–2 (Supp. 1974); WIS. STAT. § 51.04 (1971), *as amended*, (Supp. 1974); WYO. STAT. ANN. § 75–58 (1967).

[51] All of the above statutes except those for Alaska, Arkansas, Florida, Hawaii, Louisiana, and Montana restrict emergency commitment to mentally ill individuals who appear to be dangerous to themselves or others. The following jurisdictions require that the threat of harm be immediate: Arizona, District of Columbia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming.

[52] *See, e.g.*, NEB. REV. STAT. § 83–325 (1971); WASH. REV. CODE ANN. § 71.05.150 (1975).

[53] BRAKEL & ROCK, *supra* note 7, at 42. Nonjudicial determinations tend to be based either on administrative hearings held by specially established mental health boards or medical certificates signed by one or two physicians stating that the person concerned is mentally ill and should be hospitalized. In some states, the physician's signature alone is sufficient grounds for commitment. *Id.*

[54] *Id.*

[55] In some states a person may be committed on a non-judicial basis but is afforded a right to a judicial hearing if he or his representative chooses to set judicial proceedings in motion. *See, e.g.*, ILL. REV. STAT. ch. 91½, § 6–3 (1973) (admission on certificate of physician).

[56] This is somewhat of an anomaly and can be explained only by pointing out that state legislatures have been reluctant to provide across-the-board procedural safeguards in the commitment process. What they have done instead is to urge the use of voluntary procedures whenever possible. However, the element of subtle coercion existent in this recourse has been illustrated in Gilboy & Schmidt, *"Voluntary" Hospitalization of the Mentally Ill*, 66 NW. U.L. REV. 429 (1971), where the authors demonstrated that voluntary admissions are rarely truly "voluntary." Usually a potential admittee is faced with the choice of signing in voluntarily or facing the rigors of a court hearing. The latter alternative is made to look punitive and undesirable, so the person really does not have much of a choice.

were Polish emigrants living in Chicago, unable to speak English. One day Mrs. Duzynski discovered $380 missing from their apartment and demanded the stolen money from the janitor whom she suspected because he had a spare key. The janitor called the police, complaining that both Mr. and Mrs. Duzynski were insane, whereupon the two were seized without further examination and taken to the Cook County Mental Health Clinic in handcuffs. Once there, the two were unable to answer any of the questions put to them in English, were pronounced mentally ill, and were committed to Chicago State Hospital. Six weeks later Mr. Duzynski hanged himself in desperation; Mrs. Duzynski was released the next day.[57]

Some legislatures, reacting to criticism concerning the inequity of legally confining a person without minimum legal safeguards,[58] have made some effort to reform commitment procedures to afford due process safeguards.[59] The safeguards provided are the ones typically afforded defendants in criminal proceedings: notice,[60] hearing,[61] counsel,[62] trial by jury,[63] standard of proof,[64] and privilege against self-incrimination.[65] The states vary tremendously, however, on the extent to which they require these or other safeguards in their statutory procedures.[66]

[57] Kutner, *supra* note 33, at 384.

[58] *See, e.g.*, articles cited in note 33 *supra*.

[59] California and Massachusetts are generally considered two of the states most liberal in extending procedural safeguards to involuntary civil commitment. *See* CAL. WELF. & INST'NS CODE §§ 5000–401 (West 1972); MASS. GEN. LAWS ANN. ch. 123, §§ 1–37 (Supp. 1974).

[60] Notice is a fundamental element of procedure in criminal cases. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation"). *See* notes 86–92 and accompanying text *infra*.

[61] Hearings provide safeguards at several levels in the criminal system. One is the right to a preliminary hearing in the absence of a grand jury indictment to establish probable cause to continue further pretrial detention required by FED. R. CRIM. P. 5(a), (c). *See* Mallory v. United States, 354 U.S. 449 (1957); *Ex Parte* Schuber, 68 Cal.App.2d 424, 156 P.2d 944 (1945). *See* notes 93–109 and accompanying text *infra*.

At other levels are the right to a full hearing and the right to be present at that hearing. Every state provides for an individual to be heard at some point in the commitment process. *See* BRAKEL & ROCK, *supra* note 7, at 80, Table 3.3. Yet not every state allows the individual to be present at his commitment hearing. This right is guaranteed in criminal proceedings by the sixth amendment to the Constitution and extended to the states by the fourteenth amendment. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965). The right is not absolute, however, and can be lost by disruptive behavior. Illinois v. Allen, 397 U.S. 337, 342–43 (1970).

[62] U.S. CONST. amend. VI. *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). *See* notes 110–115 and accompanying text *infra*.

[63] The Supreme Court has ruled that the sixth amendment right to a jury trial applies to all state criminal cases which would fall within that right in a federal court. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[64] The Supreme Court noted that proof beyond a reasonable doubt is an element of due process in criminal cases in *In re* Winship, 397 U.S. 358, 364 (1970). *See* notes 122–131 and accompanying text *infra*. *See also The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 156 (1970).

[65] U.S. CONST. amend. V. *See* notes 134–137 and accompanying text *infra*.

[66] By comparing the tables contained in AMERICAN BAR FOUNDATION, MENTALLY DISABLED AND THE LAW (F. Lindman & D. McIntyre 1961) and BRAKEL & ROCK, *supra* note 7, one can see some of the legislative changes that occurred in the decade between the two American Bar Foundation reports. The tables on "Hearing and Post-hearing Procedures" in judicial hospitalization (AMERICAN BAR FOUNDATION, Table II-C, 56–62; BRAKEL & ROCK, Table 3.3, 80–87) reveal that in the ten-year period between the studies, California, Kansas, North Carolina, Pennsylvania, and Vermont provided for a mandatory hearing in commitment proceedings where no such provision had existed before. In 1971, all states and the District of Columbia had some provision providing a hearing at some point in the process. The same tables demonstrate that states varied in their position with respect to allowing individuals to be present at their commitment hearings. For example, in California in 1961, the individual's presence was mandatory, CAL. WELF. & INST'NS CODE § 5054 (Deering Supp. 1957); whereas in 1971, the individual was to be kept in custody but represented by counsel, CAL. WELF. & INST'NS CODE §§ 5302, 5303 (West Supp. 1968).

The right to a jury trial was made mandatory upon demand in California and Wyoming in the ten-year period, but as of the 1971 Brakel & Rock report, thirty-five states had no provision for a jury trial. A comparison of the tables on "Legal Counsel in Hospitalization Proceedings" (AMERICAN BAR FOUNDATION, Table II–N–2, 100–03; BRAKEL & Rock, Table 3.12, 125–28) shows that five states, Illinois, Maine, New York, Tennessee, and Wyoming, developed a right to counsel, with court-appointed counsel mandatory if the individual is not represented; California, Utah, and the District of Columbia made their already present discretionary right to counsel mandatory if the individual lacks representation; Nevada developed a discretionary right to counsel. As of the Brakel & Rock report, all but eight states included a right to be represented in their commitment proceedings. Of course, the existence of such a right does not

Common Law Extensions

The courts have contributed to the impetus for extension of procedural safeguards to civil commitment proceedings, although judicial advocacy of such an expansion is sporadic and less than uniform. Many courts have been reluctant to extend what they consider to be criminal safeguards to a civil proceeding. The basis for this hesitancy is usually the "benevolent benefactor" theory—the state is not seeking to punish the mentally ill person but merely to provide him with the protection and care necessitated by his condition.[67] An Iowa court could thus state:

> [Where a person is deprived of his liberty in a mental hospital,] such restraint is not in the way of punishment, but for his own protection and welfare as well as for the benefit of society. Such loss of liberty is not such liberty as is within the meaning of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law." [68]

In the same vein, another court could assert:

> [P]ersons may be deprived of their liberty for the good of society or themselves. This is not a deprivation of due process of law, but a temporary restraint on liberty, based on the extent of the illness, the need for treatment and hospitalization, as well as the protection of society.[69]

Such reasoning is far from universal and would now be considered regressive by some. In *Denton v. Commonwealth*,[70] for example, the state supreme court held that a lunacy inquest was a quasi-criminal proceeding which, "although not concerned with criminal intent or criminal acts," may nonetheless result in the deprivation of an individual's liberty or property. Such a deprivation should only be effected under due process guarantees. Accordingly, "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." [71]

The major erosion of the civil-criminal distinction occurred in the Supreme Court's decision in *In re Gault*,[72] a case involving a fifteen-year-old civilly committed to a juvenile institution as a delinquent for making obscene telephone calls. The Court's opinion asserted that the juvenile commitment involved was a "deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" [73] Stating that the distinction between a civil and criminal proceeding is moot when an individual's fundamental right to liberty is at stake, the Court held that the exercise by the state of its *parens patriae* power was not unlimited.[74] Due process safeguards must be applied when a civil proceeding endangers that right to liberty.[75]

Unable to ignore the similarity, commentators swiftly made the analogy between civil commitment proceedings of juveniles and civil commitment proceedings of mentally ill persons.[76] The ice was broken and some courts

---

necessarily make it effective because in many instances representation is only for purposes of display. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966).

[67] The Supreme Court discussed the criminal-civil distinction with respect to states' reasoning in support of their use of the *parens patriae* concept in *In re* Gault, 387 U.S. 1 (1967) and found the distinction moot. *See* note 35 *supra*.

[68] Prochaska v. Brinegar, 251 Iowa 834, 838, 102 N.W.2d 870, 872 (1960) (plaintiff not denied due process merely because representing attorney did not meet and consult with the plaintiff prior to hearing).

[69] State v. Sanchez, 457 P.2d 370, 373 (N.M. 1969) (within constitutional bounds, enacting judicial method of determining a person mentally ill and regulating the custody and control of that person and his property is a proper legislative function).

[70] 383 S.W.2d 681 (Ky. 1964) (the burden of proof, manner of proceeding, and rules of evidence in a lunacy inquest should be the same as those in any criminal or quasi-criminal proceeding).

[71] *Id.* at 682.

[72] 387 U.S. 1 (1967).

[73] *Id.* at 50.

[74] *Id.* at 30, *citing* Kent v. United States, 383 U.S. 541 (1966).

[75] *Id.* at 30–31.

[76] Since the decision in *Gault*, innumerable articles and comments have appeared extending its rationale to various areas of civil commitment, analogizing the relationship between juvenile delinquents and the state to the relationship between the mentally ill and the state. *See, e.g.*, Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43 (1974); Combs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 AM. J. CRIM. LAW 47 (1973); Ennis, *Civil Liberties and Mental*

seized the analogy and extended due process safeguards to civil commitment proceedings of the mentally ill on the basis of *Gault*.[77] A federal district court in Wisconsin formulated the most expansive decision on this subject in *Lessard v. Schmidt*,[78] a class action contesting the validity of the Wisconsin civil commitment procedures. However, much of the court's reasoning is applicable to the commitment procedures of other states as well. The court noted that a committed individual is not only deprived of his liberty but also loses numerous civil rights[79] and is imprinted with a stigma which reduces future opportunities.[80] It then stated:

> The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation. In criminal cases, this authority is derived from the police power, granted because of the necessity of protecting society from anti-social actions. This power is tempered with stringent procedural safeguards designed to protect the rights of one accused of crime.... In civil commitment proceedings the same fundamental liberties are at stake. State commitment procedures have not, however, traditionally assured the due process safeguards against unjustified deprivation of liberty that are accorded those accused of crime....[81]

In response to the argument that due process safeguards were unnecessary because an alleged mentally ill person was being committed for rehabilitative rather than punitive reasons, the court asserted:

> [T]he argument in favor of relaxed procedures on the basis of a subsequent right to treatment ignores the fact that unless constitutionally prescribed procedural due process requirements for involuntary commitment are met, no person should be subjected to "treatment" against his will.[82]

The court went on to discuss the procedural due process safeguards applicable to civil commitment proceedings.[83] The reasoning of *Lessard* has been applied and extended by other courts to similar purpose.[84]

Applicable Due Process Safeguards

The recognition that involuntary civil commitment procedures may result in the deprivation of a person's fundamental right to liberty and greatly influence the course of his future life has led to the incorporation of the following due process safeguards in some jurisdictions.[85] At the present time, all of these safeguards are not recognized in all jurisdictions. Although many are still minority views, their acceptance is desirable to ensure adequate protection of individuals affected by the commitment process.

Illness, 7 Crim. L. Bull. 101 (1971); Reisner, *Psychiatric Hospitalization and the Constitution: Some Observations on Emerging Trends*, 1973 U. Ill. L.F. 9; *Project—The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 Ariz. L. Rev. 1 (1971); *Developments, supra* note 2; Comment, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, 1969 Duke L.J. 677; Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 Duke L.J. 729; Note, *Lessard v. Schmidt: Due Process and Involuntarily Civil Commitment*, 68 Nw. U.L. Rev. 585 (1973).

[77] *See, e.g., In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated & remanded on other grounds*, 414 U.S. 473 (per curiam), *modified*, 379 F. Supp. 1376 (E.D. Wis. 1974); Dixon v. Attorney Gen., 325 F. Supp. 966 (M.D. Pa. 1971); *In re* Fisher, 39 Ohio 2d 71, 313 N.E.2d 851 (1974); Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1974); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588 (1974).

[78] 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated & remanded on other grounds*, 414 U.S. 473 (1974) (per curiam), *modified*, 379 F. Supp. 1376 (E.D. Wis. 1974).

[79] *Id.* at 1088.

[80] *Id.* at 1089.

[81] *Id.* at 1084.

[82] *Id.* at 1087.

[83] *See* notes 85–137 and accompanying text *infra*.

[84] *See* cases cited note 77 *supra*.

[85] *See generally* Kittrie, *Compulsory Mental Treatment and the Requirement of "Due Process,"* 21 Ohio St. L.J. 28 (1960); *Developments, supra* note 2, 1271–1316; Comment, *Mental Illness and Due Process: Involuntary Commitment in New York*, 16 N.B.L.F. 165 (1970); Comment, *A Critical Look into Involuntary Civil Commitment Procedure*, 10 Washburn L.J. 237 (1971); Comment, *Progress in Involuntary Commitment*, 49 Wash. L. Rev. 617 (1974); Note, *Civil Commitment of the Mentally Ill*, 23 DePaul L. Rev. 1276 (1974).

Notice

One basic element of due process is the "defendant's" right to notification of the nature of the charges against him to enable him to prepare his defense. This right to notice is well established in both civil and criminal proceedings.[86] Yet, some state commitment statutes either fail to require such notice or require that only minimal information be provided.[87] One recent trend is to discard this approach. A few courts have held that although due process may not be offended by a temporary confinement without notice where immediate action is necessary for the protection of society or the person,[88] such confinement cannot be continued without notice to the individual of other available rights, such as the right to a hearing or the right to counsel. Moreover, regardless of whether temporary or indefinite commitment is at issue, the alleged mentally ill person must be provided adequate and timely notice of the action before such commitment proceeding can commence.[89] According to the court in *Lessard,* notice of an impending commitment proceeding must be sufficient in terms of information provided—not just the date, time and place; but also the basis for detention, the right to counsel and to a jury trial, the standard upon which the individual may be detained, the names of the examining physicians and all others who may testify in favor of continued detention, and the substance of the proposed testimony.[90]

Critics of affording such preliminary notice assert that this type of provision could be detrimental to the individual involved because its traumatic impact would further unbalance his precarious mental state.[91] This criticism is grounded on the "vegetable theory" mentioned above—the person is not capable of responding to rights guaranteed other citizens so he should not receive those rights. The argument also ignores the traumatic impact on a person of suddenly finding himself in a mental institution without knowing why and feeling powerless to influence a situation seemingly beyond his control. In refuting the criticism, commentators have asserted that notice may be beneficial rather than traumatic because it provides the concerned individual with the information needed to understand his situation and to exert some influence on the proceeding. The individual may respond to being treated like a citizen possessing dignity and value rather than like a vegetable without the ability to comprehend the situation.[92]

Hearing

In *Lessard* the court held that, except in emergency situations where the state has a compelling interest in preventing injury, deprivation of liberty without a preliminary hearing is impermissable under the due process clause of the fourteenth amendment[93] and that such

[86] *See* note 60 *supra. See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); State *ex rel.* Hussman v. Hursh, 253 Minn. 578, 580–81, 92 N.W.2d 673, 675–76 (1958) (per curiam); *In re* Wellman, 3 Kan. App. 100, 103, 45 P. 726, 727 (1896); *Developments, supra* note 2, 1973–75; Note, *Civil Commitment of the Mentally Ill: Theories and Procedures,* 79 HARV. L. REV. 1288, 1291 (1966).

[87] Nebraska, for example, provides that the county board of mental health may issue a warrant for the individual only after an application for commitment is filed. NEB. REV. STAT. § 83–325 (1971). *See* Table 3.2, "Judicial Hospitalization of the Mentally Ill—Prehearing Procedures," in BRAKEL & ROCK, *supra* note 7, at 72–79, for statutory provisions relating to notice as of 1971.

[88] *See, e.g.,* State *ex rel.* Fuller v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954) (The court stated that the state could provide for the summary detention of an individual without notice until the truth of the charges could be investigated. The court went on to hold the Missouri statute unconstitutional, however. After the decision, the emergency commitment statute was amended to require notice to the probate court of any emergency commitment within ten days of the detention. Then, if proceedings are not begun within five days after the probate court is so notified, the judge must release the patient. Mo. REV. STAT. § 202.805 (Supp. 1970)).

[89] *See* cases cited note 77 *supra.*

[90] 349 F. Supp. at 1092. *See also In re* Gault, 387 U.S. at 33.

[91] *See* M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 295–98 (1952); *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 1st Sess. 72 (1961) (statement of Dr. F. J. Braceland); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMMITMENT PROCEDURES (REPORT No. 4, April 1949).

[92] Confinement in a mental institution without notice can be just as traumatic as the notice received, if not more. *See In re* Ballay, 482 F.2d 648, 667, n.69 (D.C. Cir. 1973) for judicial attention to this point.

[93] 349 F. Supp. at 1091. The court, pointing to Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (individual must be given an opportunity for a hearing before he can be deprived of any signifi-

hearing must be held within forty-eight hours of the initial detention.[94] This preliminary hearing is designed to determine whether probable cause exists for continued detention of the person and is directly analagous to the probable cause hearing in the criminal process.[95] The safeguard is especially necessary for emergency detention statutes in which an individual may be held for a prolonged period of time without either a right to a full hearing[96] or provision for a mandatory hearing.[97] Some courts have refused to recognize this right on the grounds that prehearing detention is acceptable under emergency situations as long as the person affected is afforded judicial review within a "reasonable" period of time, which may amount to several months.[98] This determination allows a person to be deprived of his liberty on the assumption that he falls within the standards justifying emergency detention without the state being required to prove that such an assumption is warranted.[99] A right to a preliminary hearing would impose this requirement.

The right to a full hearing is a constitutionally recognized guarantee afforded the defendant in a criminal proceeding because it allows the accused individual to confront his accusers through the adversary process. As stated earlier, in many respects the alleged mentally ill person is in the same position as the alleged criminal; both may be deprived of their liberty and stigmatized as social deviants with dramatic consequences to their future opportunities.[100] Accordingly, the right to a full hearing to determine the actual need for commitment should be extended to civil commitment proceedings. This right and the confrontation it affords have been recognized by both courts[101] and legislatures.[102]

A controversial issue included within the right to a hearing is the right of the alleged mentally ill person to be present at that hearing.[103] A tentative objection to the extension of this right is the argument that the person's presence at the hearing may be traumatic and detrimental to his well-being because of the information he would hear.[104] This objection has been rejected by some courts. In *Bell v. Wayne County General Hospital,*[105] the court admitted that an alleged mentally ill person might be removed from a commitment proceeding when his conduct is "so disruptive that the proceeding cannot continue in any reasonable manner." But the court went on to hold that a Michigan statute,[106] allowing removal of the

---

cant property interest), reasoned that a person's interest in liberty is an even more fundamental right than the right to property discussed in that case and therefore a hearing must be afforded in this instance as well.

[94] 349 F. Supp. at 1091.

[95] *See* note 66 *supra.*

[96] For example, in Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd mem. sub. nom.* Briggs v. Arafeh, 411 U.S. 911 (1973), the district court approved a statute allowing confinement for up to forty-five days without a hearing. CONN. GEN. STAT. ANN. § 17–183 (Supp. 1975).

[97] Not every state requires a mandatory hearing; in some states a hearing is held only if requested. *See, e.g.,* N.Y. MENTAL HYGIENE LAW §§ 31.31(a), .33–.35, .39(a) (McKinney Supp. 1973).

[98] *See* Logan v. Arafeh, 346 F. Supp. at 1268; Fhagen v. Miller, 29 N.Y.2d 348, 353–54, 278 N.E.2d 615, 617, 328 N.Y.S.2d 393, 396, *cert. denied,* 409 U.S. 845 (1972). In *Fhagen,* the New York Court of Appeals held that the emergency and medical sections of the New York mental hygiene law authorizing temporary commitment of mentally ill persons without a pre-admission or post-admission hearing were not a deprivation of a person's liberty without due process, even though no requirement of violence or dangerousness was present. The rationale for this holding was that persons are afforded an opportunity to litigate the question of mental illness shortly after commitment. This determination ignores that deprivation of liberty until that adjudication may be unjustifiable and thus result in irreparable stigma and loss of rights.

[99] In Robinson v. California, 370 U.S. 660 (1961), the Supreme Court intimated that it would be unconstitutional "to make it a criminal offense for a person to be mentally ill. . . ." *Id.* at 666. The crux of the decision is that a person cannot be punished simply because he fits into a certain category or status. Accordingly, one could argue that simply because a person may fall within the category of persons who are mentally ill, he should not be deprived of his liberty without due process, if he is to be restrained at all. Such detention is all too often a presumption of "guilt" rather than "innocence," or, more explicitly, illness rather than health. The state should have to bear the burden of proving illness.

[100] Lessard v. Schmidt, 349 F. Supp. at 1088–89.

[101] *See* cases cited note 77 *supra.*

[102] *See* BRAKEL & ROCK, *supra* note 7, at 52.

[103] *Id.* at 53.

[104] Curran, *Hospitalization of the Mentally Ill,* 31 N.C.L. REV. 274 (1952–53).

[105] 384 F. Supp. 1085 (E.D. Mich. 1974).

[106] MICH. COMP. LAWS ANN. § 330.21 (Supp. 1973).

patient from the hearing on the certificate of the medical superintendent of the detention facility or the certificate of two physicians, was a violation of due process. The court reasoned, on the basis of the overriding principle of confrontation in the adversary process, that a committing court may not decide in advance, on the basis of a physician's opinion, that an alleged mentally ill person should not be allowed to appear. Before total exclusion of the person from the hearing may be allowed, some alternative, such as holding the hearing in the mental facility, must first be attempted.[107] The person must be afforded every opportunity to be present at his hearing in order to assist in his defense.

Another related trend is the requirement of a full record of commitment proceedings, adequate for review, to be compiled and maintained by the examining court.[108] In the past, such records have not always been kept, often to the individual's detriment. With a right to a record, the alleged mentally ill person is guaranteed an adequate record for appeal should he or his representative choose that course.[109]

Counsel

The right to counsel is also an established aspect of constitutional law in criminal proceedings[110] and was extended to civil juvenile delinquency proceedings by the Supreme Court in *In re Gault*.[111] The rationale in *Gault* can be extended to civil commitment proceedings of mentally ill persons as well, again keeping in mind that individual liberty and future opportunity are at stake in both instances. Accordingly, an alleged mentally ill person should have the right to effective legal representation at all significant stages of the commitment process, and he should be advised of that right.[112] Recent developments suggest that the right to representation must be made available at the earliest stage of the commitment proceeding in accordance with the individual's need for timely preparation of either a defense or an argument for alternative modes of treatment.[113]

A serious debate exists concerning whether counsel's presence should be allowed at any psychiatric interview prior to the commitment proceedings.[114] Although this point is not easily answerable, counsel should at least have access to all reports and the results of examinations introduced at the commitment hearings on the basis that such information is necessary to prepare an informed defense.[115]

Trial by Jury

In criminal proceedings the right to a trial by jury is guaranteed by the sixth amendment.[116] The right to jury trial for the determination of mental illness existed in Blackstone's time but then disappeared.[117] The present approach to whether a jury trial should be allowed in a civil commitment proceeding balances the advantages to the individual of a jury trial and the costs to the state in terms of the detrimental effect on the commitment system.[118] In weighing the opposing con-

[107] 384 F. Supp. at 1094. *Cf.* BRAKEL & ROCK, *supra* note 7, at 53.

[108] *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

[109] The right of appeal is another procedural safeguard often bypassed, yet it is through such appeals that many of the substantive revisions in mental health law have been generated. Where all else fails, a habeas corpus proceeding is available by statute in many states. *See, e.g.*, ILL. REV. STAT. ch. 91½, § 10-6 (1973).

[110] *See* note 62 *supra*.

[111] 387 U.S. at 41.

[112] *See, e.g., In re* Fisher, 39 Ohio 2d 71, 313 N.E.2d 851 (1974) (holding that an individual confronted with civil commitment proceeding is entitled to representation by counsel at all significant stages of that proceeding).

[113] One should recognize that mere provision of counsel does not necessarily provide adequate representation. For this, counsel must effectively intervene in the patient's best interest. *See* ANDALMAN & CHAMBERS, *supra* note 76, at 50; COHEN, *supra* note 66, at 460–66; KITTRIE, *supra* note 2, at 91–95.

[114] *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. at 1100. The court recognized that some critics assert an attorney's presence would effectively eliminate the psychiatrist's acquisition of desired information.

[115] *Id.* at 1100; Lynch v. Baxley, 386 F. Supp. at 389, *citing* Sarzan v. Gaughan, 489 F.2d 1076, 1085 (1st Cir. 1973).

[116] *See* note 63 *supra*.

[117] According to Blackstone, the method of proving a person *non compos mentis* was very similar to the inquest of idiocy by the writ *de idiota inquirendo*, in which the person was tried by a jury of 12 men. 1 BLACKSTONE, COMMENTARIES *305.

[118] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Examining the right to a jury trial as applied to juvenile proceedings, the Court found that

siderations, one must consider the roles of the jury to prevent "arbitrariness and oppression by the interposition of a jury verdict between the state and the defendant," [119] and to mediate the decision-making process with community values.[120] Both of these factors play an important part in protecting the individual's interests in a commitment proceeding. The role of the jury as the mediator or arbitrator of the evidence is especially important in the determination of whether the state has met the burden of proof required to commit an individual.[121] Accordingly, the right to jury trial should be provided upon demand in the civil commitment process, especially when the alleged mentally ill person or his attorney desires community input into the decision.

Standard of Proof

Three different standards of proof have been applied to civil commitment proceedings. The first is the usual "preponderance of the evidence" standard used in most civil proceedings where only damages are sought;[122] the application of this standard to commitment proceedings has been rejected by many courts because an individual's liberty is at stake and the deprivation of this basic right should require a more stringent standard than that applied in damage actions.[123] Some courts have opted for a compromise position with "clear and convincing evidence" as the standard, reasoning that the issue involved is not the occurrence of an event, as in a criminal proceeding, but rather an individual's mental condition and propensity to act, issues which are more difficult to prove.[124] The justifications for the preceding two standards ignore that a person's liberty is at stake and that in such an instance, as in the criminal law, the state should have to prove beyond a reasonable doubt that a person meets the required standards for commitment.[125] As the court pointed out in *In re Ballay,* due process depends upon the relative interests involved and the nature of the procedure and the function it performs:

> [T]he standard of proof reflects the risk of winning or losing a given adversary proceeding, or, stated differently, the certainty with which the party bearing the standard of proof must convince the factfinder.... [I]n situations where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed...[126]

Since in civil commitment proceedings the interests of society are pitted against the individual's fundamental right to liberty, some courts, weighing the balance, have ruled that the standard of proof should be that of proof beyond a reasonable doubt.[127] This standard is more appropriate for several reasons. First, there is a substantial and fundamental interest of society in assuring accuracy in the proceedings in order to build public confidence.[128] Second, since the proceedings are already similar in many respects to a criminal trial, the imposition of a higher standard of proof is unlikely to have any discernible effect upon the proceedings themselves.[129] And finally, based on the inconclusive nature of the evidence, the positive aspect of the standard is clearly visible —a strict standard of proof assures that per-

such a right was not constitutionally required since such a requirement would impair the state's interest in informality by making the juvenile proceeding fully adversarial, by introducing delay, and by impeding experimentation of new procedures.

[119] *See Developments, supra* note 2, at 1293, *citing* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (White, J., concurring). *See also* Duncan v. Louisiana, 391 U.S. 145, 151, 155–56 (1968).

[120] Humphrey v. Cady, 405 U.S. 504, 509–10 (1972). *See also Developments, supra* note 2, 1219–25. An allegedly mentally ill person may prefer a jury, for example, when expert testimony is blatantly inconclusive and/or contradictory, thus undermining the expert's position in the eyes of the jury.

[121] If an individual who appears lucid and coherent requests a jury trial, he is likely to be released because of the difficulty of proving the case before a jury. *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st & 2d Sess. 245 (1970).

[122] *See, e.g.,* Christiansen v. Weston, 36 Ariz. 200, 284 P. 149 (1930) (preponderance of evidence proper standard in commitment proceeding).

[123] *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

[124] *See, e.g.,* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588 (1974); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

[125] *See* note 64 *supra.*

[126] *In re* Ballay, 482 F.2d at 662.

[127] *Id.* at 669; Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972).

[128] *In re* Ballay, 482 F.2d at 657.

[129] *Id.* at 663.

sons will not be unnecessarily deprived of their liberty on the basis of an ambiguous foundation, given the unsatisfactory nature of expert testimony and the problematic prediction of dangerousness.[130]

There also seems to be a recent shift in what must be proved in order to involuntarily commit an individual. Both courts and legislatures are moving more towards the police power concept of "dangerousness" as a ground for commitment and away from the *parens patriae* concepts of "unable to care for self" or "in need of mental treatment," because a deprivation of liberty is a serious curtailment of personal rights and should only be imposed when absolutely necessary.[131] Since society has a definite stake in protecting its citizens, the police power provides a much more solid foundation for depriving an individual of his liberty since the likelihood of injury is involved when a person is found to be dangerous to himself or others.

Admissible Evidence

Some courts are also beginning to apply traditional rules of evidence to commitment proceedings. This extension, too, seems to be in keeping with the acknowledgement of civil commitment as a procedure by which an individual may be confined at the cost of his liberty, his rights and his reputation. In *Lessard,* the court could find no sound policy reason for admitting hearsay evidence, excludable in other proceedings, into a commitment hearing and held that traditional hearsay rules would apply in the latter as well.[132] Moreover, the right of each party to be apprised of all evidence upon which an issue is to be decided, along with the opportunity to examine, explain or rebut such evidence, and the right to cross-examine witnesses have all been extended by courts to civil commitment proceedings.[133] Previous reasoning had been that normal evidentiary rules would not apply to a commitment proceeding because the state was acting in the best interests of the individual; protections normally afforded persons in other types of litigation were therefore not needed in this informal setting. With the waning of the "benevolent benefactor" rationale, these protections have become assimilated into the commitment proceeding.

Privilege Against Self-Incrimination

In *Lessard v. Schmidt* the court approached the conflicting interests of protecting individual rights and preventing a seriously ill person from obtaining needed treatment and decided that individual rights were paramount and individuals cannot, consistent with due process, be committed on the basis of their statements to psychiatrists "in the absence of a showing that the statements were made with 'knowledge' that the individual was not obliged to speak."[134] The court went on to hold that statements made to a psychiatrist cannot be the basis for commitment unless voluntarily given after notice of the possible consequences of the statements.[135]

This approach has been both accepted and rejected by other courts and commentators. Criticism rests on the argument that the state is left in an almost powerless position if required to meet a stringent burden of proof without being allowed to examine the alleged mentally ill person without his permission. The balance of interests between individual and state is thereby upset and the state's ability to achieve the valid goals of civil commitment

[130] *Id.* at 667. The effectiveness of psychiatric testimony as a basis for commitment has recently come under fire. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693 (1974); Roth, Dayley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes,* 13 SANTA CLARA LAW. 400 (1973).

[131] For judicial opinion on this matter see Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). For statutory criteria for hospitalization of the mentally ill see Table 3.2, "Judicial Hospitalization of the Mentally Ill—Prehearing Issues," BRAKEL & ROCK, *supra* note 7, at 72–79, and Table 3.11, "Emergency Detention," *id.,* at 118–24. *See also,* Combs, *supra* note 76; Friedman & Daly, *Civil Commitment & the Doctrine of Balance: A Critical Analysis,* 13 SANTA CLARA LAW. 503 (1973).

[132] Lessard v. Schmidt, 349 F. Supp. at 1103, *But see* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964) (admitting extensive hearsay over objection).

[133] Ennis & Litwack, *supra* note 130.

[134] 349 F. Supp. at 1101.

[135] *Id.* at 1102. Of course, this would not mean that an examining psychiatrist would have to provide the examinee with a full *"Miranda"*-type warning.

undermined.[136] The countervailing argument questions the validity and reliability of psychiatric examinations and testimony and asserts that the privilege is necessary to contravene misinterpretation and faulty diagnosis.[137] Given the stakes involved, the more cautious approach of the latter argument is the more acceptable.

Present State of Civil Commitment

Many of the above positions on rights applicable to the civil commitment process reflect minority views and have not been accepted by most state legislatures or judiciaries. Nonetheless, as inroads are made into the benevolent benefactor doctrine of *parens patriae,* the trend towards implementation of stricter due process guidelines will become apparent.[138] Two factors underlie the erosion of this long-standing doctrine. The first is the shift in the balancing approach to due process between the fundamental right to individual liberty and the state's interest in providing care and treatment. Courts and commentators now consider the right to liberty to be paramount and require greater justification than being labeled "mentally ill" to deprive an individual of his freedom.[139]

The second factor is the recognition that involuntary civil commitment may not be the optimal means of achieving the state's goals of providing care and treatment to a person unable to care for himself, and/or treating a dangerous person or person in need of mental treatment. A person who refuses treatment is difficult to rehabilitate. Furthermore, at least one court has recognized that the state may not be upholding its part of the bargain by providing services to the person deprived of his liberty to receive those services.[140] Mental institutions, although perhaps more comfortable today, are still basically the same custodial institutions they were a century ago. From this recognition stems the trend toward the "least restrictive alternative" developed by some courts and legislatures[141] and the right to treatment that is also slowly being implemented.[142] The state's *parens patriae* care of the mentally ill is not considered unjustified in all instances by this position; rather such care may not warrant the deprivation of liberty in a few extreme cases.

At the same time, the duty of the state to protect its citizens through utilization of the

[136] *See Developments, supra* note 2, at 1306–13.

[137] *See, e.g.,* Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?,* 26 Stan. L. Rev. 55 (1973); Fielding, *Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination,* 9 Gonzaga L. Rev. 117 (1973); Comment, *Defective Delinquent Commitment Proceedings and the Constitution: The Privilege Against Self-Incrimination and the Right to Counsel at the Examination Stage,* 22 Am. U.L. Rev. 619 (1972); Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding,* 1973 Duke L.J. 729.

For a full discussion of the invalidity and unreliability of psychiatric testimony in general see Ennis & Litwack, *supra* note 130. These authors demonstrate that psychiatrists should not be allowed to testify as "experts" in commitment proceedings because psychiatric judgments are not sufficiently reliable or valid to justify their admissibility under traditional rules of evidence, and such judgments fail to convey meaningful or otherwise unavailable information about issues relevant to a commitment proceeding. Accordingly, the admission of psychiatric opinion could be a denial of due process.

[138] *See, e.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

[139] Cases cited note 138 *supra*; Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). *See also,* Friedman & Daly, *supra* note 131; Reisner, *supra* note 76.

[140] *See, e.g.,* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[141] *See* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). *See generally Developments, supra* note 2, at 1245–73. The "least restrictive alternative" doctrine asserts that inpatient hospitalization should be used as a last resort and that every attempt should be made to place the patient in a less restricted setting, such as an outpatient clinic. *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 Mich. L. Rev. 1108 (1972).

[142] *See* Wyatt v. Stickney, 344 F. Supp. 373. *See also* Bailey & Pyfer, *Deprivation of Liberty and the Right to Treatment,* 7 Clearinghouse Rev. 519 (1974); Schwitzgebel, *Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria,* 8 Harv. Civ. Rights—Civ. Lib. L. Rev. 513 (1973); *Symposium—The Right to Treatment,* 57 Geo. L.J. 673 (1969); *Symposium—The Mentally Ill and the Right to Treatment,* 36 U. Chi. L. Rev. 742 (1969); Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment,* 86 Harv. L. Rev. 1282 (1973).

police power remains.[143] Here, the state's interest in depriving an individual of his liberty is greater than when it merely seeks to provide care. The state has a legitimate interest in seeing that a mentally ill person does not injure himself or others, or the property of others. Such protection is within the traditional purview of the health, safety, welfare, and moral aspects of the police power.[144] However, the doctrines of the "least restrictive alternative" and the right to treatment are again applicable, since the state should neither unnecessarily deprive a person of his liberty, nor fail to provide adequate treatment when such treatment was the purpose for that deprivation.[145] Finally, in light of the present state of the art of mental health, the individual's right to liberty is entitled to the most stringent procedural safeguards available, despite contentions by mental health practitioners that such safeguards impede their ability to get persons needing assistance into the mental health system.[146]

Conclusion

This comment has illustrated the trend in the area of involuntary civil commitment toward the protection of the fundamental right of liberty by the extension of stringent "criminal" procedural safeguards to the civil commitment process. Some critics reject this extension because they feel it makes the process too similar to a criminal trial;[147] yet in so doing, they fail to recognize that in many ways the results of a civil commitment proceeding and a criminal trial are excruciatingly similar. Persons subjected to each proceeding face the possibility of losing their liberty and their civil rights, as well as receiving a stigma which they will have to carry the rest of their lives.[148] If persons are to be confined against their wishes, while this may be a result consistent with the police power of the state in certain instances, they should be afforded as many safeguards as are available to ensure that their detention is justified.[149]

Although the analogy between civil commitment and criminal incarceration has been made throughout this comment, society, with its benevolent attitude, is unwilling to classify mental illness as a crime. Indeed, in *Robinson v. California,* the Supreme Court intimated that to do so would be unconstitutional.[150] Nonetheless, persons labelled mentally ill are deprived of their liberty and stripped of their rights and dignity in a process with few of the safeguards which would be available if their condition were considered criminal. Involuntary civil commitment, because of its sometimes indefinite period of confinement and its harsh social stigma, may be a worse fate than criminal incarceration. An ex-convict has a better chance of success after release than an ex-mental patient in terms of acceptance by the community.[151] In the final analysis, even though mental illness may not be a crime, the end result of being confined as mentally ill without legal process may well be the same. The application of due process safeguards to commitment hearings is not only warranted to prevent this unconstitutional procedure, it is long overdue.

[143] Combs, *supra* note 76, at 55–59, argues that "dangerousness" criteria used under the police power doctrine are unconstitutionally vague and invite arbitrary and discriminatory enforcement. *See also Developments, supra* note 2, at 1222–45.

[144] *See* notes 11–13 *supra.*

[145] *See* notes 139–42 *supra.*

[146] *See, e.g.,* Slovenko, *Civil Commitment in Perspective,* 20 J. Public L. 3 (1971) (arguing against stricter due process safeguards). Slovenko feels informality is essential to aid the state in achieving a result in the best interests of the individual. The individual's wishes are irrelevant.

[147] *Id.*

[148] Hence the similarity between the criminal process and the commitment process. Lessard v. Schmidt, 349 F. Supp. at 1088–89.

[149] *See* Note, *Mental Illness: A Suspect Classification?,* 83 Yale L.J. 1237 (1974), arguing that classification on the basis of mental illness is constitutionally suspect and therefore the traditional review procedures associated with such classifications should apply.

[150] 370 U.S. 660, 666 (1961).

[151] Lessard v. Schmidt, 349 F. Supp. at 1089.

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

Printed in U.S.A.

CONSUMER PROTECTION: NEW HOPE FOLLOWING FAILURE OF CIVIL AND CRIMINAL REMEDIES

I. INTRODUCTION

Consumers are frequently victimized by unlawful business practices.[1] Although legal redress for injury suffered is often available in theory, practical experience has shown that consumers are unable to effectively use traditional remedies.[2] The search for an adequate consumer remedy has focused on both the criminal and civil areas. Criminal laws, from the early Printers' Ink statutes[3] to modern Truth-in-Lending legislation,[4] have been largely ignored by law enforcement agencies. On the other hand, individual consumers have been unable to bring civil actions because of a number of practical limitations on such suits.[5] Even the powerful class action, once thought to be the ultimate consumer weapon,[6] has lost much of its vitality through recent Supreme Court decisions.[7]

In order to develop an adequate consumer remedy, the goals sought to be achieved should be clearly envisaged. Both compensation and deterrence must be provided to fully protect the consuming public. Compensation for loss suffered has been the primary aim of most plaintiffs damaged by the commercial practices of others. In the consumer setting, this goal is frustrated by small losses, ignorance of legal rights, and fear of the legal process. Yet the impact of unlawful practices on the consumer makes compensation imperative. It has been estimated that consumers are cheated out of more than a billion dollars each year.[8] Furthermore, low-income consumers, who can least afford such losses, are the most frequent victims of fraudulent and deceptive business practices.[9] The Kerner Commission reported that frustration with sales and credit practices of neighborhood merchants was a major factor leading to the ghetto riots of the 1960's.[10] The law's inability to adequately compensate the consumer has thus led not only to a diminution of consumer buying power but also to deep-rooted feelings of injustice and discontent in major segments of our society.

Many merchants consider the occasional compensation they must pay the consumer to be a cost of doing business and will continue an unlawful practice so long as it remains profitable. A legal remedy must therefore be stringent enough, either as a single legal action or as an aggregation of separate actions, to deter the merchant from unlawful commercial activities. In this connection, it is helpful to view the consumer as both an individual and a member of a class.[11] While an individual consumer may occasionally be able to get a judgment through a civil action, the entire class of consumers would benefit substantially

[1] *See generally,* D. CAPLOVITZ, THE POOR PAY MORE (1963); W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968).

[2] *See* text accompanying notes 12–20 *infra.*

[3] These statutes, based on the "Printers' Ink Model Statute" drafted by the Printers' Ink journal, were designed to punish " 'untrue, deceptive, or misleading' advertising." Note, *The Regulation of Advertising,* 56 COLUM. L. REV. 1018, 1058 (1956). For the text of the statute see note 65 *infra.*

[4] The Truth-in-Lending legislation authorizes a fine of not more than $5000 and/or imprisonment of not more than one year for one who "willfully and knowingly" fails to comply with the Act's requirements. Consumer Credit Protection Act, 15 U.S.C. § 1611 (1970).

[5] *See* text accompanying notes 12–20 *infra.*

[6] *See* Eovaldi, *Private Consumer Substantive and Procedural Remedies Under State Law,* 15 ANTITRUST BULL. 255 (1970); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure,* 49 B.U.L. REV. 407 (1969).

[7] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969).

[8] STAFF OF SUBCOMM. ON FRAUDS AND MISREPRESENTATION AFFECTING THE ELDERLY OF SENATE SPECIAL COMM. ON AGING, 89TH CONG., 1ST SESS., REPORT ON FRAUDS AND DECEPTIONS AFFECTING THE ELDERLY 8 (Comm. Print 1965).

[9] D. CAPLOVITZ, THE POOR PAY MORE 171 (1963).

[10] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1969).

[11] Professor Rice, in a comprehensive survey of consumer remedies, emphasized that consumer transaction problems must be analyzed not only in their individual context but also as a class. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems,* 48 B.U.L. REV. 559, 560–67 (1968).

if merchants could be deterred from even initiating unlawful activity.

This comment will examine several consumer remedies to determine their effectiveness in meeting the goals of compensation and deterrence. No attempt will be made to compile a comprehensive survey of available statutory and common law remedies. Rather, various *types* of remedies will be analyzed in light of their strengths and weaknesses. It will be seen that while traditional remedies have been inadequate, new remedies dependent on public officials for enforcement may at last bring justice to consumers in the market place.

II. Private Remedies

An action for compensatory damages would intuitively appear to be the appropriate answer for the consumer who has lost money at the hands of a sharp merchant. Yet, this common remedy neither compensates nor deters. Many factors account for the failure of the individual action for damages. At a threshold level, many consumers do not even know when they have been cheated. For example, it is almost impossible for the average consumer to know that he has been overcharged on an automobile repair bill or that the mileage has been set back on a used car.

Even if the consumer knows he has been cheated, he often does not realize a legal remedy is available.[12] Lack of knowledge of one's legal rights is prevalent among low-income buyers but is also common among the more affluent.[13] The greatest bar to legal action, however, is not a lack of knowledge but the prohibitively high cost of litigation and professional help. Most consumer claims are for small amounts and do not justify the cost incurred in attaining redress.[14] It was estimated in 1968[15] that even a $200 loss was insufficient to make legal action worthwhile—the threshold figure for profitable litigation is certainly much greater now. Most unscrupulous merchants confine their cheating to small amounts because they realize that "'no one bilked out of fifty dollars is going to pay a lawyer to get his money back." [16]

To alleviate the problem of cost, modern consumer legislation often provides for attorney's fees and/or an additional recovery above and beyond actual damages for a consumer who successfully pursues legal action. The federal Truth-in-Lending Act, which requires creditors to make certain disclosures of credit terms, provides for a "reasonable attorney's fee" to be awarded the plaintiff if successful plus a recovery of twice the finance charge with a minimum recovery of $100 and a maximum of $1000.[17] The federal Fair Credit Reporting Act, which regulates the activities of credit information agencies, provides for a recovery of actual damages suffered and authorizes the award of attorney's fees for a successful action.[18] At the state level, the Uniform Deceptive Trade Practices Act (UDTPA), promulgated by the National Conference of Commissioners on Uniform State Laws, provides for attorney's fees if the merchant "has willfully engaged in the trade practice knowing it to be deceptive." [19] But the UDTPA, in pro-

---

[12] *Id.* at 567; Caplovitz, *supra* note 1, at 172.

[13] *See* Rice, *supra* note 11, at 567. Low-income consumers often do not know where to turn for help if cheated by a merchant. In a 1960 survey, 64 per cent of low-income consumers said they would not know where to go if cheated. The Better Business Bureau was most often named by those who could name at least one source of help. Only three per cent said they would seek out a private lawyer. Caplovitz, *Consumer Problems,* 23 Legal Aid Brief Case 147 (1965).

[14] The availability of small claims courts in many states allows many consumers to bring actions which would not be feasible in other courts. Attorneys are usually barred in small claims court, and the parties, following informal rules of procedure and evidence, present their own claims and defenses. However, many low-income consumers do not know of the existence of these courts or are skeptical or afraid of using them. *Cf.* Note, *infra* note 16, at 436–38.

[15] Rice, *supra* note 11, at 567 n.29.

[16] Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection,* 114 U. Pa. L. Rev. 395, 409 (1966).

[17] Consumer Credit Protection Act, 15 U.S.C. § 1640(a) (1970).

[18] *Id.* § 1681 (o).

[19] Uniform Deceptive Trade Practices Act § 3. In addition, the Act authorizes the award of attorney's fees to "the prevailing party if the party complaining of a deceptive trade practice has brought an action which he knew to be groundless. . . ." *Id.* This section should prevent a consumer from bringing a suit simply to harass a disliked merchant. The UDTPA prohibits twelve specific types of deceptive trade practices. By 1970 it had been adopted in nine states. For a comprehensive study of the Act see Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act,* 76 Yale L. J. 485 (1967).

viding for injunctive relief only, does nothing for the consumer who wants his money back.[20]

To bring civil suits within reach of the average consumer's pocketbook, provision must be made for attorney's fees and/or multiple damage awards. If, as is the modern trend, such terms are included in consumer protection statutes, the consumer will have more incentive to seek redress. Yet, taxing the cost of both parties' professional services to a losing defendant will not help the consumer who does not realize he has been cheated, who does not know a legal claim exists, or who does not know where to turn to get help. If only the individual action for compensation is actively pursued, the rare consumer who successfully presses his legal claim will be far outnumbered by those who do not. The merchant may actually be left with a net profit after making payments to a few consumers, and these payments will come to be considered a cost of doing business. The merchant, in turn, will pass along the higher cost to other consumers. Thus, the merchant will not be deterred from fraudulent and deceptive commercial practices by the remedies outlined above.

An issue sparking substantial comment is whether an individual consumer has standing to sue to enjoin unlawful commercial acts.[21] Injunctions have traditionally been reserved for parties faced with an inadequate remedy at law.[22] The consumer usually cannot utilize the injunction because the availability of a suit for compensatory damages is considered an "adequate" remedy at law (despite the special problems the consumer encounters as noted above). However, the Uniform Deceptive Trade Practices Act specifically allows any "person likely to be damaged" to bring an injunction, the Act's sole remedy.[23] Whether or not this language eliminates the traditional restraints on equitable remedies is unclear, especially since an injunction is to be granted "under the principles of equity and on terms that the court considers reasonable." [24]

The major hurdle a consumer faces on the standing issue under the UDTPA is whether he is "likely to be damaged" once he learns of the deceptive practice. The phrase seems to contemplate a person who will suffer future damage. Yet, a consumer, who does not realize he has suffered a loss until after the fact, will surely not patronize the same merchant and thus is not threatened with future injury. On the other hand, the UDTPA is well-suited to govern disputes between merchants. For example, if merchant *A* "passes off" his inferior goods as those of merchant *B*, merchant *B* is "likely to be damaged" by *A*'s acts even after *B* learns of the practice (unless *A* gives reliable assurances that he will end the unlawful activity). Merchant *B*'s suit for an injunction also complies with traditional notions of equity in that equity seeks to avoid the multitude of suits at law which would be necessary to compensate *B* for *A*'s continuing illegal practice.

No court is known to have squarely confronted the issue of consumer standing under the UDTPA.[25] But the Second Circuit interpreted similar language under the Lanham Trademark Act to deny standing to an injured consumer.[26] The Lanham Act states that one who falsely describes the origin of any goods or services may be liable to another "who believes that he is or is likely to be damaged" by the false description.[27] This language was interpreted to deny standing to injured consumers in *Colligan v. Activities Club of New York, Ltd.*[28] The court relied on the statement

[20] UDTPA § 3.

[21] *See* Dole, *supra* note 19, at 498–500; Eovaldi, *supra* note 6, at 303–06; Note, *Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds,* 23 U. FLA. L. REV. 528, 540–41 (1971).

[22] *See* Rice, *supra* note 11, at 576. For a good discussion of what is considered an "adequate" remedy see Starrs, *The Consumer Class Action—Part I: Considerations of Equity,* 49 B.U.L. REV. 211, 224–33 (1969).

[23] UDTPA § 3.

[24] *Id.*

[25] An Illinois circuit court sidestepped the issue in Holstein v. Montgomery Ward & Co., CCH POVERTY LAW REP. § 9652 (Cir. Ct. Cook Cty. Ill. Mar. 11, 1969).

[26] Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971).

[27] Lanham Trademark Act, 15 U.S.C. § 1125(a) (1970). "Any person who shall affix . . . in connection with any goods or services . . . a false designation of origin . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation." *Id.*

[28] 442 F.2d 686 (2d Cir.), *cert denied,* 404 U.S. 1004 (1971).

of purpose contained in the Act that "[t]he intent of this chapter . . . is to protect persons engaged in such commerce against unfair competition" [29] and interpreted this statement to mean that "the Act's purpose . . . is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct." [30] Two considerations arise upon drawing comparisons between the Lanham Act and the UDTPA. First, since the Lanham Act applies to anyone who *is* damaged, its scope is not merely prospective but also applies to past injury. This would appear to be a stronger case for allowing consumer standing since consumers need not show a likelihood of future injury as under the UDTPA but can simply rely upon the past injury for standing. Yet, since consumers are denied standing to sue under the Lanham Act, a fortiori, they lack standing under the UDTPA criteria. On the other hand, the *Colligan* court also relied upon an explicit purpose stated in the Lanham Act to protect "persons engaged in such commerce." [31] Since the UDTPA does not contain similar language, perhaps the unfavorable impact of *Colligan* and the comparison with the Lanham Act is somewhat vitiated.

Despite the unsuitability of the UDTPA as a consumer remedy, one commentator has argued that public policy dictates that consumers should have standing to sue under the UDTPA because the social policy of protecting uninformed consumers overrides the theoretical legal problems posed by consumer standing.[32] A California statute has bypassed the issue entirely by allowing "any person acting for the interests of itself, its members or the general public" to enjoin fraudulent and deceptive practices.[33] If consumers are to have access to the UDTPA, the ultimate solution will have to be explicit legislative approval as under the California statute.[34]

Even if an effective injunctive tool could be devised for consumer use, the injunction is not itself an adequate consumer remedy. First, it provides no compensatory damages. This factor would probably dissuade most consumers from seeking an injunction because they are more concerned with recouping their losses than with protecting future victims of fraudulent practices. The second goal, deterrence, would also not be met because the merchant would know that he is free to reap high profits until some consumer should happen to bring suit against him. Since a defendant is entitled to specificity in the injunctive decree to give him fair notice of what conduct is proscribed,[35] he may be able to easily devise another unlawful profiteering scheme which falls outside the narrow equitable decree. To be an effective remedy, the injunction must be joined with another remedy which will both compensate the consumer and deter the merchant.

The class action suit, once thought to be the ultimate consumer weapon, has been rendered almost useless by recent Supreme Court decisions. Rule 23 of the Federal Rules of Civil Procedure, which outlines the requirements for initiating a class action in the federal courts, seems to allow large numbers of plaintiffs who have sustained minor damages to aggregate their claims so as to make a lawsuit worthwhile. From the consumer's standpoint, the remedy would be ideal. One injured consumer representative could sue on behalf of all others similarly wronged. The aggregation of claims would make it worthwhile to hire an attorney and undertake litigation. The class action would adequately compensate all aggrieved consumers in the class as well as deter the

[29] Lanham Trademark Act, 15 U.S.C. § 1127 (1970).

[30] 442 F.2d at 692.

[31] The court's interpretation that merchants, but not consumers, are "engaged in such commerce" is subject to question on a literal reading of the statute. Consumers are certainly as integral a part of the commercial flow of goods and services as are merchants. Nonetheless, the court's reading of Congress' purpose is probably correct. *See* Standard Brands, Inc., v. Smidler, 151 F.2d 34, 37–43 (2d Cir. 1945) (Frank, J., concurring).

[32] Dole, *supra* note 19, at 500.

[33] CAL. CIV. CODE § 3369(5) (West 1970).

[34] It has also been suggested that deceptive practices could be classified as public nuisances and private citizens allowed to enjoin the public nuisance. Comment, *Commercial Nuisance: A Theory of Consumer Protection,* 33 U. CHI. L. REV. 590 (1966). The major difficulty with this theory is that public nuisances, as distinguished from private nuisances, could traditionally be enjoined only by public officials on behalf of the public unless the private citizen seeking to sue could show a threat of special damage. *See* Rice, *supra* note 11, at 578.

[35] *Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1064–67 (1965).

merchant from future illegal activity by eliminating his profit.

The first blow to the consumer class action came in 1968 when the Supreme Court ruled in *Snyder v. Harris*[36] that class members could not aggregate their claims to meet the $10,000 jurisdictional requirement for diversity suits in federal courts. Since no single member of the class in *Snyder* alleged damages in excess of the jurisdictional amount,[37] it was hoped that if at least one member of the class had incurred injury in an amount greater than $10,000, other members with less damages could "piggy-back" their way into court. While few ordinary consumers would ever sustain such large losses,[38] local governments are often sizeable consumers of goods and services and could often meet the jurisdictional amount.[39] However, the possibility of "piggy-back" or "ancillary" jurisdiction was ruled out by the Supreme Court in *Zahn v. International Paper Co.*[40] The representative in *Zahn* claimed damages in excess of $10,000 while other members of the class alleged damages of less than $10,000.[41] The Court ruled that each member of the class must meet the $10,000 amount.[42] Since few consumers incur even $200 in damages,[43] $10,000 in damages would be extraordinary.

Diversity jurisdiction, to which *Snyder* and *Zahn* dealt devastating blows, is not the only avenue to federal court jurisdiction over class actions. Many class actions can be brought under federal question jurisdiction and often do not need to meet the $10,000 jurisdictional amount.[44] For instance, claims based on such specific statutes as the Truth-in-Lending Act,[45] the Fair Credit Reporting Act,[46] and the antitrust[47] and securities[48] laws do not require a minimum amount. Although federal consumer statutes do not provide nearly as comprehensive coverage as do some state statutes,[49] it seemed possible that a significant number of consumer class actions based on federal question jurisdiction could yet be brought in federal court after *Snyder* and *Zahn*. The 1974 Supreme Court decision in *Eisen v. Carlisle & Jacquelin*[50] effectively eliminated even this possibility.

The plaintiff in *Eisen* based his suit on sections one and two of the Sherman Act,[51] alleging that the defendants, two brokerage firms, monopolized odd-lot trading on the New York Stock Exchange and charged unreasonable fees as part of the monopoly. Because the suit was based on the Sherman Act, the plaintiffs did not have to meet a jurisdictional amount. However, the Court strictly interpreted rule 23 and held that individual notice must be sent to all members of the class who could be identified through reasonable efforts. Furthermore, no part of the notification cost could be borne by the defendant, as the lower

[36] 394 U.S. 332 (1969).

[37] *Id.* at 333. *See also* Zahn v. International Paper Co., 414 U.S. 291, 298–99 (1973).

[38] The average loss in *Eisen v. Carlisle & Jacquelin* was $3.90. Schuck & Cohen, *The Consumer Class Action: An Endangered Species,* 12 SAN DIEGO L. REV. 39, 63 (1974).

[39] *See, e.g.,* Consumer Federation of America v. Wyeth Laboratories, Civil No. 306–702 (D.D.C., Oct. 19, 1972).

[40] 414 U.S. 291 (1973).

[41] *Id.* at 292.

[42] The Supreme Court came out differently on an analogous issue in Supreme Tribe of Ben-Hur v. Cauble 255 U.S. 356 (1921). The Court there held that if the named members of a class satisfy diversity requirements, the claims of unnamed plaintiffs of non-diverse citizenship can also be adjudicated. The dissent in *Zahn* felt that this approach to "ancillary jurisdiction" for diversity requirements should be followed for the monetary amount issue to allow parties with less than $10,000 to have their claims adjudicated also. *Id.* at 309 (Brennan, J., dissenting).

[43] *See* text accompanying note 15 *supra.*

[44] 28 U.S.C. § 1337 (1970) reads: "The district courts shall have original jurisdiction of any civil action . . . arising under any Act of Congress regulating commerce. . . ." *Id.* This section has been interpreted to confer jurisdiction on federal courts without regard to an amount in controversy in cases involving regulation of commerce. Springfield Television, Inc., v. City of Springfield, Missouri, 428 F.2d 1375 (8th Cir. 1970); Caulfield v. United States Department of Agriculture, 293 F.2d 217 (5th Cir. 1961), *cert. denied,* 369 U.S. 858 (1962). This section was explicitly recognized as the jurisdictional base of a Truth-in-Lending case involving damages of less than $10,000. Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972), *rev'd and remanded on rehearing,* 498 F.2d 114, 117 n.2 (1974).

[45] Consumer Credit Protection Act, 15 U.S.C. §§ 1601–65 (1970).

[46] *Id.* at §§ 1681–8(t).

[47] *See* 15 U.S.C. §§ 1–40 (1970).

[48] *See* 15 U.S.C. §§ 77(a)–78(*lll*) (1970).

[49] *See, e.g.,* ILL. REV. STAT. ch. 121½, §§ 157.13–157.41, 261–317, 381–92, 401–17, 501–33 (Supp. 1974).

[50] 417 U.S. 156 (1974).

[51] 15 U.S.C. §§ 1, 2 (1970).

court had suggested, even though he could have more easily borne the cost.[52]

Since the cost of notice in *Eisen* was estimated to be a minimum of $225,000,[53] the plaintiff would be understandably reluctant, or perhaps even unable, to bear this expense. The rationale behind the requirement of notification is to allow a class member to either opt out of the class to sue on his own or to intervene in the class suit itself. Yet, since plaintiffs with small claims would not seriously entertain either choice, individual notice should not be a prerequisite to a class suit on their behalf.

Perhaps the only viable alternative to the *Snyder, Zahn,* and *Eisen* decisions is further federal legislation specifically changing the class action requirements. This was evidently the approach in the newly-enacted Federal Consumer Product Warranties Act.[54] Section 110(d) of the Act allows a class suit where no individual claim is less than $25, the aggregate amount is greater than $50,000, and there are more than 100 members in the class.[55] The House Report,[56] whose version of the class action provision was ultimately adopted in the Senate Conference Report,[57] emphasized that a practical approach should be taken to section 110(d):

> [Y]our Committee would emphasize that this section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers . . . [Y]our Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief.[58]

Section 110(d) may be an indication that a more generalized class action section liberalizing the notice requirements of rule 23 is a possibility for the future.

Most state class action provisions are not amenable to consumer suits either. New York's class action statute, typical of many states, allows a class suit when the "question is one of a common or general interest of many persons *or* where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court. . . ."[59] Two interrelated problems have developed with respect to this and similar statutes. The disjunctive "or" would, if taken literally, warrant class treatment when either numerous parties or a common interest among individuals exists. Yet, the courts have often disregarded the distinction between the two clauses with the result that "or" often is read "and."[60] The requirement that each class suit be one of a "common or general interest" is further exacerbated by the strict interpretation often given that phrase. The New York courts have construed it to mean that "separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan . . . do not alone create a common or general interest. . . ."[61] The stringent limitations placed on state class action statutes of the New York type are matched by judicial restrictions imposed on common law class actions. The requirement of a common interest is echoed and amplified by Illinois, a jurisdiction with only common law class actions. Illinois courts require that both a "community of interest" in the subject matter and in the remedy must exist before class treatment will be

[52] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 271–72 (S.D.N.Y. 1971).

[53] Schuck & Cohen, *supra* note 38, at 58.

[54] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, ch. 15, tit. II, § 205, 88 Stat. 2188 (1975).

[55] *Id.* § 110(d).

[56] H. R. Rep. No. 1107, 93d Cong., 2d Sess. 1 (1974).

[57] S. Rep. No. 1408, 93d Cong., 2d Sess. (1974).

[58] *Id.*

[59] N.Y. Civ. Prac. § 1005(a) (McKinney 1963) (emphasis added).

[60] *See* Homburger, *State Class Actions and the Federal Rule,* 71 Colum. L. Rev. 609, 614 (1971). *See also* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure,* 49 B.U.L. Rev. 407 (1969).

[61] Gaynor v. Rockefeller, 15 N.Y.2d 120, 129, 256 N.Y.S.2d 584, 590, 204 N.E.2d 627, 631 (1965).

authorized.[62] Furthermore, the factors to be considered in applying this test are:

(1) whether the claims of all members of the class share a common question of law and fact;
(2) whether each member's cause of action arises from the same transaction;
(3) whether one party can adequately represent the rights and interests of all other members;
(4) whether the number of possible class members renders separate litigation impossible or impracticable; *and*
(5) whether there exists a purely equitable cause of action.[63]

These criteria demonstrate the hapless condition of the average consumer class action in Illinois. The New York and Illinois examples are illustrative of similar constraints on class actions in other states.[64]

III. Public Remedies

With the decline of the class action, attention has shifted to the public sector in the search for an adequate consumer remedy. One old but seldom used remedy for unlawful commercial activity is the criminal sanction. Printers' Ink statutes, which criminalized untrue, deceptive, and misleading advertising,[65] combined with the crime of false pretenses to provide protection for the early consumer. These statutes have been augmented by current statutory enactments which often include provisions penalizing especially egregious conduct. The federal Truth-in-Lending Act punishes "willful and knowing" violations with a fine of up to $5000 and/or up to a year in jail.[66] An employer who willfully violates Title II of the Consumer Credit Protection Act regulating employee garnishment is subject to a year in jail and/or a $1000 fine.[67] Similar provisions appear in most other consumer protection statutes.

Despite the availability of criminal penalties, these sanctions are seldom invoked. Of the nine cases in 1971 which were referred for prosecution under the Truth-in-Lending Act, five were dropped before the trial stage.[68] The Sherman Antitrust Act has likewise resulted in few criminal convictions—from 1909 to 1965 only 394 defendants were incarcerated, serving sentences ranging from four hours to one year.[69]

One reason for the lack of enforcement of criminal sanctions in the commercial sphere is the judicial policy of strict construction of criminal statutes. For example, theft by false pretenses usually requires that there be a false "assertion of an existing fact, not a promise to perform some act in the future."[70] Thus, a merchant who cheats a consumer out of his money by promising something for the future, never intending to fulfill the promise, is not guilty of false pretenses. This distinction is nicely illustrated in *Commonwealth v. Becker*.[71] The defendant had been convicted on three counts of obtaining money under false pretenses. On appeal, two counts were reversed because the defendant had merely promised that he would install a new roof but had not yet begun work. The third count was affirmed because the defendant represented that the roof, upon which he had initiated work, was

[62] DePhillips v. Mortgage Associates, Inc., 8 Ill. App.3d 759, 291 N.E.2d 329 (1972); Moseid v. McDonough, 103 Ill. App. 2d 23, 243 N.E.2d 394 (1968).

[63] *Id.*

[64] *But see* Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). One important liberalization in the California rules is the authorization of publication notice if "personal notification is unreasonably expensive. . . ." Cal. Civ. Code § 1781(d) (West 1973).

[65] "Any person . . . who, with intent to sell . . . merchandise . . . or anything offered by such person, . . . directly or indirectly . . . makes, publishes . . . or places before the public . . . in a newspaper . . . or other publication . . . an advertisement . . . of any sort regarding merchandise . . . or anything so offered . . . to the public, which advertisement contains an assertion . . . which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor." F. Thayer, Legal Control of the Press § 87, at 606 (3d ed. 1956). Some form of this statute has been adopted in 43 states. Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1058 (1956).

[66] Consumer Credit Protection Act, 15 U.S.C. § 1611 (1970).

[67] *Id.* at § 1674(b) (1970).

[68] National Institute for Consumer Justice, Criminal Sanctions in Consumer Legislation 379, 384 (1973).

[69] Wright, *Jail Sentences in Antitrust Cases*, 37 F.R.D. 183 (1965).

[70] Commonwealth v. Moore, 99 Pa. 570, 574 (1882). For a comprehensive discussion of the false pretenses problem see Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967 (1953).

[71] 151 Pa. Super. 169, 30 A.2d 195 (1943).

complete. Thus, the latter was an "assertion of an *existing* fact (that the roof was presently complete), not a promise to perform some act in the future (promise to install a roof)." [72] The rationale behind a strict construction of the crime of false pretenses derives from the danger inherent in trying to distinguish between a promise made without ever intending to perform and an innocent breach of contract.[73] Since *intent* is essentially the only distinction between innocent and criminal conduct, the possibility exists that

> a debtor might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat. The risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts is a very real consideration. . . . [T]he way would be open for every victim of a bad bargain to resort to criminal proceedings to even the score with a judgment proof adversary.[74]

California Chief Justice Traynor recognized this problem in *People v. Ashley*[75] but concluded that the defendant was adequately safeguarded by two elements: (1) that the requisite intent could not be proven by mere non-performance of the promise and (2) that this intent must be proven beyond a reasonable doubt.[76] Justice Traynor felt that no greater difficulty would be encountered in proving intent in a false promise than in a misrepresentation of an existing fact and therefore ruled that the jury should be allowed to weigh the evidence in the former case as well as the latter.[77]

A further safeguard for the innocent defendant based on the intent requirement is that an *unlawful* intent is normally required for commercial crimes rather than a mere intent to do the act. The resistance to imposing strict liability on the defendant is evidenced by legislative and judicial treatment of the Printers' Ink statute. This statute was designed "to make the advertiser absolutely liable for what he says, without requiring the often difficult proof of . . . intent to deceive, or actual knowledge of the improper character of the advertisement by the defendant." [78] Despite this intended purpose, eleven state legislatures superimposed the requirement that the advertiser know, or be reasonably charged with knowledge of, the falsity of his statements.[79] The absolute liability initially desired has been even further eroded by four states which require an "intent to deceive." [80] Thus, a defendant may know that his statements are false but nonetheless lack an "intent to deceive." Since this type of intent usually goes hand in hand with knowledge of falsity, the distinction may not be of great practical significance. The "intent to deceive" element, if not explicit in the statute, is occasionally read in by the judiciary.[81]

The reluctance to impose strict liability on unintentional wrongdoers stems from the traditional notion that defendants who are not morally blameworthy should not be subject to the possibility of criminal sentences.[82] On the other hand, it has been argued that

> the real question in protecting consumers is not whether a person who carried on such a scheme *intended* to defraud and therefore is a criminal. The pertinent question is: should the law allow a vast number of the public to be seduced into misery—have their money stolen and their lives demeaned—by the actions of *any* soul—guided or misguided, bad-intentioned or good-intentioned? [83]

This approach is taken by the Federal Food, Drug and Cosmetic Act[84] which imposes criminal liability without regard to personal knowledge or intent. The provisions of the Act are presumably more onerous because the injury

[72] *Id.* at 197, *quoting* Commonwealth v. Mauk, 79 Pa. Super. 153, 157 (1922).
[73] *See* Chaplin v. United States, 157 F.2d 697, 698–99 (D.C. Cir. 1946).
[74] *Id.* at 699.
[75] 42 Cal. 2d 246, 267 P.2d 271, *cert. denied,* 348 U.S. 900 (1954).
[76] *Id.* at 263–64, 267 P.2d at 284.
[77] *Id.* at 263, 267 P.2d at 284.
[78] Note, *supra* note 65, at 1059.
[79] *Id.* at 1060.
[80] *Id.* at 1061.
[81] People v. Austin, 301 Mich. 456, 3 N.W.2d 841 (1942).
[82] *See* Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55 (1933).
[83] MAGNUSON, *supra* note 1, at 17.
[84] 21 U.S.C. §§ 301–92 (1970). *See also* United States v. Dotterweich, 320 U.S. 277 (1943) (affirmed conviction of president of company which shipped adulterated goods even though he had no personal knowledge and the defect was not apparent).

inflicted by violation is to a consumer's health rather than "merely" to his pocketbook.

In addition to the limitations imposed by the *scienter* requirement, a variety of sociological and practical problems combine to make the criminal sanction even less effective. Both the general public and law enforcement officials embrace the attitude that merchants should not be treated like "common criminals."[85] Thus, prosecutors are reluctant to indict perpetrators of commercial crimes. The official may justify his policy of tolerance by reference to the higher priority of prosecuting more egregious crimes.[86] Even if a case is brought to trial, judges and juries are apt to treat the white collar criminal leniently. Faced with these realities, a prosecutor will tend to balance the possible penalty against the cost of prosecution.[87] The maximum penalty for a consumer crime is often a short sentence or a relatively small fine.[88] Yet, the cost of prosecution may be substantially higher than any possible fine. Unless enjoined, after the defendant pays his fine or serves a short sentence, he will be free to continue his unlawful, but profitable, business activities.

The greatest inadequacy of the criminal sanction is its failure to provide compensation for the aggrieved consumer. The victim does not care, except perhaps for personal satisfaction, whether his defrauder is penalized. He simply wants his money returned. One means of achieving this end is to coerce the defendant into compensating his victim by making restitution a condition of the defendant's probation.[89] One unresolved issue concerning this remedy is whether the defendant is required to make restitution only to the victims whose complaints initiated the prosecution or also to all other parties he may have defrauded.[90] The court in *People v. Miller*[91] held that a defendant convicted of defrauding one particular family was nonetheless required to make restitution to *all* the families he defrauded. A contrary result was reached in *People v. Becker*[92] where the court ruled that restitution could be imposed "only for the loss caused by the very offense for which defendant was tried and convicted."[93] The result in *Miller* is, of course, more desirable from the consumer's standpoint.

To overcome difficulties inherent in the criminal field, many states have enacted legislation authorizing public authorities to seek injunctions against unlawful business practices. In 1970, the National Conference of Commissioners on Uniform Laws published a final version of the Unfair Trade Practices and Consumer Protection Law.[94] The UTPCPL

[85] *See* Note, *supra* note 16, at 426–27.

[86] *See* Note, *supra* note 65, at 1064.

[87] Two benefits from merely charging the defendant, even if no conviction is attained, are that the defendant's methods are exposed to the public and he will face the embarrassment of answering to a criminal prosecution. Even these considerations will not deter some defendants.

[88] Increased penalties for antitrust violations were signed into law on December 21, 1974. Ch. 15, 88 Stat. 1708 (1974). Violations now are felonies rather than misdemeanors; the one year jail sentence was increased to three years; and the maximum fine of $50,000 was increased to $1 million for a corporation and $100,000 for individuals. In light of the attitudes toward white-collar crime discussed in the text, it is questionable whether the increased criminal sanctions will actually result in greater deterrence to the potential antitrust violator.

[89] An example of a statute providing for such restitution is 18 U.S.C. § 3651 (1970):

> While on probation . . . the defendant . . . may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which convictions was had. . . .

[90] *See generally* Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness,* 5 U. RICHMOND L. REV. 71 (1970).

[91] 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967).

[92] 349 Mich. 476, 84 N.W.2d 833 (1957).

[93] *Id.* at 486, 84 N.W.2d at 838.

[94] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW. Three alternative forms of unlawful acts are offered to the states by the UTPCPL. Form No. 1, often characterized the "Little FTC Act," adopts the language of the Federal Trade Commission Act in prohibiting "unfair methods of competition and unfair or deceptive acts or practices . . . ." By 1972, Hawaii, Maine, Massachusetts, North Carolina, South Carolina, Vermont and Washington had adopted this approach. Form No. 2 is designed for states which already adequately regulate unfair competition and makes only "false, misleading or deceptive acts" unlawful. By 1972, Arizona, Arkansas, Illinois, Iowa, Kansas, Maryland, Minnesota, New Jersey, and North Dakota had adopted Form No. 2. Form No. 3 is borrowed almost verbatim from the UDTPA in prohibiting thirteen specific types of deceptive practices. Alaska, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island and Texas have adopted

authorizes the attorney general to bring an action for a temporary or permanent injunction against a merchant when the attorney general believes that the merchant "is using, has used, or is about to use" a practice declared unlawful.[95] Unlike most criminal statutes, proof of intent is not required for an injunction under the UTPCPL.[96] Since an injunction does not carry the opprobrium of a criminal conviction, attorneys general and judges might feel less reluctant to use this remedy against businessmen. No cases have been found which construe the statute's restrictions on use of the injunctive remedy. The dearth of cases is due in part to the recent promulgation of the UTPCPL but probably also in part to underutilization of the statute by attorneys general.

As mentioned before, the problem with an injunction is that it operates only prospectively. No compensation is made to consumers already injured—only future consumers are protected.[97] Since the merchant usually keeps profits already earned and is simply told to discontinue the illegal practice, there is an incentive to initiate profitable and illegal activities and continue them as long as possible.

Although there have been many failures in both the civil and criminal fields, two legislative enactments, one federal and one state, have the potential to provide both compensation and deterrence in the area of consumer protection. Both remedies rely on public authorities for enforcement so that an individual need not bear the cost of litigation nor even be completely versed as to what his legal rights are. Both remedies also provide for full compensation to aggrieved consumers. These remedies may inaugurate a new era for the victimized consumer public.

IV. The FTC and State Attorneys General: Public Enforcement of Private Rights

The Federal Trade Commission Act gives the Federal Trade Commission broad authority to regulate "unfair or deceptive acts or practices."[98] This sweeping language enables the FTC to regulate a wide variety of different types of deceptive practices. Enhancing its broad scope, violations of the FTCA are somewhat easier to prove because intent to deceive is not required—a mere likelihood of deception is sufficient to invoke the FTC's authority.[99] Nor does the FTC, in determining whether a violation has occurred, use the standard of whether a "reasonable man" is likely to be deceived.[100] Statements are prohibited if "the representations . . . are likely to mislead an appreciable . . . segment of the public."[101] That the segment deceived need not be too large nor intelligent is exemplified by *Charles of the Ritz Distributors Corp. v. FTC*[102] where the court held that at least some people would believe that a make-up cream named "Rejuvenescense" would restore their skin to its youthful state. Thus, representations made to induce this belief were in violation of the Act.

Despite the comprehensive language of the FTCA's substantive provisions, the FTC has traditionally been severely restrained by procedural limitations contained in the FTCA. Until very recently,[103] the FTC's only means of en-

---

Form No. 3. The UTPCPL does not share the standing problem inherent in the UDTPA. Section 8 of the UTPCPL stipulates that "any person who . . . suffers any ascertainable loss . . . as a result of the use . . . of a method . . . declared unlawful . . . may bring an action. . . ." Another variation from the UDTPA is the addition of the thirteenth deceptive practice, a catchall "any other act or practice which is unfair or deceptive to the consumer." For a thorough discussion of the UTPCPL see Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972).

[95] UTPCPL § 5.

[96] *But see* Me. Rev. Stat. Ann. tit. 17, § 1620 (1964) (proof of intent required).

[97] A few states allow restitution to be joined with an injunction. N.J. Stat. Ann. § 56:8-8 (1964) ("The court may make such orders . . . as may be necessary . . . to restore to any person in interest any moneys . . . which may have been acquired by means of any practice herein declared to be unlawful.").

[98] 15 U.S.C. § 45(a)(1) (1970). The Commission's jurisdiction extends to all "persons, partnerships, or corporations" except banks and certain common carriers. *Id.* § 45(a)(6).

[99] D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942).

[100] Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

[101] Feil v. FTC, 285 F.2d 879, 892 n.19 (9th Cir. 1960).

[102] 143 F.2d 676 (2d Cir. 1944).

[103] Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, the FTC is empowered to seek civil fines. *See* note 115 and accompanying text *infra*. Congress authorized the FTC in 1973 to seek preliminary injunctions and temporary restraining orders. 15 U.S.C. § 53(b) (1970) (Supp. III, 1973).

forcement was the cease and desist order, which could not be enforced until "finalized." [104] An order becomes "final" upon expiration of the time period allowed for appeal from the FTC decision or after the defendant has exhausted his avenues of appeal.[105] Since it normally takes a year to issue a complaint,[106] and three to five years to finalize a cease and desist order,[107] the FTC's efforts to halt unlawful practices have clearly been hampered. An extreme example of the FTC's impotency is illustrated by its efforts to halt the misdeeds of the Holland Furnace Company.[108] The company initiated its fraudulent method of operation in the early 1930's[109] and agreed to an FTC consent order in 1936.[110] Although the company continued its fraudulent practices, the FTC did not issue a second complaint until 1954[111] nor a cease and desist order until 1958 —which the company ignored.[112] Seven years later the company was fined $100,000 for refusing to obey a court order enforcing the cease and desist order.[113] Yet, in the twenty-nine years the FTC was struggling to stop the company's operation, the company had earned as much as $30 million a year by deceiving homeowners.[114]

On January 4, 1975, Congress enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.[115] This Act contains important provisions which may enable the FTC to thwart frauds similar to the one perpetrated by the Holland Furnace Company. The Act considerably enhances the FTC's enforcement powers by authorizing the agency to bring an action in federal district court to impose civil penalties of up to $10,000 per violation.[116] Such actions can be brought in two situations. First, the defendant is subject to this penalty if he engages in a practice

[104] 15 U.S.C. § 45(*l*) (1970).

[105] *Id.* § 45(g).

[106] *See* SUBCOMM. ON FRAUDS AND MISREPRESENTATION AFFECTING THE ELDERLY, 89TH CONG., 1ST SESS., REPORT ON FRAUDS AND DECEPTIONS AFFECTING THE ELDERLY 81 (Comm. Print 1965).

[107] Weston, *Deceptive Practices and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 561 (1964).

[108] The company's modus operandi was for its agents to misrepresent themselves as "furnace engineers" and "safety engineers" in order to gain access to a home furnace. The salesmen would then dismantle a furnace, condemn it as hazardous, and refuse to reassemble it because of the alleged danger. Of course, the salesmen's primary motive was to sell their own furnaces to the homeowner. MAGNUSON, *supra* note 1, at 22–23.

[109] *Court Catches Up With Holland Furnace Co.*, 48 CONSUMER BULL., April 1965, at 25.

[110] 24 F.T.C. 1413–14 (1936).

[111] *In re* Holland Furnace Co., 55 F.T.C. 55 (1958) *aff'd*, 295 F.2d 302 (7th Cir. 1961).

[112] 55 F.T.C. at 90.

[113] *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965).

[114] MAGNUSON, *supra* note 1, at 23.

[115] Ch. 15, tit. II, 88 Stat. 2183 (1975).

[116] A portion of the section which relates to civil penalties is set out below. Special notice should be taken of the language which stipulates that each day the practice continues is considered a separate violation.

(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on

which is prohibited by an FTC ruling,[117] where he has "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive *and* is prohibited by such rule." [118] The major difficulty here is that the defendant must "know" that his conduct is both improper and prohibited by an FTC ruling. On this point, the Conference Committee said:

> In determining whether knowledge of a Commission rule may be fairly implied, it is intended that the courts hold a defendant responsible where a reasonable and prudent man under the circumstances would have known of the existence of the rule and that the act or practice was in violation of its provisions.[119]

The second situation which subjects a defendant to liability is engaging in a practice which the FTC has determined in a cease and desist proceeding to be unfair or deceptive.[120] The defendant himself need not have been the subject of the particular cease and desist order; nonetheless, he must have "actual knowledge that such act or practice is unfair or deceptive" and, as such, is unlawful under the FTCA.[121]

Under both provisions, the defendant must know that his behavior is violative of the FTCA although he must have actual knowledge in the latter while "knowledge fairly implied" will suffice for the former. Balanced against the less stringent intent element in the former is the necessity of proving that the defendant "knows" of the ruling prohibiting such practices. In the latter section, with its "actual knowledge" requirement, the defendant need not be aware of the cease and desist order itself which prohibits such acts but merely that the acts are unfair or deceptive and unlawful. On balance, then, the task of making out a violation may be equally formidable in both cases. Yet, the sanction of up to $10,000 per violation per day[122] should provide a powerful deterrent.

Another section of the new Act is of greater interest to consumers. Under it, the FTC is authorized to seek "such relief as the court finds necessary to redress injuries to consumers or other persons [including] rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification. . . ." [123] Violation of an

---

> ability to continue to do business, and such other matters as justice may require.

Ch. 15, tit. II, § 205, 88 Stat. 2183 (1975).

[117] Before enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the FTC's power to promulgate substantive rules of business conduct was under a cloud. These rules, termed "Trade Regulation Rules" by the FTC, greatly clarified the broad standard of "unfair methods of competition" and "unfair or deceptive acts or practices." Under its old enforcement procedure, the FTC would issue a cease and desist order against acts which violated any rule. Now, however, the FTC can use the rulings to impose civil penalties. *See* note 116 *supra* and accompanying text. Notwithstanding the FTC's long history of rule-making, there have been numerous assertions that the agency did not possess substantive rule-making authority. In 1972 the District Court for the District of Columbia held, in the "Octane Rating" case, that the FTC lacked authority to promulgate these rules. National Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972). Congressional hearings on the issue were initiated. H.R. REP. No. 1107, 93d Cong., 2d Sess. 33 (1974). Although the district court decision was later reversed (National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973)), Congress went ahead and explicitly authorized rule-making in the new Magnuson-Moss Act, ch. 15, tit. II, § 202, 88 Stat. 2183 (1975). Congress also outlined rule-making procedures and the scope of judicial review. *Id.*

[118] *Id.* § 205 (emphasis added).

[119] S. REP. No. 1408, 93d Cong., 2d Sess. 40 (1974).

[120] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, ch. 15, tit. II, § 205, 88 Stat. 2183 (1975).

[121] *Id.*

[122] *Id.*

[123] The applicable language of the statute is set out below:

> (a) (1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.
>
> (2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partner-

FTC ruling is the first circumstance under which this section can be invoked. Unlike the section imposing civil penalties, this provision does not require that the defendant know that he is violating a ruling or even that he is engaging in unfair or deceptive acts, *i.e.*, strict liability is imposed for a rule violation. The second means of invoking the broad remedies quoted above is slightly unclear from the statute:

> If any person . . . engages in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such person . . . then the Commission may commence a civil action against such person. . . . If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief [as described].[124]

A reasonable interpretation of the first sentence of this section would be that only violations of a cease and desist order levied against the defendant will trigger the remedies section. In other words, so long as the defendant obeys the order, the FTC cannot bring an action on behalf of consumers against him. Yet, this interpretation is inconsistent with the second sentence which relates to the knowledge of the defendant at the time he committed the acts. Once a cease and desist order has issued against a defendant, surely he will know that such acts are "dishonest or fraudulent" so that there should be no need to convince the court of the defendant's state of mind. The second sentence makes greater sense if the first is read to permit the FTC to sue on behalf of consumers for the acts which *prompted* the cease and desist order. Thus, the FTC can seek compensation for consumers for the unlawful acts which *preceded* the cease and desist order if a reasonable person would have known the acts were dishonest or fraudulent. Evidence that this latter interpretation was actually Congress' intent is found in the Conference Report:

> If any person . . . engages in an unfair or deceptive act or practice *resulting* in the issuance of a cease and desist order by the Commission against such respondent, the Commission may commence an action for redress of the injuries caused by such respondent's acts or practice.[125]

Furthermore, the statutory standard of "known under the circumstances [to be] dishonest or fraudulent" appears to be a liberalization of the standard seen in the prior section that the defendant know his acts to be *unlawful* under the FTCA. In sum, it should be substantially easier to invoke the consumer remedy section with its liberalized intent requirements than the stricter civil penalties section.

The FTC's new power to seek civil fines as well as remedies on behalf of consumers significantly enhances its ability to be a potent consumer protection agency. Under the new law, consumers have an opportunity to fully recoup losses sustained at the hands of dishonest merchants. If strictly enforced by the FTC and liberally construed by the judiciary, the possibility of compensation coupled with large civil fines should also deter such business practices from occurring in the first place.

Another effective consumer remedy which has been around much longer than the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act is the power granted by

---

ship, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Id. § 206.

[124] *Id.*

[125] S. REP. No. 1408, 93d Cong., 2d Sess. 41 (1974) (emphasis added).

many state statutes to state attorneys general to sue on behalf of consumers.[126] One common statutory provision, found in the Unfair Trade Practices and Consumer Protection Law, has been available for a number of years but is rarely used. *Kugler v. Romain*[127] represents one of the few instances where an attorney general has taken advantage of this broad power, and the results were laudable.

The defendant in *Kugler* was engaged in the business of door-to-door selling of "educational books" to low-income consumers. The books and certain "bonuses" listed at wholesale for $35 and $40 but were sold at $249.50 cash payment and $279.95 installment credit payment. The maximum retail price of the books in the regular market was about $110. To sell the product at these exorbitant prices the defendant's solicitors followed a practice of misrepresentation and deception. The New Jersey Attorney General instituted an action against the defendant individually and as the Educational Services Company. In addition to other relief, the Attorney General sought compensation for all persons who were induced to enter contracts with the defendant. The Attorney General took his authorization from a statute which is almost identical to the comparable provision in the uniform Unfair Trade Practices and Consumer Protection Law.[128] The New Jersey act reads as follows:

> Whenever it shall appear to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this act [including the use of deception and misrepresentation in connection with a sale] he may seek and obtain in an action in the Superior Court an injunction prohibiting such person from continuing such practices . . . The court may make such orders or judgment as may be necessary . . . to restore to any person in interest any moneys or property . . . which may have been acquired by means of any practice herein declared to be unlawful.[129]

Recovery was sought not only on behalf of the twenty-four victims who testified at trial but also for all others "similarly situated" who had executed the same contract.

At trial, the Attorney General asserted that the inflated contract price alone was unconscionable under the Uniform Commercial Code.[130] If the price was unconscionable, he argued that the Consumer Fraud Act was also violated for all consumers who had been charged the exorbitant price. However, the trial court rejected the contention that the price was unconscionable. The twenty-four consumers who testified at trial gave proof of the defendant's deceptive and fraudulent methods (other than the high price) and were thus allowed to recover their losses.

The Attorney General appealed on behalf of all consumers victimized by the defendant who did not come under the trial court's decree. On appeal, the New Jersey Supreme Court held that relief should be accorded to all consumers similarly situated as well as the original twenty-four. The court recognized that this "class-type" relief could not be maintained if the claim of each individual consumer depended upon a separate set of facts applicable only to him. Since no effort had been made at trial to show that all contracts were illegal because of fraudulent and deceptive practices engaged in each time a contract was executed, the court analyzed the argument rejected by the trial court. The Supreme Court accepted the view that the exorbitant price itself was unconscionable and further indicated that "unconscionability must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like which are stamped unlawful under [the Consumer Fraud

[126] States have often attempted to use their common law power as *parens patriae* to sue on behalf of their individual citizens. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Oklahoma v. Atchison, Topeka & Santa Fe Railroad, 220 U.S. 277 (1911); New Hampshire v. Louisiana, 108 U.S. 76 (1883). Yet, the Supreme Court has consistently held that the *parens patriae* doctrine allows a state to bring suit only to protect the common welfare of the people as a whole. *Id.* The promotion of purely individual interests must be left to individual initiative. Nonetheless, the legislatures are free to enact statutes which explicitly grant the attorney general the power to act on behalf of consumers which he lacks at common law. *See* California v. Frito-Lay, Inc., 474 F.2d 774, 777 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

[127] 58 N.J. 522, 279 A.2d 640 (1971).

[128] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW.

[129] N.J. STAT. ANN. § 56:8-8 (1960).

[130] N.J. STAT. ANN. § 12A:2-302 (1960).

Act]."[131] Once a violation of the Consumer Fraud Act was found, the section authorizing actions by the Attorney General on behalf of consumers was triggered and, "since the price unconscionability rendered the sales contract invalid as to all consumers who executed it, the Attorney General was entitled to a judgment so holding as to the entire class of such persons."[132]

Despite the availability in a number of states[133] of the attorney general-initiated action demonstrated in *Kugler v. Romain,* this remedy is seldom used.[134] Yet, the limited staff and resources allocated by states to consumer protection activities make it imperative that an attorney general or consumer fraud agency lawyer seek remedies that are class-oriented rather than individualistic. A 1973 publication[135] of the National Association of Attorneys General reported that out of forty-one states polled, only five have more than ten attorneys working full-time on consumer protection; five other states have between four and ten; fifteen states have between two and four; eight states have one; and eight states have no full-time consumer protection attorneys.[136] The small staffs of these agencies must handle hundreds of complaints. The 1973 report indicated that the average number of complaints received by any one state was 5,050.[137] The generally small staff size coupled with the large number of complaints received would dictate that consumer protection agencies make the most effective use of their limited resources. Yet, must state agencies expend a major portion of their limited resources and staff time on the processing and mediation of individual complaints to the point that one agency reported its "staff has been swamped with complaint processing and [is] unable to give priority to the filing of lawsuits."[138]

To make more effective use of their limited resources, consumer protection agencies should change the focus of their activity from individual mediation to class compensation. Class-oriented remedies similar to the one instituted by the New Jersey Attorney General in *Kugler v. Romain* would have the advantage of compensating large numbers of consumers while not requiring the time and effort of processing and mediating a myriad of individual complaints. Perhaps the best function for individual complaints would be to determine when a particular merchant's unlawful practices have developed into a regular pattern or have become sufficiently egregious to justify a full-blown *Kugler* suit. Of course, the disadvantage of setting priorities in this manner is that many consumers who seek help from the consumer protection agency will be denied it. Yet, a great many consumers who do not seek help for one reason or another but are similarly aggrieved will be compensated. Until consumer protection agencies are sufficiently staffed to handle both individual complaints and *Kugler*-type suits, it is in the public interest to pass over some consumer complaints.

V. Conclusion

After a series of false hopes, tools are available which will enable the consumer to find justice in the market place. In achieving the long-sought goals of compensation and deterrence, these remedies have drawn from traditional private and public methods of enforcement. Both the FTC and state attorney general actions depend on public officials to champion the rights of the consuming public. Both also include the age-old remedy of compensatory damages as an integral part of the available sanctions. Once the merchant realizes that his activities fall under the hopefully watchful eye of the public agency rather than the powerless consumer, he will be wary of engaging in unlawful business practices. If he does, he will be liable not simply to an individual consumer but to all consumers he has cheated. Upon elimination of the profit motive, the incentive to initiate illegal acts disappears.

[131] Kugler v. Romain, 58 N.J. 522, 537, 279 A.2d 640, 652 (1971).

[132] *Id.* at 539, 279 A.2d at 654.

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

[134] Another example of an action brought by an attorney general on behalf of consumers can be found in People v. Wonder Ware Stainless Steel Co., No. 67, ch. 3066 (Cir. Ct. of Cook County, Ill., Aug. 2, 1967). However, the court there limited recovery to the cases then pending before the consumer fraud agency rather than compensating all consumers who had bought from the defendant.

[135] National Association of Attorneys General, Committee on the Office of Attorney General, State Programs for Consumer Protection (Dec. 1973).

[136] *Id.* at 12-13.

[137] *Id.* at 16.

[138] *Id.* at 20.

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

SCHNECKLOTH v. BUSTAMONTE: THE QUESTION OF NONCUSTODIAL AND CUSTODIAL CONSENT SEARCHES

I. INTRODUCTION

In *Schneckloth v. Bustamonte*,[1] the United States Supreme Court announced the criteria for determining the validity of a search authorized by voluntary consent. It held that where the subject of a search is not in custody, the voluntariness of the consent is "a question of fact to be determined from all the circumstances."[2] Furthermore, the Court determined that ignorance of the right to withhold consent should not ipso facto render the consent involuntary. Rather, a lack of such knowledge should merely be one factor in determining the existence of voluntariness.[3] The Court, however, limited the application of its holding to noncustodial consent search situations.[4] It explicitly left unresolved the question of whether demonstrated knowledge of the right to refuse is required when the subject is in custody.[5]

This comment explores questions surrounding custodial and noncustodial consent searches. First, it briefly examines consent searches as a workable exception to the search warrant requirement of the fourth amendment. It then discusses and analyzes *Bustamonte*. Next, it examines the manner in which some federal courts have handled the question left open by *Bustamonte*—whether the prosecution must show that the defendant was aware of his right to refuse consent at the time he consented to the search. The comment also analyzes whether the federal courts which have addressed the issue have done so consistently with *Bustamonte* and *Miranda v. Arizona*.[6] Finally, the comment discusses some of the implications of *Bustamonte* and its progeny.

II. LEGAL FOUNDATION

The fourth amendment prohibits unreasonable searches and seizures.[7] In doing so, it seeks to safeguard the security and privacy of individuals from arbitrary intrusions by governmental officials.[8] Moreover, the sanctions of the fourth amendment bind both federal and state governments.[9] As a result, the most favored source of governmental authority to conduct a search is a warrant issued upon probable cause.[10] In most cases, courts will presume a search conducted without such a warrant to

[1] 412 U.S. 218 (1973).

[2] *Id.* at 248–49.

[3] *Id. See also* United States v. Matlock, 415 U.S. 164 (1974) (approving the holding in *Bustamonte*).

[4] Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.
(412 U.S. at 248–49).

[5] *Id.* at 240 n.29.

[6] 384 U.S. 436 (1966).

[7] 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 all particularly describing the place to be searched and the person or things to be seized.
U.S. CONST. amend. IV.

[8] Camara v. Municipal Court, 387 U.S. 523 (1967); Schmerber v. California, 384 U.S. 757 (1966).

[9] In Weeks v. United States, 232 U.S. 383 (1914) the Supreme Court held that evidence seized in violation of the fourth amendment could not be used in a federal prosecution. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled Wolf v. Colorado, 338 U.S. 25 (1949), and held that the fourteenth amendment incorporates full fourth amendment safeguards for state citizens. The Court also ruled in *Mapp* that the exclusionary rule is necessary to guarantee the protections of the fourth amendment.

[10] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Johnson v. United States, 333 U.S. 10 (1948).

be unreasonable.[11] They prefer the intervention of a detached magistrate to insure that the search proceeds upon adequate probable cause and to properly limit the scope of the search.[12] Despite the mandate that searches be conducted pursuant to the warrant procedure, a number of exceptions exist. Searches incident to a lawful arrest,[13] searches conducted while in hot pursuit of an offender,[14] searches to prevent destruction of evidence,[15] and consent searches[16] have been recognized as legitimate exceptions to the warrant requirement.

The law recognizes valid consent searches as an exception to the warrant requirement because of their "inherent reasonableness."[17] In *Bustamonte* the Supreme Court had to determine the boundaries of such reasonableness. This determination, however, was complicated by *Miranda*. There the Court announced that an individual placed under arrest or brought into custody must be given warnings of his rights to remain silent and to have the assistance of counsel. One of the questions confronted in *Bustamonte* was whether to extend the knowing and intelligent waiver requirement of *Miranda*, as well as *Miranda*-type warnings, to noncustodial consent search situations.[18]

---

[11] Katz v. United States, 389 U.S. 347, 357 (1967).

[12] The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or by a government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[13] *See* United States v. Robinson, 414 U.S. 218 (1973) (where there is a lawful custodial arrest, full search of the subject is not only an exception to the warrant requirement, but also is a "reasonable" search under the fourth amendment); Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest is limited to the area within which the arrestee can "reach" for a weapon, but if police wish to search beyond the area in the immediate control of the accused they must secure a warrant).

[14] Warren v. Hayden, 387 U.S. 294 (1967) (police in hot pursuit of a suspect may enter a home without a warrant and look anywhere within premises where offender may be hiding; moreover, the fact that the suspect is not found inside will not require the officers to overlook evidence in "plain view" within the premises). *Cf.* Chappel v. United States, 342 F.2d 935 (D.C. Cir. 1965) (search in "hot pursuit" permitted).

[15] Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of vehicle permitted after police impounded it); Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of a vehicle upon probable cause that it contained contraband was allowable because of vehicle's mobility). *See also* United States v. Johnson, 467 F.2d 630 (2d Cir. 1972) (evidence contained in suitcases left out in public where anyone might take them); State v. Trantola, 461 S.W.2d 848 (Mo. 1971) (evidence burning); State v. Murphy, 2 Ore. App. 25, 465 P.2d 900 (1970) (fingernail scrapings).

[16] Vale v. Louisiana, 399 U.S. 30 (1970); Bumper v. North Carolina, 391 U.S. 543 (1968); Katz v. United States, 389 U.S. 347 (1967).

[17] Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964).

[18] Following the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court sought to safeguard an individual's fifth and sixth amendment rights by requiring warnings, some commentators predicted that the Court would be equally vigilant in safeguarding an individual's fourth amendment rights in consent search situations. *See* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS, (2d ed. 1967). Inbau and Reid even recommended that police officers advise suspects of their constitutional right to refuse to let an officer search when he does not present a warrant. *Id.* at 183–84. In Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 158 (1967), it was not only predicted that the same kind of knowing waiver as *Miranda* required would be applied to consent searches, but also a *Miranda*-type warning was suggested. Shortly after *Miranda*, a few courts held that it must be shown that a person was aware of his right to refuse consent before the right can be waived. *See, e.g.*, United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966), and United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968). However, these rulings were not adopted in the subsequent decision of the Third Circuit in Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969). In United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966) there was dictum to the effect that warnings are necessary for an effective fourth amendment consent, but the Seventh Circuit subsequently called that position of "dubious propriety." Byrd v. Lane, 398 F.2d 750, 755 (7th Cir. 1968). Hence, while some of the early authorities indicated the courts might extend *Miranda's* requirement of a knowing and intelligent waiver with its commensurate warnings to cover the fourth amendment, most courts rejected this prop-

III. Schneckloth v. Bustamonte

A. Facts and Procedural History

An automobile was stopped at 2:40 a.m. by a policeman when he observed that the car's right headlight and license plate light were burned out. Bustamonte was one of six persons in the vehicle. The driver of the car did not have a driver's license, but another passenger, Alcala, produced one, explaining that the car was his brother's. All six occupants got out of the car at the officer's request. After two more policemen arrived, the officer asked Alcala if he could search the car.[19] The officer's uncontradicted testimony was that no one was threatened with arrest[20] prior to the request and that the situation was "all very congenial."[21] The driver testified that Alcala consented to the search and that he offered to help with it. He even opened the trunk and the glove compartment. The officers found three checks wadded up under the left rear seat. They had been stolen previously from a car wash.[22]

Bustamonte was charged and tried in a California state court with possession of a check with intent to defraud.[23] He moved to suppress the introduction of the checks into evidence,[24] arguing that the state had failed to meet its burden of proving that Alcala's consent to the search of the car had been voluntary.[25] The trial judge denied the motion, and Bustamonte was convicted. The California Court of Appeals affirmed, concluding that in light of all the circumstances the defendant had voluntarily consented to the search.[26] The California Supreme Court denied review,[27] and Bustamonte sought a writ of habeas corpus in federal district court, which also denied his petition.[28] Bustamonte then appealed to the United States Court of Appeals for the Ninth Circuit.[29] It set aside the district court's ruling and remanded the case for further proceedings.[30] The state petitioned the United States Supreme Court for a writ of certiorari to decide whether the test used by the circuit court to determine valid consent was, in fact, required by the fourth and fourteenth amendments.[31]

B. Voluntariness as the Standard

The Supreme Court reversed the court of appeals by a vote of six to three.[32] Justice Stewart, writing for the majority, stated that the issue before the Court was what the state had to establish in order to meet its burden[33] of proving that consent had been voluntarily given.[34] In approaching this question, Justice Stewart examined a line of cases in which the Supreme Court had developed a voluntariness standard for determining the admissibility of confessions.[35] He noted that the confession

osition. *See, e.g.*, Leeper v. United States, 446 F.2d 281 (10th Cir. 1971); United States v. Noa, 443 F.2d 144 (9th Cir. 1971); United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970); United States v. Goosbey, 419 F.2d 818 (6th Cir. 1970); United States v. Vickers, 387 F.2d 703 (4th Cir. 1967); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967).

[19] The prosecutor admitted that there was no probable cause for the search and that no warrant was obtained. The Supreme Court's recent holding in United States v. Robinson, 414 U.S. 218 (1973) would not be applicable to the present case. *Robinson* involved a search of the person incident to a traffic arrest and not simply the issuance of a citation for missing lights and lack of a driver's license, as in *Bustamonte*.

[20] While no one was under arrest, none of the subjects was warned of his constitutional right to refuse consent. No court ever determined whether Alcala, the member of the group who consented to the search, knew of his right to refuse consent.

[21] 412 U.S. at 220.

[22] *Id.*

[23] Cal. Penal Code § 475(a) (1970).

[24] Bustamonte was a third party to the search. His standing to object to the introduction of the seized evidence was based on Fed. R. Crim. P. 41(e). *See* Jones v. United States, 362 U.S. 257 (1960) (anyone legitimately on premises where search occurs may attack its validity via motion to suppress when the fruits of that search are offered in evidence against him in a case based upon possession). *See also* Brown v. United States, 411 U.S. 223 (1973); Simmons v. United States, 390 U.S. 377 (1968).

[25] Under Mapp v. Ohio, 367 U.S. 643 (1961) illegally seized evidence is inadmissible in state prosecutions.

[26] People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).

[27] The order of the California Supreme Court is not reported.

[28] The District Court's decision is not reported.

[29] Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971).

[30] The Ninth Circuit remanded on the grounds that the state had the burden of proving that the consent to the search had been given with the understanding that it could be freely and effectively withheld. The District Court never reached this issue. *See* note 20 *supra*.

[31] Schneckloth v. Bustamonte, 405 U.S. 953 (1972).

[32] Justices Douglas, Brennan, and Marshall dissented, each writing a separate opinion. In a con-

cases reflected an accommodation of the need for police questioning as a mechanism for law enforcement with a need to prevent unfair and even brutal police tactics.[36] Justice Stewart stressed that these cases did not yield a talismanic definition of voluntariness, automatically applicable to the variety of situations where the question arose.[37] Nor did voluntariness literally mean a "knowing choice." [38] The test in these cases was whether the confession was the product of an essentially free and unconstrained choice by its maker.[39]

Justice Stewart found that the voluntariness of a confession is a question of fact to be determined from the totality of the circumstances.[40] He noted that no single factor has ever been determinative, and that knowledge of the right to remain silent has been only one factor considered in deciding whether a confession was voluntary.[41] In none of the confession cases did the due process clause require the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that the police asked him.[42]

Justice Stewart then moved from the confession cases to cases dealing with consent searches.[43] As with police questioning, he found that two competing concerns must be balanced—the legitimate need for searches and the need to prevent official coercion.[44] Together, the prior consent search cases and the competing concerns led him to the conclusion that voluntariness of a consent search should be given the same meaning as it had in the pre-*Miranda* confession cases. Hence, whether consent is "in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." [45]

Justice Stewart's result may be correct, but he seems to have arrived at it through incorrect reasoning. For instance, he should not have imported the confession standard into consent searches. In the consent search cases he cited, the Court did not undertake a totality of the circumstances analysis.[46] On the contrary,

---

curring opinion, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, accepted the majority opinion written by Justice Stewart but would have held that federal collateral review of a state prisoner's fourth amendment claims should be confined to the question of whether he was provided with a fair opportunity to raise such claims and have them adjudicated in state courts. Justice Powell argued that federal habeas corpus relief should not be generally available for state prisoners whose petitions are based upon the admission of evidence obtained in violation of the fourth amendment. Justice Blackmun, concurring in a separate opinion, agreed with the views stated in Justice Powell's opinion, but noted that it was unnecessary to reach the issue discussed by Justice Powell in the present case.

[33] In Bumper v. North Carolina, 391 U.S. 543 (1968) the Court held: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Id.* at 548.

[34] 412 U.S. at 223.

[35] *Id.* at 223–27. The confession cases examined by Justice Stewart began with Brown v. Mississippi, 297 U.S. 278 (1936) (a confession in a state criminal case obtained by brutality and violence was held invalid under the due process clause of the fourteenth amendment), and ended with Escobedo v. Illinois, 378 U.S. 478 (1964) (confession held invalid where defendant was denied request to consult with attorney). *See also* Miranda v. Arizona, 384 U.S. 436, 507 n.3 (1966) (Harlan, J., dissenting); Spano v. New York, 360 U.S. 315, 321 n.2 (1959) (citing 28 cases).

[36] 412 U.S. at 224–25.

[37] *Id.* at 224, *citing* Columbe v. Connecticut, 367 U.S. 568 (1961).

[38] 412 U.S. at 224.

[39] *Id.* at 225.

[40] *Id.* at 227. This was the standard the California courts had applied.

[41] Examples of some of the factors considered are found in the following cases: Reck v. Pate, 367 U.S. 433 (1961) (use of physical punishment such as deprivation of food or sleep); Payne v. Arkansas, 356 U.S. 560 (1958) (lack of education); Fiskes v. Alabama, 352 U.S. 191 (1957) (low intelligence); Haley v. Ohio, 332 U.S. 596 (1948) (youth). *See generally* Miranda v. Arizona, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting) (Justice Harlan discusses the totality of the circumstances test).

[42] 412 U.S. at 226–27. The cases Justice Stewart relied upon preceded *Miranda*.

[43] Bumper v. North Carolina, 391 U.S. 543 (1968); Zap v. United States, 328 U.S. 624 (1946); Davis v. United States, 328 U.S. 582 (1946).

[44] 412 U.S. at 227.

[45] *Id.* Later in the opinion, Justice Stewart stressed that the fourth and fourteenth amendments require that consent not be coerced, by implied threat or covert force. He reiterated that it is the duty of the courts to protect the constitutional rights of citizens. *Id.* at 228–29, *citing* Boyd v. United States, 116 U.S. 616, 635 (1886).

[46] In Davis v. United States, 328 U.S. 582 (1946) the defendant was convicted of violating rationing regulations when he sold gas without requiring the necessary coupons. On appeal the issue was whether the defendant had voluntarily consented to the search which produced the evidence

many of the cases examined only one factor.[47] Moreover, he failed to recognize that *Miranda* clearly rejected the old voluntariness test for confession cases.[48] The object of *Miranda* was to establish prophylactic rather than *post hoc* safeguards to protect the privilege against self-incrimination and to preserve the right to counsel. By relying on the pre-*Miranda* confession cases, Justice Stewart seems to have ignored their repudiation. He may have even been implying that *Miranda* should be swept aside and that the old voluntariness be brought back for confession cases. As will be discussed later, Justice Stewart was more justified when he reasoned that custodial interrogation is distinguishable from a noncustodial search because the latter is not inherently coercive while the former is. *Miranda* only requires that the subject be advised of and aware of his constitutional rights when he is in custody.

C. Knowledge of the Right to Refuse Consent

After concluding that the totality of the circumstances was the proper test to use in consent search cases, Justice Stewart considered the question of whether proof of knowledge of the right to refuse consent was required by the voluntariness standard.[49] He answered it in part by analogizing to the pre-*Miranda* confession cases and examining prior consent search cases. Justice Stewart found that a suspect's knowledge of the right to remain silent had never been determinative of whether a confession was the result of a free and unconstrained choice.[50] However, as Justice Marshall pointed out in his dissenting opinion, the confession cases never dealt with the question of a suspect's knowledge of the right to remain silent.[51] The issue was instead whether the police coerced the suspect into confessing.[52] In addition, in *Miranda* the Supreme Court announced the proof of knowledge requirement, and thus facilitated the prosecution's burden of proof by requiring objective, procedural safeguards prior to questioning a defendant in custody. Hence, knowledge of the right to remain silent became determinative of whether a confession was voluntary.[53]

Justice Stewart stated that implicit in the consent search cases was the notion that knowledge of the right to withhold consent was not a prerequisite to voluntary consent.[54] These decisions, however, provide little, if any, support for the proposition that knowledge is not a prerequisite to consent. Both *Davis v. United States* and *Zap v. United States* were

---

used for conviction. While the Court mentioned the totality of the circumstances test, the decision turned on the fact that the coupons were the property of the Office of Price Administration and therefore subject to inspection at any time. Although the coupons were in the custody of a private citizen, since they were considered public property the defendant could not refuse a request for their production. Hence the question of adequate consent was irrelevant. In Zap v. United States, 328 U.S. 624 (1946) FBI agents, when auditing defendant's books and records, found evidence indicating that Zap had attempted to defraud the Government. The Supreme Court held that a private citizen who had executed a wartime government contract waived his right to privacy. Zap could not object to a search made pursuant to a power of inspection. In Bumper v. North Carolina, 391 U.S. 543 (1968) four policemen told the defendant's grandmother they had a search warrant and thereby obtained permission to search her home. Although the warrant later proved to be invalid, a rifle found during the search was introduced into evidence. The trial court considered the consent given to be voluntary. The Supreme Court reversed, holding that submission to a claim of lawful authority did not constitute valid consent. Hence, in *Davis* and *Zap* it was unnecessary to decide the issue of consent since the cases turned on the right of inspection in special circumstances. *Bumper* turned on only one key factor rather than an examination of the totality of the circumstances.

[47] *See* note 46 *supra*. Likewise, in Johnson v. United States, 333 U.S. 10 (1948), the Court did not utilize a totality of the circumstances standard as suggested in *Bustamonte*. In *Johnson* the police simply claimed authority to search, when in fact they lacked such authority. It was only this fact that conclusively established that no valid consent was given not the totality of the circumstances.

[48] *See* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1966): "I venture to say that only one with an extravagant faith in the actual operation of the 'totality of the circumstances' test could fail to see that the safeguards provided by the old test were largely 'illusory.'"

[49] 412 U.S. at 229.

[50] *Id.* at 226–27.

[51] *Id.* at 280–81 (Marshall, J., dissenting).

[52] "[T]he questions of compulsion and violation of the right itself are inextricably intertwined. The cases involving coerced confessions therefore pass over the question of knowledge as irrelevant, and turn directly to the question of compulsion." *Id.* at 281.

[53] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[54] 412 U.S. at 234.

decided on the ground of the right of the government to make an inspection; hence, the defendants' knowledge of the right to refuse was irrelevant. In *Bumper v. North Carolina,* the knowledge issue did not have to be reached since the policeman's representation that he had a valid warrant when, in fact, he did not was clearly coercive.[55]

Practical considerations also made Justice Stewart reluctant to import a requirement that a subject be aware of his right to refuse consent. He was fearful that a proof of knowledge requirement would cast serious doubt on whether consent searches could be conducted in the future.[56] Moreover, even if it could be shown that there was no coercion in a given case, the prosecution would still have the "near impossible burden" of demonstrating that the subject of the search in fact had known of his right to refuse consent.[57]

Justice Stewart conceded that the problem would not exist if the officer requesting consent were required first to inform the subject explicitly of his constitutional right to withhold it. Noting that a number of courts had rejected this position,[58] he concluded that it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. He emphasized that most consent searches occur in informal and unstructured atmospheres such as in a person's home or on the highway. They are unlike the structured atmosphere of a trial or the inherently coercive aura of custodial interrogation. Consequently, to require warnings would interfere with standard investigatory practices of law enforcement agencies.[59] Finally, Justice Stewart suggested that a warning, absent an on-the-scene determination of an individual's understanding of his rights, would not insure the effectiveness of fourth amendment protections. He implied that consent might be found in all cases where the warning was given—whether or not the individual was truly aware of his rights.[60]

As Justice Marshall pointed out in his dissent, there are a number of ways to demonstrate a subject's awareness of his right to refuse consent.[61] Justice Stewart conceded that a warning requirement would be the easiest method. Although he rejected such a warning as too burdensome, he did not suggest that *Miranda* warnings hinder police investigation. Logically when an officer requests permission to search, it would not seem burdensome to require him to tell the subject he need not permit the search.[62] Moreover, even assuming *arguendo* that there is a burden in delivering a warning, it should not outweigh the subject's need for knowledge of his rights.[63] Finally,

[55] *See* note 46 *supra. See also* 412 U.S. at 280–81 (Marshall, J., dissenting).

[56] 412 U.S. at 229.

[57] *Id.* at 230. Justice Stewart suggested that any defendant who was the subject of a search could easily and effectively frustrate the introduction into evidence of the fruits of that search by denying that he in fact knew he could refuse to consent.

[58] *See* note 18 *supra.*

[59] For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial, where, assisted by counsel if he chooses, a defendant is informed of his trial rights. . . . And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona* . . . we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

412 U.S. at 231–32.

[60] *Id.* at 245.

[61] For a discussion of other methods the prosecution might employ to demonstrate that a subject was aware of the right to refuse consent see 412 U.S. at 285–87 (Marshall, J., dissenting).

[62] The Federal Bureau of Investigation has routinely informed subjects of their right to refuse consent without any adverse effects on investigation. *See* Comment, *Consent Searches: A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130, 143 n.75 (1967), citing a letter from J. Edgar Hoover.

[63] Justice Marshall attacked the alleged impracticality of warnings in the following harsh language:

I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying on the knowing relinquishment of constitutional

contrary to Justice Stewart's apprehension, a warning in and of itself would not automatically create a valid consent to search. The warning would only be a threshold requirement to insure that the subject is aware of his right to refuse. The question of police coercion would still remain, as would the need to examine the actual abandonment of the right.[64]

D. Consent as a Waiver

Justice Stewart dealt next with the proposition that consent is a waiver of a person's rights under the fourth and fourteenth amendments.[65] Bustamonte argued that by allowing the police to conduct a search, an individual waives whatever right he had to prohibit the search. Under the mandate of *Johnson v. Zerbst*,[66] which concerned the waiver of the right to counsel at a criminal trial, Bustamonte contended that to establish such a waiver the state must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." [67] Justice Stewart noted that the language of some previous decisions might seem to require an intentional and knowing waiver in consent search situations. He found, however, that the *Johnson* doctrine had been applied only to rights designed to insure the fairness of a criminal trial and the reliability of the truth-determining process.[68] He stated that the protections of the fourth amendment are of a wholly different nature and have nothing to do with promoting the fair ascertainment of truth at a criminal trial.[69] The purpose of the fourth amendment is to protect the privacy of citizens. Justice Stewart concluded that the reasons which require a knowing waiver in fair trial situations were absent in privacy cases, and that there was no reason to extend the "knowing waiver" principle.[70]

Justice Stewart correctly noted that in most cases the fourth amendment protections do not promote the fair ascertainment of truth at a criminal trial, but rather the security of one's privacy against unreasonable invasions by the police.[71] Moreover, Justice Stewart was also correct in finding that most of the case law applying the *Johnson* test of knowing and intelligent waiver test concerns the safeguarding of rights associated with the criminal trial. He did not mention, however, that none of the decisions limit the requirement of knowledge to those rights which guarantee a fair trial.[72] On the contrary, beginning with *Johnson*, the cases turn on whether the right is "fundamental." [73] For example, in *Glasser v.*

---

rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of individuals go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

412 U.S. at 288 (Marshall, J., dissenting.)

[64] *See* 412 U.S. at 281 (Marshall, J., dissenting), where he used *Miranda* to show that Justice Stewart's fears were groundless.

[65] *Id.* at 235.

[66] 304 U.S. 458 (1938).

[67] Justice Brennan, in his dissenting opinion, took a similar position:

The Court holds today that an individual can effectively waive [the right to be free of unreasonable searches] even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.

412 U.S. at 277 (Brennan, J., dissenting).

[68] *Id.* at 236. Justice Stewart noted that *Johnson* concerned the waiver of the right to counsel at a criminal trial and that the *Johnson* principle had been applied to waiver of counsel at other stages of the trial process. *See, e.g.*, United States v. Wade, 388 U.S. 218 (1967) (line-up); Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation); Von Moltke v. Gillies, 332 U.S. 708 (1948) (entering of guilty plea). The principle has also been applied to waiver of the right to confront witnesses, Brookhart v. Janis, 384 U.S. 1 (1966); waiver of the right not to be placed twice in jeopardy, Green v. United States, 355 U.S. 184 (1957); and to waiver of the right to a jury trial, Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942).

[69] 412 U.S. at 241.

[70] *Id.*

[71] *But see* Comment, *The Doctrine of Waiver and Consent*, 49 NOTRE DAME LAW. 891, 902–03 (1974) where it is suggested that the infringement upon a defendant's rights in a search situation is especially egregious where he must stand trial for possession of the very evidence illegally seized.

[72] *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) (waiver of constitutional rights not only must be voluntary but also must be a knowing intelligent act done with sufficient awareness of the relevant circumstances and likely consequences).

[73] A waiver of a constitutionally protected interest and "acquiesence in the loss of fundamental rights" cannot be presumed. 304 U.S. at 464.

United States,[74] the Court said: "To preserve the protection of the Bill of Rights . . . we indulge every reasonable presumption against waiver of fundamental rights." [75] If the focus is actually on fundamental rights, what is it about the fourth amendment that makes it less fundamental than other amendments? Justice Stewart in *Bustamonte* failed to reveal what makes an uninformed waiver of a fourth amendment right fair and the uninformed waiver of a "trial right" unfair.

Justice Stewart also overlooked that the Supreme Court itself has recognized that the fourth and fifth amendments are equally vital when he distinguished between the "truth ascertaining" amendments and the privacy protections of the fourth amendment. This equality of stature was noted in *Mapp v. Ohio*[76] where the exclusionary rule of *Weeks v. United States*[77] was made applicable to the states.[78] In *Boyd v. United States*[79] the Court announced that the fourth and fifth amendments express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." [80] In light of the Court's approach in the past to the rights protected under the fourth and fifth amendments, it would seem illogical to regard one as more deserving of judicial protection than the other. If the fifth amendment is deserving of the knowing and intelligent waiver requirement, the fourth amendment is equally so.[81]

E. Custodial and Noncustodial Consent Searches

After distinguishing *Miranda* earlier in the opinion, Justice Stewart considered whether the Court should require a knowing waiver for consent searches as a means of insuring against police coercion, just as it had done in the case of custodial interrogation for the confession cases.[82] Viewing noncustodial consent searches as closely analogous to investigative questioning, he concluded that the knowing waiver requirement is unnecessary. He reasoned that there is no equivalent danger of police coercion inherent in a noncustodial request for consent to search such as that made in *Bustamonte*.[83] He explicitly left open the question of whether a knowing and intelligent waiver might be required if consent to search were sought after the subject was taken into custody.

> [T]he present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the "consent" to search was given by a person in custody.[84]

According to some commentators,[85] Justice Stewart was on solid ground when he concluded that the knowing and intelligent waiver requirement need not be applied to noncustodial consent searches. In *Miranda*, the Court found that the techniques of police questioning and

[74] 315 U.S. 60 (1942).
[75] *Id.* at 70.
[76] 367 U.S. 643 (1961).
[77] 232 U.S. 383 (1914).
[78] We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberties secured only after years of struggle . . ." They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. (citations omitted).
Mapp v. Ohio, 367 U.S. 643, 656-57 (1961).
[79] 116 U.S. 616 (1886).
[80] *Id.* at 630. *But cf.* Schmerber v. California, 384 U.S. 757, 761 (1966) (consent to search is not evidence of a testimonial or communicative nature).
[81] A strict fourth amendment waiver standard would, in effect, operate as an exclusionary rule. By lowering the standard for waiver of fourth amendment rights the Court may be attempting to limit the scope and force of the exclusionary rule. Some members of the Court have expressly stated their disenchantment with the rule. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C.J., dissenting).
[82] *See* Miranda v. Arizona, 384 U.S. 436, 472 (1966).
[83] 412 U.S. at 247.
[84] *Id.* at 240 n.29.
[85] *See* Note, *Voluntariness of Consent to Search*, 87 HARV. L. REV. 213, 218 (1974).

the nature of custodial surroundings are inherently coercive.[86] Consequently, the warnings are to serve as a prophylactic device to dispel the compulsion inherent in custodial situations.[87] Justice Stewart therefore appears correct in likening a noncustodial search to noncustodial interrogation. If noncustodial interrogation requires neither a knowing waiver nor *Miranda* warnings, such waiver and fourth amendment warnings are not mandated in a noncustodial consent search situation.[88] Under this reasoning, Bustamonte and the other members of the party did not have to be warned of their fourth amendment rights because they were not in custody.

Regardless of whether Justice Stewart was correct in making the distinction between custodial and noncustodial consent searches,[89] the distinction stands. Taking his reasoning to its logical conclusion, a knowing waiver should at least be required in a custodial consent search situation. Justice Stewart himself acknowledged that the considerations would be different when the subject is in custody. It is thus possible that the Court may require a showing that a subject who assents to a search while in custody was aware of, or advised of, his right to refuse before the consent will be considered valid.

IV. Custodial Consent Searches: Post-Bustamonte Developments [90]

The Supreme Court has not yet answered the question left open by *Bustamonte*: whether a custodial consent search requires proof of knowledge of the right to refuse. However, a number of federal courts have faced the issue. Surprisingly, no court appears to have held, as a matter of law, that a subject need be aware of or advised of his right to refuse consent when he is in custody.[91] Instead of preserving the distinction between custodial and noncustodial consent searches, the courts have blurred it. In short, whether or not the subject is in custody, the courts are applying a totality of the circumstances test. Three general approaches to custodial consent searches have emerged: a balancing approach, a "constructive notice" approach and the "no warning whatsoever" approach.

A. The Balancing Approach

The balancing approach, as adopted by the

---

[86] 384 U.S. at 458. By "custodial interrogation," the Court meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

[87] *Id.* at 477.

[88] Justice Stewart suggested that noncustodial searches will normally occur on a person's own territory absent an inherently coercive atmosphere. 412 U.S. at 247.

[89] Some commentators have suggested that the Court's separating noncustodial and custodial searches is a distinction without a difference. They argue that *Miranda* does not solely rest on police coercion. First, *Miranda* represents a move away from the subjective due process test of waiver of constitutional rights toward the objective approach requiring knowledge of the right in question. Second, in conjunction with this prophylactic emphasis, *Miranda* indicates that knowledge of the right in and of itself is a threshold requirement of any valid waiver of that right. *See* Note, *Schneckloth v. Bustamonte: A New Era in Consent Searches?*, 35 U. Pitt. L. Rev. 655 (1974); *cf.* Comment *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 Colum. L. Rev. 130 (1967).

Certainly, the language of the Court in *Miranda* indicates that the Court was not only concerned with police coercion but also with another vital proposition—that a defendant's statements should not be used against him unless they were made while he was aware of his constitutional right to remain silent and cognizant of the consequences of waiving that right. The Court stated that any statements made should "truly be the product of... free choice" (384 U.S. at 458)—a choice which is made "knowingly and competently." *Id.* at 465. The Court also stated: "For those unaware of the privilege [against self-incrimination] the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." *Id.* at 468. Moreover, the Court stated: "This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.* at 469. Finally, the Court indicated that a waiver should not be made in ignorance of the right to counsel because: "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Id.* at 472.

[90] For a general discussion of the validity of consent searches on an individual in the custody of law officials see Annot., 9 A.L.R. 3d 858 (1966).

[91] United States v. Watson, No. 73-1539 (9th Cir.), 14 BNA Cr. L. Rep. 2299 (March 20, 1974) erroneously cited the case as holding as much. *See, e.g.*, United States v. Garcia, 496 F.2d 670, 673 n.8 (5th Cir. 1974); State v. Price, 521 P.2d 376, 377 n.4 (Hawaii 1974). The full opinion in *Watson* was recently published in the official reporter and the case is clearly consistent with the balancing approach of the Ninth Circuit. *See* 504 F.2d 849, 853 (9th Cir. 1974).

Sixth[92] and Ninth Circuits,[93] does not differentiate between consent to search given before or after custody/arrest.[94] "Arrest is but one factor, albeit a critical one, in determining whether or not the consent was voluntary."[95] Hence, although the presence or absence of custody alone is not controlling as a matter of law, the courts adopting the balancing approach have themselves scrutinized the facts to insure that the coercive factors do not outweigh the non-coercive ones.

United States v. Rothman[96] serves as an excellent example. Here the appellant was convicted for possession of marijuana with intent to distribute.[97] He argued that the marijuana introduced into evidence should have been suppressed as the fruit of an improper search. After going through a magnetometer successfully at an airport, Rothman was detained by an officer. He eventually grabbed the deputy's hand and jerked him. He was arrested for assaulting a federal officer, handcuffed, and given his *Miranda* warnings.[98] Rothman's checked luggage was removed from the plane and brought to the office in which he was being held by the deputy. The deputy asked him for permission to search, and Rothman refused. Thereafter, an FBI agent was called and he arrived and interrogated Rothman. The agent then went into an adjoining room. After the agent left, Rothman told the deputy to go ahead and open the bags. The deputy refused, saying that they would probably get a search warrant.[99] Rothman then took the keys lying on the desk and opened the luggage which contained thirty-nine kilos of marijuana.

The trial court held that there was voluntary consent, based primarily on Rothman's original refusal to permit the search. It reasoned that since Rothman was aware of his option to refuse, his eventual consent was voluntary.[100] The Ninth Circuit reversed the trial court and noted that *Bustamonte* held that knowledge of the right to refuse is a factor to be taken into account, but that the prosecution is not required to demonstrate such knowledge as a prerequisite to voluntary consent. It continued, however, by emphasizing that

> *Bustamonte* cuts two ways. The knowledge of the right to refuse consent is no longer a necessary condition for valid consent, but neither is it necessarily a sufficient condition. It is only an element to be considered as a part of the "totality of the circumstances."[101]

Hence, the fact that the appellant might not have been aware of his right to refuse would not necessarily mean he was coerced. On the other hand, because the trial court found he was aware of his option to refuse, it did not necessarily mean that his consent was voluntary.

Pursuant to the reasoning of Justice Stewart in *Bustamonte,* the court stated that it had to accommodate two competing concerns—the need for searches and the importance of assuring the absence of coercion.[102] After a "careful sifting of the unique facts of [this] case,"[103] the court determined that the balance was in favor of the policy of assuring the absence of coercion. Coercive elements were present since Rothman had been arrested, handcuffed, and held in *incommunicado* custody prior to opening the bags. Furthermore, although given *Miranda* warnings, he was interrogated for

---

[92] United States v. Hearn, 496 F.2d 236 (6th Cir.), *cert. denied,* 419 U.S. 1048 (1974).

[93] United States v. Heimforth, 493 F.2d 970 (9th Cir.), *cert. denied,* 416 U.S. 908 (1974); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

[94] As used in this context arrest includes custody, but custody does not necessarily include arrest.

[95] 492 F.2d at 1264 n.1.

[96] 492 F.2d 1260 (9th Cir. 1973).

[97] 21 U.S.C. § 841(a)(1) (1970).

[98] 492 F.2d at 1263.

[99] *Id.* In United States v. Agosto, 502 F.2d 612 (9th Cir. 1974) the court held that the statement of an officer that he would obtain a search warrant if consent were not given, and that in the meantime he would secure the garage premises, is not such a lack of voluntariness as a matter of law to vitiate consent. *But see* United States v. Faruolo, 506 F.2d 490, 496–97 (2d Cir. 1974), where Judge Newman, in a concurring opinion, cautioned that he would be inclined to reject a finding of voluntariness obtained in response to statements about the discretionary aspect of a warrant if they did not in some way affirmatively communicate this aspect of the warrant-issuing process. Judge Newman reasoned that the subject is misled into believing the only variable in the choice whether to consent or not is time—rather than the far more important variable of whether the warrant will be issued at all. The subject should not be led to believe that obtaining a warrant is a virtually automatic formality.

[100] 492 F.2d at 1264.

[101] *Id.*

[102] *Id.*

[103] 412 U.S. at 233.

two hours.[104] The court noted that under such an atmosphere the government's burden of proving voluntary consent is heavy.[105] In light of the "totality of the circumstances" test it ruled that it was compelled to hold that "the consent was not voluntary because it was systematically, psychologically coerced."[106]

The court stated that this was not the type of case in which the police officers should rely upon consent to justify a search since they had ample time to get a warrant.[107] Finding no justification for the coercive official tactics which produced the consent, the court held the trial judge's finding of consent was clearly erroneous.[108]

[104] 492 F.2d at 1264.

[105] *Id.* at 1264–65.

[106] *Id.* at 1265. In United States v. Hearn, 496 F.2d 236 (6th Cir. 1974) the court neatly compared the factors tending to establish a voluntary and uncoerced consent with the factors tending to establish an involuntary coercive consent search:

> (a) [the defendant's] having been initially given his *Miranda* advice of rights incident to his arrest on the stolen welder charge; (b) his continued freedom of movement and lack of any physical restraint incident to his arrest upon the stolen welder charge; (c) his presence on his own farm and in familiar surroundings; (d) his acquiescence in the officer's suggestion to 'go look at it' (i.e., the traxcavator) and his affirmative response, 'Well, let's go see it'; and (e) his leading the way to the barn and in mounting the bales of hay in advance of the others.
>
> Upon the other hand, factors tending to establish an involuntary and coercive consent search include: (a) the presence of three law enforcement officers on his farm; (b) his initial arrest upon the stolen welder charge; (c) the suggestion by the officers that the barn be inspected for the presence of the traxcavator; (d) the use by the officers of information gained by a prior unlawful search as the predicate for their suggestion that the barn be inspected for the presence of the traxcavator; and (e) the absence of any warning to the appellant that he had a constitutional right to refuse to consent to a search of the barn.

496 F.2d at 243.

The court concluded that the coercive factors, though some of them were subtle and implicit, would nevertheless substantially outweigh the non-coercive ones. Accordingly, it concluded that the trial court's determination that the consent was freely and voluntarily given was clearly erroneous. *Cf.* United States v. Jones, 475 F.2d 723 (5th Cir.), *cert. denied*, 414 U.S. 841 (1973).

[107] *See* Johnson v. United States, 333 U.S. 10, 15 (1948).

[108] 492 F.2d at 1265. The court also rejected the government's other theories to validate the search: search incident to arrest and administrative search.

Since the voluntariness test of *Bustamonte* was limited to noncustodial consent searches, it would seem that the balancing approach incorrectly handles custodial consent searches. If custodial searches are inherently coercive, then under the mandate of *Miranda* and the reasoning of Justice Stewart in *Bustamonte,* there ought to be some mechanism to dispel that compulsion. Advising the subject of his fourth amendment rights would be the simplest and most effective way to accomplish that goal.

On the other hand, an argument can be made on behalf of the balancing approach. First, it is consistent with *Bustamonte* in that the Court there admonished against the use of mechanical rules in determining voluntariness.[109] Second, the approach is simply an extension of the accommodation between effective law enforcement and non-coercive searches. However, one problem with the balancing approach as applied to custodial consent searches is that it fails to clarify how the accommodation is to be struck.[110] If indeed the government's burden of showing voluntariness is greater when the defendant is in custody, the question remains as to how much greater. Is custody to be given the same kind of weight as other factors which courts must take into account, such as the age of the accused, his educational background, and intelligence?[111] Or should custody be given more weight than the other factors in light of the specter of custodial interrogation and because the police can then more easily influence a subject's decision to consent? If it is to be given more weight, how much and by what standards? It appears that the Ninth Circuit in *Rothman* gave the factor of custody substantial weight, in light of the fact that it reversed the trial court's findings of fact.

A second problem with the balancing approach is suggested by Judge Renfrew's dissent in *Rothman.*[112] He could not agree with

[109] 412 U.S. at 224.

[110] In *Bustamonte* Justice Stewart did acknowledge that "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." 412 U.S. at 229.

[111] *See id.* at 226.

[112] 492 F.2d at 1267. Judge Renfrew is a United States District Judge for the Northern District of California. He sat with the Ninth Circuit by designation.

the majority that the appellant did not voluntarily consent. He vigorously argued that the majority was mistaken in applying the "clearly erroneous" rule to a review of the trial court's finding of fact.[113]

Judge Renfrew criticized the majority for not stating what standard of persuasion should have been applied by the trial court in determining whether consent is voluntary. He noted that generally consent to search without a warrant must be shown by "clear and positive" evidence.[114] He stated that this vague standard may mean a preponderance of the evidence or that it may mean evidence establishing consent beyond a reasonable doubt.[115] Judge Renfrew further suggested that the "preponderance of the evidence" standard was the appropriate one in this case. He attacked the majority's criticism of the trial court's reliance on the appellant's initial refusal to permit a search, since that factor related to the question of his psychology. "This question, involving to a great extent an analysis by the trier of fact of the demeanor of the witness, is best left to the trier of fact. Indeed the 'clearly erroneous' rule is based upon that principle." [116] He concluded that if the preponderance of the evidence rule is the appropriate standard of proof in this kind of case, then reversal was completely unwarranted.[117]

This conclusion led Judge Renfrew to believe that either the majority adopted the reasonable doubt standard or that its holding is founded solely on law and not on facts. He wrote that if it were the former standard, an anomaly had been created since the Ninth Circuit has adopted a preponderance standard for judging voluntariness of confessions.[118] Moreover, even if the reasonable doubt standard were appropriate here, he was not convinced that the trial court's ruling was clearly erroneous.[119]

In the final analysis Judge Renfrew suspected that the majority actually decided the case on the raw principle of law: "No person can voluntarily consent to a search while in custody if the authorities have a reasonable opportunity to obtain a warrant." [120] If this is in fact the rule of the majority, he stated, it created the inconsistent situation in which a defendant in custody could confess to the commission of a crime but not consent to a search.[121] He also noted that such a rule of law was in conflict with *Bustamonte* since the Court admonished against the use of mechanical rules in determining voluntariness.[122]

Arguably, a rule that a person cannot voluntarily consent to a search while in custody if the authorities have a reasonable opportunity to obtain a search warrant is tantamount to requiring a showing of knowledge of the right to refuse consent. The former rule contemplates that if the police have probable cause to search, they should be required to obtain a warrant from a detached magistrate. If the police are not required to obtain a warrant, then requiring knowledge of the right to refuse might be said to replace the need for a magistrate. Under this reasoning, it would appear that Judge Renfrew is incorrect in his conclusion that the majority decided the rule of law he suggested. The majority could just as easily have required warnings or a showing that the accused is aware of the right to refuse consent when the subject is in custody. The majority, however, explicitly repudiated that approach.[123] Therefore, the court either applied the "reasonable doubt" standard, or it applied the "preponderance of the evidence" standard.

If the standard to be applied in the future is one of reasonable doubt, perhaps trial courts should begin with a presumption that the consent to search was involuntary, just as crimi-

[113] *Id.*

[114] Sherrick v. Eyman, 389 F.2d 648, 651 (9th Cir.), *cert. denied*, 393 U.S. 874 (1968).

[115] 492 F.2d at 1267.

[116] *Id.*

[117] According to Judge Renfrew:

> If the preponderance of the evidence rule is the appropriate standard of proof in this case, then reversal is completely unwarranted. The combination of taking the facts in a light most favorable to the government, i.e., stressing the facts supporting voluntariness, and applying the clearly erroneous rule is too great a barrier to overcome for reversal.

Id. at 1267–68.

[118] *See* United States v. Cluchette, 465 F.2d 749 (9th Cir. 1972). *Cf.* Lego v. Twomey, 404 U.S. 477 (1972).

[119] "The reasonable doubt standard would have to arise from consideration of appellant's psychology, a factor which does not leap forth from the printed pages of the record." 492 F.2d at 1268.

[120] *Id.*

[121] *Id.*

[122] *See* 412 U.S. at 224.

[123] 492 F.2d at 1264 n.1.

nal trials favor the defendant by presuming his innocence. As long as the defense raises a reasonable doubt as to the voluntariness of the consent, then the trier of fact should be allowed to find that it was involuntary. On the other hand, if the standard used is that of a preponderance of the evidence, then the trier of fact need only find that it was more likely than not that there was not consent.

Regardless of which standard the court applied, Judge Renfrew is correct in suggesting that the court should have clearly stated which one it applied. Without this clarity, appellate courts may assume the trial courts' role as the finder of fact. As between the "preponderance of the evidence" and the "reasonable doubt" standards, there is little question that the latter would assure greater protection against coercion when the search is conducted while the subject is in custody. If, however, courts are concerned about the possibilities of coercion, it would seem that a prophylactic rule rather than the *post hoc* reasonable doubt standard would be more effective. Such a prophylactic rule may even be required in light of *Miranda*. On the other hand, *Bustamonte* itself seems to call for a "preponderance of the evidence" standard, in light of the accommodation struck between effective law enforcement and uncoerced searches.[124]

B. Combination of Miranda Warnings—Put Subject on Constructive Notice

The second approach is the one taken by the Court of Appeals for the First Circuit in *United States v. Gorman*.[125] Although the case was decided before *Bustamonte*, it specifically answered the question of whether *Miranda*-type warnings are required when a subject is in custody. The *Gorman* decision was adopted by many courts even before *Bustamonte* was decided and court continued to follow it after *Bustamonte*.[126]

In *Gorman* the defendant was arrested and brought to headquarters. He was advised of his right to remain silent, to call an attorney, to have an attorney provided for him if he could not afford one, and of the fact that anything he said might be held against him.[127] At the end of an interview with an FBI agent, he was asked whether he would object to a search of his motel room. He said, "Go ahead; look in the room."[128]

The court recognized that the search was neither incident to an arrest nor pursuant to a warrant. It could only be justified on the ground that Gorman voluntarily consented to it. Distinguishing two other cases[129] where custodial consent searches had been held invalid, the court concluded that the search here was voluntary. It held that

> when the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent. When this is combined with a warning of his right to remain silent and his right to counsel, which would seem in the circumstances to put him on notice that he can refuse to cooperate,

[124] The majority often quotes from . . . *Bustamonte*. That case, however, does not support the majority's decision in that the Supreme Court approached the facts with a much greater willingness to find voluntary consent. Though the respondent in *Bustamonte* was not in custody, there was no evidence that he knew that he could refuse to allow a search. The majority here, in contrast, seems to begin with a presumption of involuntariness. Perhaps, as the majority says, *Bustamonte* cuts both ways, but it does not justify the majority's swath.
492 F.2d at 1268 n.6 (dissenting opinion).

[125] 380 F.2d 158 (1st Cir. 1967).

[126] *See, e.g.*, United States v. De Marco, 488 F.2d 828 (2d Cir. 1973) where the court did not have to reach the question whether fourth amendment warnings would be required if the subject were in custody. In United States v. Kohn, 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd*, 495 F.2d 763 (2d Cir. 1974), the court held that the mere fact that a suspect is under arrest does not negate the possibility of voluntary consent, neither does the suspect's knowledge that the search will almost certainly demonstrate his guilt. *See also* People v. Strawder, 34 Cal. App. 3d 370, 108 Cal. Rptr. 901 (1973); State v. Price, 55 Hawaii 442, 521 P.2d 376 (1974); *cf.* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973); United States *ex rel.* Lundergan v. McCann, 417 F.2d 519 (2d Cir. 1969). The Third Circuit explicitly adopted the *Gorman* approach. Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969). The Seventh and Tenth Circuits have held simply that it is unnecessary to advise the suspect of his right to refuse, even when he is in custody, for there to be valid consent. *See* Hayes v. Cady, 500 F.2d 1212 (7th Cir. 1974); United States v. Cage, 494 F.2d 740 (10th Cir. 1974).

[127] Miranda v. Arizona, 384 U.S. 436 (1966).

[128] 380 F.2d at 161.

[129] *See* Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States 190 F.2d 649 (D.C. Cir. 1951).

we think it fair to infer that his purported consent is in fact voluntary.[130]

The court stated that it could not accept the suggestion that a specific warning of fourth amendment rights is necessary to validate a warrantless search after the suspect has been arrested.[131] The court reasoned as follows:

> Although the analogy with *Miranda* . . . has a surface plausibility, we do not think that the *Miranda* prescription, formulated to give threshold warnings of fifth and sixth amendment rights at the earliest time in a critical proceeding, must or ought to be mechanistically duplicated when circumstances indicate the advisability of requesting a search.... To single out for further warning a request to search premises of an accused is to assume that a different order of risks has not been covered at the threshold. But that things which might be found in a search could be used against an accused seems implicit in the warning of the right to remain silent which, as the Court observed, is calculated to make him "more acutely aware * * * that he is not in the presence of persons acting solely in his interest." [132]

The court also distinguished between the purposes of the fifth and sixth amendments on the one hand and the fourth on the other. It stated that *Miranda* is concerned with the exclusion of unreliable evidence, such as a confession stemming from fear or force, the exclusion of self-incriminating statements whether reliable or not, and the need to assure a defendant he may have a lawyer before any further interrogation. The rules governing searches are concerned with the maintenance of civilized standards of police practice.[133] The court concluded that the objective of this fourth amendment policy seems to be achieved

> when the police have given the basic *Miranda* warnings, when a defendant subsequently voluntarily submits to an orderly interrogation free from any coerciveness other than that implicit in the fact of arrest or custody, when a straight forward request for permission is made, and when an unambiguous and positive response is received.[134]

[130] 380 F.2d at 163–64.
[131] *Id.* at 164.
[132] *Id. Cf.* 384 U.S. at 469.
[133] 380 F.2d at 164.
[134] *Id.*

The reasoning in *Gorman* is very similar to that subsequently adopted by the Supreme Court in *Bustamonte*.[135] There the Court emphasized that the exclusionary rule, prohibiting the introduction of illegally procured evidence, is not designed to preserve a fair trial, but to inhibit illicit police practices. In contrast, where knowledge of a right is necessary for waiver, there has been a danger that without the requirement, unjust convictions might result. For example, an unknowing waiver of counsel might well mean the imprisonment of an innocent person. When fourth amendment rights are waived without awareness of the right to refuse consent, the argument runs that there is no danger of yielding untruthful information.[136]

In arriving at their decisions, both courts sought to distinguish between the rights protected by the fourth amendment and those which relate to the guarantee of a "fair trial." This distinction is not adequately discussed by either court, and it appears to be based merely on the substantive content of the respective constitutional rights rather than on the fundamental nature of the liberties which they guarantee. Both *Gorman* and *Bustamonte* concluded that the purpose of the *Johnson v. Zerbst* knowing waiver requirement is to protect the fairness of a trial. As indicated earlier, however, the real purpose of the standards in *Johnson* is to protect *fundamental* rights.[137] Perhaps the courts have decided that the language in *Johnson* was mere rhetoric. Yet they continue to insist that the fourth amendment is no less fundamental.[138]

Another problem with the *Gorman* approach is that it erroneously assumes that the Court in *Miranda* was only concerned with the preservation of the right to a fair trial. Such an assumption overlooks one of the prime bases for the decision in *Miranda*. While it is true that the *Miranda* warnings help to reduce the possibility of an unrealiable confession, the major

[135] "We therefore see no reason in policy or precedent to automatically borrow a procedure adapted to one set of constitutional rights at one stage of a criminal proceeding and apply it to a quite different right, serving quite different purposes, at another stage." *Id.*
[136] 412 U.S. at 235–46.
[137] *See* note 73 *supra.*
[138] *See* 412 U.S. at 248.

objective of the decision was to prevent physically and psychologically coercive police tactics. The *Miranda* warnings were conceived of as a mechanism to reduce the potential for abusive police behavior. The Court in *Miranda* specifically pointed out that the constitutional foundation underlying the privilege against self-incrimination is

> the respect a government—state or federal—must accord to the dignity and integrity of its citizens. . . . [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[139]

Consequently, if *Miranda* was intended to curtail abusive police practices, it can not be said that the fifth amendment preserves a fair trial, while the fourth does not. Furthermore a trial, is just as tarnished by the introduction of evidence seized in violation of an individual's constitutional rights,[140] as it is by the admission into evidence of a coerced confession. The question then is not whether the confession or the evidence is reliable, but whether it was obtained by coercing the defendant and capitalizing on his ignorance.[141]

Although the *Gorman* approach perceives the fourth and fifth amendments as having different purposes, many courts continue to hold that *Miranda* warnings coupled with the request for permission to search are all that is required to validate a custodial consent search. The theory is that the warnings and the request for permission give the defendant constructive knowledge that he may refuse to consent.[142] This may be true, yet the theory can just as easily cut the other way. The accused might reason that, since he has been told that he has a right to remain silent and a right to a lawyer and since he has not been told that he can refuse the search, he therefore must allow it. Or he might simply perceive the request to search as a "formality."

Requiring a fourth amendment warning may be the only way to insure that the accused has consented to the search with full knowledge. Without an explicit fourth amendment waiver when the defendant is in custody, it is difficult to know whether the defendant, in fact, voluntarily waived the right. Moreover, such a fourth amendment warning would not be unduly burdensome to police investigations and could easily be appended to the request to search.[143]

C. Rejection of "Constructive Notice" Approach—No Warning Required

Although initially intimating that it would follow the *Gorman* approach, the Fifth Circuit has taken what appears to be the least consistent position with *Miranda* and *Bustamonte* on the question of custodial consent searches. In *United States v. Luton*,[144] the defendant was convicted of possession of an unregistered fire arm.[145] On appeal he contended that as a matter of law he had the right to withhold consent and require the police to obtain a search warrant upon a showing of probable

[139] 384 U.S. at 460.

[140] This tarnishing is especially true when the charge is possession. *See* note 71 *supra*.

[141] The sixth amendment clearly does not protect the fairness of a trial in the sense of deterring coercive police behavior. Rather it is through the guarantees of counsel, the right to a jury and to confront witnesses that the accused is afforded a fair trial. In short, he is insured that he will be represented by a lawyer who knows the rules of the trial system and that he will have an opportunity to present his side of the story to an impartial finder of fact.

[142] Such a theory implies that the fourth and fifth amendments overlap. The fifth amendment warning against self-incrimination is apparently sufficiently encompassing to protect fourth amendment guarantees. The theory, however, appears to directly conflict with the court's conclusion that the amendments have different purposes and Justice Stewart's suggestion in *Bustamonte* that the protections of the fourth amendment are of a "wholly different order." 412 U.S. at 242.

[143] The reluctance of courts to give consent searches greater constitutional protection is puzzling in light of Mr. Justice Goldberg's statement in Escobedo v. Illinois, 378 U.S. 478 (1964):

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

378 U.S. at 490.

[144] 486 F.2d 1021 (5th Cir. 1973), *cert. denied*, Luton v. Mississippi, 417 U.S. 920 (1974).

[145] 26 U.S.C.A. § 5861 (1970). The weapon was discovered in the trunk of the defendant's car during a search following his arrest for state burglary charges.

cause.[146] He sought to distinguish *Bustamonte* on the ground that it dealt only with consent given by an individual who was not in custody. He argued that custody is such an inherently coercive condition that one subjected to it must be specifically informed of his rights before he can waive them.[147]

The court replied that this argument was without merit in light of prior cases.[148] It stated that these cases established that in the Fifth Circuit consent to search may be given by a person under arrest who has not been specifically informed of his fourth amendment rights, "so long as there is no proof of coercion or intimidation and if prior to the search *Miranda warnings are given.*" [149] Through the use of italics the court seemed to make the prior *Miranda* warnings essential to the decision. The court implied that without the prior *Miranda* warnings consent to search given by one in custody would be considered invalid as a matter of law. In short, the Fifth Circuit seemed to be following the *Gorman* approach.

In *United States v. Garcia,*[150] however, the Fifth Circuit explicitly rejected the suggestion made in *Luton. Garcia* dealt with the validity of a border search which resulted in the appellant's conviction for possession of heroin with intent to distribute.[151] The facts were as follows: Mrs. Garcia and her son attempted to cross the border between Mexico and El Paso, Texas. After her license plate number was routinely placed in a computer system at the inspection station, the computer report indicated she was suspected of smuggling heroin. Mrs. Garcia was then referred to a secondary inspection. She possessed a valid permanent resident alien card. A search of her car failed to disclose any contraband. The customs inspectors also searched Mrs. Garcia and her son, but all that was found was a key to a storage locker at a bus depot. The inspectors knew that such lockers were often used by drug dealers to transfer narcotics. A special agent was dispatched and about an hour after the original detention he arrived and questioned Mrs. Garcia and her son. The special agent asked Mrs. Garcia if she would mind showing the contents of the locker and she agreed. She accompanied the officers to the bus station and opened the locker. After examination of its contents, they found what was later shown to be heroin.[152] The officers then placed Mrs. Garcia under arrest for smuggling heroin and *"for the first time* [she] was advised of her *Miranda* protections." [153] She later explained her role in the heroin operation.

The Fifth Circuit determined that Mrs. Garcia's detention constituted "custodial interrogation," [154] and that the statements she had made prior to being warned of her rights to remain silent and to have counsel were inadmissible.[155] Next the court considered whether the heroin seized from the locker could be admitted into evidence at the new trial. The government sought to validate the search on a consent theory.[156] Mrs. Garcia contended that the government was under an obligation to demonstrate not only that her alleged consent had been uncoerced, but also that it had been obtained with an understanding that it could be freely and effectively withheld. She conceded that in *Bustamonte* the Supreme Court rejected this contention for noncustodial situations. However, she argued that custody heightens the possibilities for coercion so as to require a specific warning of one's fourth amendment rights.[157] The court replied that it had already refused to distinguish custodial from noncustodial searches.[158] Thus, knowledge of fourth amendment rights is not neces-

[146] 486 F.2d at 1023.

[147] *Id.*

[148] *See* United States v. Legato, 480 F.2d 408 (5th Cir.), *cert. denied,* 414 U.S. 979 (1973); United States v. Canseco, 465 F.2d 383 (5th Cir. 1972).

[149] 486 F.2d at 1023.

[150] 496 F.2d 670 (5th Cir. 1974).

[151] 21 U.S.C. § 841(a) (1970).

[152] 496 F.2d at 671–72.

[153] *Id.* at 672.

[154] *See* United States v. Salinas, 439 F.2d 376 (5th Cir. 1971), where the court delineated when a border search becomes custodial.

[155] The court accordingly granted her a new trial which would exclude these statements. 496 F.2d at 673.

[156] Because the court found that the search could not be justified as a consent search, it did not treat in depth the Government's contention that the search was permissible under border search principles as well. *Id.* at 675 n.23.

[157] *Id.* at 673.

[158] *See* note 148 *supra. Cf.* United States v. Horton, 488 F.2d 374, 380 n.4 (5th Cir. 1973), *cert. denied,* 416 U.S. 943 (1974).

sarily required to validate consent to search after a suspect is in custody.[159]

Mrs. Garcia next argued that the *Miranda* violation should invalidate her purported consent.[160] "If the evidence taken in violation of *Miranda* cannot be used to aid the Government on the issue of guilt . . . . the statements elicited should similarly not be used by the Government during a motion to suppress to show her consent." [161]

The court replied that while its independent application of *Miranda* principles to fourth and fifth amendment protections had been somewhat nebulous,[162] it was holding that "prior *Miranda* warnings are not required to validate consent searches in the circumstances here presented." [163] The court reasoned that the fifth amendment privilege against self-incrimination plays a crucial role in preserving the integrity of the trial process, and that "this clearly was the principal basis for the Court's *Miranda* decision." [164] It stated that while the fourth amendment proscription against unreasonable searches and seizures is no less important than fifth amendment protections, it has not been recognized as fostering the integrity of the trial process.[165] In a fifth amendment situation, a defendant's statements, in and of themselves, present the potential constitutional evil. For fourth amendment purposes, however, it is the unreasonable search, not the use of a defendant's statements proving consent to search, which must be condemned. "A search and seizure produces real and physical evidence, not self-incriminating evidence. . . . Therefore, *Miranda's* ratio decidendi . . . should not be superimposed *ipso facto* to the wholly different considerations in fourth amendment analysis." [166]

The Fifth Circuit thus went a step beyond the *Gorman* approach. It held that the failure of an officer to warn a suspect subjected to custodial interrogation of his *Miranda* and fourth amendment rights does not vitiate his consent. The *Gorman* approach at least requires *Miranda* warnings and the request for permission to search, reasoning that this will adequately advise a defendant of his fourth amendment rights. In *Garcia,* however, no warning of any kind is required to validate the consent, let alone to dispel the inherent coercion of custody. Hence, while the court pays lip service to the need to consider coercion,[167] it undermines that need by not even insisting on the *Miranda* warnings prior to a custodial search. This is not to suggest, however, that the *Gorman* approach is correct.

V. Implications

While it is true of all exceptions to the warrant requirement, a serious implication of *Bustamonte* and the other consent search cases is that the police may now be free to carry out a search that *they,* rather than an impartial magistrate, have decided upon. Instead of maintaining an equilibrium between the need for effective law enforcement and the need to prevent coercion, many courts seem to have tipped the scales in favor of law enforcement officials at the expense of the individual. The police may simply be able to approach a home owner and conduct a charade of asking for consent. If the police display any firmness, they would inevitably receive some form of consent. The individual, in practice, may well receive inadequate protection of his constitutional rights because juries and trial courts are more likely to accept the government's contention that he consented than the individual's claim that he was coerced. Moreover, without the knowing waiver requirement, and especially where the individual is in custody, the government may well be able to capitalize on the ignorance of citizens.

A corollary of *Bustamonte* and its progeny is that consent to search may be "finessed" under

[159] 496 F.2d at 673.
[160] *Id.*
[161] *Id.* at 673–74.
[162] In United States v. Luton, 486 F.2d 1021 (5th Cir. 1973), the use of italics seemed to make prior *Miranda* warnings more crucial to the decision. The court noted in *Garcia* that neither *Luton, Legato,* or *Canseco* directly presented a consent search situation without prior *Miranda* warnings. The court noted that in United States v. Horton, 488 F.2d 374 (5th Cir. 1973), it was faced with such a situation, and a custodial consent search was validated when *Miranda* warnings were not given until after the completion of the search.
[163] 496 F.2d at 674.
[164] *Id.*
[165] *Id.* The court cited *Bustamonte,* 412 U.S. at 241.
[166] 496 F.2d at 675.
[167] *Id.*

the voluntariness test—whether or not the individual is in custody. An excellent example arose in *Mann v. Superior Court*[168] where the defendant was charged with possessing marijuana and maintaining a place for the use of narcotics.[169] The police came upon the defendant's property and surveyed the interior while standing in some bushes outside the window.[170] They observed some invited guests who, after knocking, were told to enter. Soon afterwards, the police knocked on the door, and one of the voices from the party answered "come in" in response to the knock, reasonably anticipating the arrival of other guests. The police found a small quantity of marijuana inside the residence, and arrested all persons present. They also conducted an extensive search.[171] The officers admitted that they lacked lawful probable cause at the time they approached the front door. By the only prosecution testimony offered, they specifically eliminated the odor of marijuana (which was detected only after entry) as a factor in the probable cause for the subsequent arrests.[172] The prosecutor saved his case by relying on a consent theory.

To construe a simple "come in" in response to a knock, voiced by persons reasonably expecting other guests—and certainly not police officers—into a consent permitting blanket arrests and a comprehensive search of the premises is alarming. Although there was no coercion, it can hardly be said that there was consent, even under a totality of the circumstances test. Not only was the defendant unaware of his right to refuse consent, but he was also unable to exercise that right because of the police's subterfuge. At the very least, there should have been some attempt on the part of the officers to announce their identify prior to "seeking" consent to enter the premises.[173]

Furthermore, what is to prevent the police in a future situation from fabricating the bare "come in"?[174] Under *Mann* the police could

[168] Although the case was decided before *Bustamonte,* it is still illustrative. In Mann v. Superior Court, 3 Cal. 3d 1, 472 P.2d 468, 88 Cal. Rpr. 380 (1970), *cert. denied,* 400 U.S. 1023 (1971), the defendant pleaded not guilty to the charge and moved to suppress the marijuana seized at his home, claiming a violation of his fourth amendment rights. His motion was denied after an evidentiary hearing in the state trial court. Mann then sought a writ of mandate directing the trial court to suppress the challenged evidence and this was denied by the Court of Appeals and the Supreme Court of California. Mann then pleaded guilty to possession of marijuana under the narcotics count. The State's motion to dismiss the remaining count was granted. One month later, Mann petitioned the United States District Court for a writ of habeas corpus. This was denied and he appealed to the Court of Appeals for the Ninth Circuit, Mann v. Smith, 488 F.2d 245 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974). The court held that, subsequent to a plea of guilty, there can be no federal collateral attack based upon an alleged violation of constitutional rights occurring prior to the guilty plea. There was no question of the voluntary and intelligent character of the plea.

[169] Cal. Health & Safety Code of 1940, ch. 10, § 11557 (repealed 1972); Cal. Health & Safety Code of 1939, ch. 9, § 11530 (repealed 1972).

[170] Query whether the police officers were trespassing.

[171] *Cf.* Lorenzana v. Superior Court, 9 Cal.3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).

[172] *See* Mann v. Superior Court, 3 Cal.3d at 13, 88 Cal. Rptr. at 387, 472 P.2d at 475 (1970) (Peters, J., dissenting).

[173] This is not only because of constitutional mandates, but also because of CAL. PEN. CODE § 844 (West 1975), which provides: "To make an arrest, a private person, if the offense be a felony, and 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."

[174] The almost certain inevitability of the fabricated "come in" is illustrated by the so-called 'dropsy' testimony in street drug arrests. The following criticisms which Professor Irving Younger made of McCray v. Illinois, 386 U.S. 300 (1967) (an informer's identity need not be disclosed in every case) are relevant to the future of consent searches:

> [The *McCray* majority] said that "nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are commiting perjury."
>
> Why not? Every lawyer who practices in the criminal courts knows that police perjury is commonplace.
>
> The reason is not hard to find. Policemen see themselves as fighting a two-front war—against criminals in the street and against "liberal" rules in court. All's fair in this war, including the use of perjury to subvert "liberal" rules of law that might free those who "ought" to be jailed.
>
> ....
>
> For the first few months (after *Mapp v. Ohio*), New York policemen continued to tell the truth about circumstances of their searches, with the result that evidence was suppressed. Then the police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable

conceivably snoop around a person's home, enter it, and then claim that they were told to "come in." Surely the constitutional rights assured by the fourth and fourteenth amendments demand greater protection.[175]

A final implication is that not only have some courts encouraged the police to use consent searches in situations where a warrant could have been obtained, but also they may have paved the way for greater invasions of privacy than are necessary or permitted in order to conduct effective law enforcement.[176] Unlike warrant searches, there may be no limits to the scope of consent searches. Moreover, even if there is a theoretical limit, it may not exist in practice since it would be difficult for a defendant to prove that he limited the scope of a search when he consented. Hence, police officers may now be free to rummage about a house, unconstrained by anything except their own whims and desires.[177] The result is that a search conducted without a warrant may now give an officer more authority than a search conducted pursuant to a warrant specifically delineating the limits of the search.[178]

VI. Conclusion

In *Schneckloth v. Bustamonte* the Supreme Court held that knowledge of the right to refuse consent is but one factor to be considered in a noncustodial consent search situation. It also held that the absence of a warning did not vitiate consent to search in the noncustodial setting. The Court reasoned that warning the subject of his right to withhold consent would be impractical because noncustodial consent searches arise under informal and unstructured conditions. It specifically reserved the question of the significance of custodial conditions.

No case has been found which holds as a matter of law that the subject of a custodial search must be shown to have been aware of, or advised of, his right to refuse before there can be valid consent. Instead, the courts are continuing to apply a totality of the circumstances test, using one of three approaches: a balancing approach, a "constructive notice" approach, or a "no warning whatsoever" approach.

In light of the inherently coercive nature of custodial interrogation, one might have thought

and the evidence admissible. Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another.

This is now known among defense lawyers and prosecutors as "dropsy" testimony.

. . . .

Far from adopting a presumption of perjury, the *McCray* case almost guarantees wholesale police perjury. When his conduct is challenged as constituting an unreasonable search and seizure, all the policeman need say is that an unnamed "reliable informant" told him that the defendant was committing a crime. Henceforth, every policeman will have a genie-like informer to legalize his master's arrests.

Younger, *The Perjury Routine,* 204 The Nation 596, 596-97 (1967).

For more information on the "perjury routine" see P. Chevigny, Police Power ch. 11, at 180 (1969); Chevigny, *Police Abuses in Connection with the Law of Search and Seizure,* 5 Crim. L. Bull. 3 (1969).

[175] While arrest and search warrants are often issued perfunctorily, the preference for these warrants is justified on the ground that, at least, the police must make a record before the event of the basis for their actions. Consider J. Skolnick, Justice Without Trial—Law Enforcement in Democratic Society (1966):

[T]he policeman perceives his job not simply as requiring that he arrests where he finds probable cause. In addition, he sees the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to arrest, probable cause can be found according to appellate court standards. In this way, as one district attorney expressed it, "the policeman fabricates probable cause." By saying this, he did not mean to assert that the policeman is a liar, but rather that he finds it necessary to construct an *ex post facto* description of the preceding events so that these conform to legal arrest requirements, whether in fact the events actually did so or not at the time of the arrest. Thus, the policeman respects the necessity for "complying" with the arrest laws. His "compliance," however, may take the form of *post hoc* manipulation of the facts rather than before-the-fact behavior.

Id. at 214-15.

[176] Such "consent" searches are reminiscent of the "general warrants" which the framers of the Constitution attempted to eliminate through the fourth amendment. *See* Justice Douglas's dissenting opinion in United States v. Matlock, 415 U.S. 164, 180 n.1 (1974), wherein he traces the historical background of the fourth amendment.

[177] For an example of abuse under a warrantless search see Kremen v. United States, 353 U.S. 346 (1957), where the police gutted a home during a warrantless search.

[178] *See* United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

that something more than a totality of the circumstances test would be required to dispel coercion when the search is custodial. Certainly, the circumstances under which a subject is in police custody can hardly be called "unstructured." When a person is in custody the police control the situation. Unlike the atmosphere of the noncustodial setting, when the subject is in custody the police would have ample opportunity to give a warning. Of course, a warning would not be a panacea for obliterating coercive tactics used to secure consent. But a direct communication that the accused has a right to refuse and that his right will be respected could serve to "fortify the accused against the coercion inherent in the custodial setting." [179]

By conducting a search on the basis of consent, the police can potentially circumvent three important protections of the warrant procedure. First, they can avoid submitting the issue of probable cause to search to a magistrate's independent assessment. Second, they do not need to make a record in the form of a sworn affidavit prior to the search which would protect against the possibility that an ex post facto justification will be based upon what the search turns up. Finally, the police may be relieved of the particularity requirement of the warrant.[180]

In the final analysis, *Schneckloth v. Bustamonte* and its progeny may be signalling an erosion of fourth amendment rights. Perhaps the cases are a reaction to both *Mapp* and *Miranda*. While it does not necessarily follow that by not extending the "knowing and intelligent" requirement to at least custodial searches the fourth amendment will be completely emasculated, individuals can certainly ill-afford even a modest recession of these fundamental rights. The courts must continue to perform, not abdicate, their traditional role as the guardian of the people.[181]

[179] Gentile v. United States, 493 F.2d 1404 (5th Cir.), *cert. denied*, 419 U.S. 979, 981 (1974) (Douglas, J., dissenting).

[180] *Id.*

[181] *See* Boyd v. United States, 116 U.S. 616 (1886). *See also* Gouled v. United States, 255 U.S. 298 (1921):

> It has been repeatedly decided that these Amendments [the Fourth and Fifth] should receive a liberal construction, so as to prevent stealth, "encroachment upon" or "gradual depreciation" of the rights secured by them, by imperceptible practice of the courts, or by well-intentioned but mistakenly overzealous executive officers.

Id. at 304.

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Copyright © 1975 by Northwestern University School of Law
Vol. 66, No. 3
Printed in U.S.A.

PROSECUTION UNDER THE HOBBS ACT AND THE EXPANSION OF FEDERAL CRIMINAL JURISDICTION

According to several commentators, the criminal case load in the federal court system has reached unprecedented proportions.[1] This can be attributed to efforts by Congress to expand federal criminal jurisdiction to areas labeled as auxiliary to what have been termed "true" federal crimes.[2] True federal crimes usually involve a special federal interest such as protection of a federal official, or federal functions such as delivery of the mails. This type of federal prosecution has been referred to as being "self defensive."[3] Auxiliary federal jurisdiction, on the other hand, implies by its very label that other than purely federal matters must be evaluated before federal involvement is compelled. Although deemed by Congress to require federal prosecution, these auxiliary areas derive jurisdiction from a legal base which does not involve a specific federal entity or activity requiring protection. One of the most common jurisdictional bases is interstate commerce.[4] Along with the broad nature of interstate commerce as the authority for jurisdiction are the efforts of ambitious federal prosecutors not only to intensify their prosecutorial activity but also to stretch the statutory language to areas which, though not reflected in the legislative history, arguably fall within a broad construction of a federal act.[5] In order for the prosecutions' expansive advocacy to succeed, the courts must acquiesce in this broad interpretation of such statutes.[6] The

[1] *See* Abrams, *Consultant's Report on Jurisdiction: Chapter Two,* in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW (1968) [hereinafter cited as Abrams]; H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) [hereinafter cited as FRIENDLY]; Some Observations on the Condition of the Federal Courts, Address by the Honorable Philip W. Tone, United States Circuit Judge for the Seventh Circuit, before the Chicago Council of Lawyers, October 23, 1974; Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary,* 47 N.Y.U.L. REV. 841 (1972). Judge Tone said:

> In the metropolitan centers, the criminal business of the federal district courts leaves little time for civil cases. The newer judges in this district spend the great majority of their trial time in criminal trials. I would estimate 85-90% for myself while I was a district judge.

[2] Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion,* 13 LAW & CONTEMP. PROB. 64 (1948).

Professor Schwartz indicated that federal jurisdiction was being employed in three different ways: (1) The punishment of anti-social conduct of a distinctively federal concern; (2) The securing of compliance with any federal administrative regulation; (3) The punishment of conduct of "local concern" which was for some reason deemed by Congress to warrant federal intervention.

[3] *Id.* at 67. *See also* Abrams, *supra* note 1. Other examples of true federal crimes are as follows:

(a) Assaulting, resisting, or impeding certain officers or employees, 18 U.S.C. § 111 (1948);
(b) Bribery of public officials and witnesses, 18 U.S.C. § 201 (1962);
(c) Conspiracy to defraud the Government with respect to claims, 18 U.S.C. § 286 (1948);
(d) Mutilation, diminution, and falsification of coins, 18 U.S.C. § 331 (1951);
(e) Mutilation of national bank obligations, 18 U.S.C. § 333 (1948);
(f) Desertion of mails, 18 U.S.C. § 1700 (1948);
(g) Obstruction of mails generally, 18 U.S.C. § 1701 (1948);
(h) Timber removed or transported, 18 U.S.C. § 1852 (1948);
(i) Personal property of United States, 18 U.S.C. § 2112 (1948).

[4] *See, e.g.,* Kidnapping-Transportation, 18 U.S.C. § 1201 (1956); Transportation of stolen vehicles, 18 U.S.C. § 2312 (1948); Interstate transportation of wagering paraphernalia, 18 U.S.C. § 1953 (1961); Interference with commerce by threats or violence (Hobbs Act), 18 U.S.C. § 1951 (1948); Interstate and foreign travel or transportation in aid of racketeering enterprises, 18 U.S.C. § 1952 (1965).

[5] FRIENDLY, *supra* note 1 at 27. *See also* Hufstedler, *supra* note 1; Tone, *supra* note 1. Judge Tone said:

> In addition, in this district, the legal staff of the United States Attorney has more than doubled in the past few years, while the number of district judges has remained the same. The result has been not only more cases filed but more complex and time-consuming cases. Much more courtroom time must now be allocated to criminal cases.

[6] FRIENDLY, *supra* note 1. Judge Friendly wrote: The old issue of encroachment on the state

Hobbs Act[7] is one of many statutes passed in this century which has been used to expand the scope of federal criminal jurisdiction.[8]

Examination of the application of the Hobbs Act reveals an urgent need to reconsider the present reach and interpretation of federal criminal jurisdiction. It raises the fundamental question of what kind of role the federal judiciary should assume in criminal prosecutions. This comment will analyze two aspects of the expansion of the Hobbs Act. One is the purely jurisdictional expansion which has been carried as far as the Civil Rights cases as well as being based upon an effect which need only be potential.[9] The other aspect involves expansions of the "substantive" part of the Hobbs Act to areas rarely discussed in the legislative history and not prosecuted until very recently.[10] This analysis will be considered in terms of the progression of prosecution under the Hobbs Act and the response by the federal judiciary.

Initial inquiry into the intended reach of the Hobbs Act necessarily includes the reach of the Anti-Racketeering Act of 1934,[11] the predecessor of the Hobbs Act. The purposes and application of the Anti-Racketeering Act are important for two reasons. First, the language of the two acts are similiar. Second, much of the Hobbs Act hearings and debate concentrated on the inclusion of activities found by the Supreme Court in *United States v. Local 807*[12] to be outside the purview of the Anti-Racketeering Act of 1934.[13] Therefore, consid-

---

tribunal is still with us but it is only one aspect of the problem. This as I see it, is that the inferior federal courts now have more work than they can properly do—including some work they are not institutionally fit to do. This arises in part because Congress is continually giving them more to do and in part, because of the *Supreme Court's generosity in construing the grants made by the Constitution and Congressional legislation* (emphasis provided).

See also E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) [hereinafter cited as LEVI].

[7] Interference with commerce by threats or violence, 18 U.S.C. § 1951 (1948).

[8] *See* note 4 *supra.*

[9] *See* Abrams, *supra* note 1, at 38; Comment, *Scope of Criminal Jurisdiction Under the Commerce Clause,* 1972 U. ILL. L.F. 805. *See, e.g.,* the public accommodations section of the Civil Rights Act, 42 U.S.C. § 2000(a) (1964). *See also* Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974).

[10] *See, e.g.,* United States v. Pearson, 508 F.2d 595 (5th Cir. 1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. Irali, 503 F.2d 1295 (7th Cir. 1974); United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971).

[11] Anti-Racketeering Act, 18 U.S.C. § 420 (1934).

[12] 315 U.S. 521 (1942).

[13] The Anti-Racketeering Act, 18 U.S.C. § 420 (1934), reads in pertinent part:

> 420a. Interference with trade and commerce by violence, threats, etc.:
>
> Any person who, in connection with or in relation to any act in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> a. Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bonafide employee; or
>
> b. Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> c. Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections a or b; or
>
> d. Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment for up to ten years or by a fine of $10,000 or both.
>
> 420d. Provided, That no court of the United States shall construe or apply any of the provisions of sections 420a to 420e of this title in such a manner as to impair, diminish, or in any manner affect the rights of bonafide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

The Hobbs Act, 18 U.S.C. § 1951 (1948) states:

> a. Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> b. As used in this section—
>
> 1. The term robbery means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of

eration of the scope of the Anti-Racketeering Act helps in determining more precisely the intended reach of the Hobbs Act.[14]

Prior to the passage of the Anti-Racketeering Act, broad-based hearings, entitled "Investigation of the Matter of So-Called Rackets With a View to Their Suppression," were conducted by a sub-committee of the Committee on Commerce.[15] While fundamentally concerned with racketeering, the hearings failed to clarify the meaning or scope of the offense and contributed to the amorphous quality of racketeering. George B. McGovern, a labor representative, testified, "The definition apparently as accepted by the committee, is that a racketeer is one of a group who conspires to do something which is against the interests of man," [16] and the committee agreed. One individual testified that racketeering was "synonomous with organized crime" [17] while others were more specific. Judge Skillman, for instance, defined racketeering as the "extortion of money from persons engaged in legitimate business, or otherwise, by the use of force or threats." [18] Many of the examples referred to at the hearings were of direct obstructions of individuals attempting to move goods across state lines in order to market them.[19] The resolution mandating these hearings referred to newspaper accounts of the "so-called 'beer rackets,' 'poultry rackets,' 'milk rackets,' 'food rackets,' . . ." [20] Other testimony suggested that racketeering was an organized crime rather than a crime performed by an individual,[21] that it included gangs setting up protective societies,[22] payments made to protect against labor disputes,[23] and forcing individuals who tried to bring food into a city from out of state to load the goods onto trucks driven by local drivers.[24] From the variety of ideas expressed at the hearings, it is difficult to derive a notion of what conduct the Anti-Racketeering Act was meant to reach.

In an early interpretation of the statute, one district court [25] recognized the difficulty of defining racketeering, and resorted to reading the six parts of the pre-statute hearings primarily because the act passed without debate. The court wrote:

---

injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

2. The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

3. The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[14] United States v. Pranno, 385 F.2d 387 (7th Cir. 1967). The court in *Pranno* said:

> They [defendants' attorneys] cite statements in congressional debate in 1946 prior to the enactment of the so-called Hobbs Act, indicating a purpose to deal with interference by members of labor unions with motor vehicles engaged in interstate commerce. The quoted statements must, however, be viewed in the context of expanding the coverage of legislation already in effect so as to cover activities which the Supreme Court had previously held were not within the former act.

385 F.2d at 389.

[15] *Hearings Before the Senate Comm. on Commerce, Investigation of the Matter of So Called "Rackets" With a View to Their Suppression,* 73rd Cong., 2nd Sess., vols. I & II, pts. 1–6 (1933–34) [hereinafter cited as Hearings].

[16] *Id.* at vol. I, pt. 2.

[17] *Id.* at vol. I, pt. 1 (Testimony of Judge Robert P. Patterson). *See also* Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause,* 1972 U. ILL. L.F. 805.

[18] Hearings, *supra* note 15, vol. I, pt. 2.

[19] *Id.* at vols. I & II, pts. 1–6. Senator Copeland, chairman of this committee, said, "We have a protective racket, however, in the poultry business, the poultry industry. Live poultry brought into New Jersey, before it gets into New York City, has to be loaded by certain men into certain trucks. Otherwise it never lands in New York City." *Id.* at vol. I, pt. 1.

[20] *Id.* at vol. I, pt. 1.

[21] *Id.* at vol. I, pt. 3 (statement of Mr. Green, United States Attorney).

[22] *Id.* at vol. I, pt. 2 (statement of Dr. Clayton J. Ettinger).

[23] *Id.* at vol. I, Pt. 1 (statements of George Z. Medalie, United States District Attorney, Augustine J. Smith, Sec. New York County Grand Jurors Association, and Judge Thomas C. T. Crain, District Attorney of New York City).

[24] *Id.* at vol. I, pts. 1 & 2.

[25] United States v. McGlone, 19 F. Supp. 285 (E.D. Pa. 1937).

> We did this [read the hearings], not with the thought that the ideas and information contained therein would be controlling necessarily on a court, but inasmuch as *racketeering, as at present understood, is a comparatively modern phrase of peril to the public* it was considered that these hearings attended by outstanding figures in the world of law and criminal investigation, would throw considerable light on the evils sought to be prevented and methods of prevention.[26]

From the hearings, the court relied upon the definition given by the then Assistant Attorney General, Joseph B. Keenan:

> It is the organized use of threats, coercion, intimidation, and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties, or service rates, the cloak of blackmail and extortion.[27]

Yet it conceded, as did Keenan himself, that the definition was much too broad.[28]

The inconclusiveness of the hearings in defining the proscribed activity can in part be attributed to the fact that the hearings covered a wide range of additional topics including kidnapping, problems of sub-machine guns, jail penalties and their deterrent effect, parole policies, gun control, and the need for a federal Scotland Yard.[29] Also, these hearings discussed the local nature of some of these activities and the need to restrict federal involvement in the control of these areas. For instance, Keenan testified that the basic problem of enforcement should be regarded as local.[30] Professor John B. Waite of the University of Michigan stated:

> Racketeering is very largely a local crime, and it is only the local authorities that possibly can handle it. It is not the Federal government. It has got to be done by local authorities.[31]

Thus, even at this stage, the potential for an overcrowded federal court system was noticed.

The few cases that were decided after the enactment of the Anti-Racketeering Act, but before the Hobbs Act was passed, provide a view of the activities which the courts and prosecutors deemed within the purview of the Act. The evils included the use by union officials of their positions to threaten labor trouble or violence unless money was paid and also the direct interference by individuals with the movement of trucks carrying goods in interstate commerce for sale or delivery. In *United States v. McGlone*[32] a union official was charged with threatening to stop the movement of trucks by the victim's company unless money was paid. However, a labor provision within the Act resulted in the defendant's acquittal.[33] In both *Nick v. United States*[34] and *United States v. Compagna*,[35] union strikes and violence were threatened by the defendant union officials, the effect of which would have been the prevention of the shipment of films from out of state. In 1942 the Supreme Court decided *United States v. Local 807*.[36] In this case the defendant, an official of a local truckers union, conspired "to use and did use violence and threats to obtain from the own-

---

[26] *Id.* at 287 (emphasis added).

[27] *Id.* at 287–288.

[28] Hearings, *supra* note 15, vol. I, pt. 1, pp. 4–6.

[29] *Id. See generally* vols. I & II, pts. 1–6.

[30] Mr. Keenan states:

> Basically the problem of law enforcement is and should be the task of each single local community. If it happens in some local community for the time being delegated the duty of enforcing the laws to those who are either incompetent or corrupt, surely it is not an impossible task for the members of such community to rectify these conditions. The matter of such correction is not and should not constitute a Federal problem.

Id. at vol. I, pt. 1, p. 5.

Professor L. B. Schwartz wrote in 1948:

> If genuinely national interests are at stake, the controversies should not have to compete with local breaches of the peace crowding the calendar.

Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROB. 64, 67 (1948).

[31] Hearings, *supra* note 15, vol. I, pt. 3, p. 245. Judge Skillman testified: "Ninety percent of crime is probably purely local, has its beginning and end within the confines of the city or the state, and as to those matters, obviously the Government (Federal), under the present Constitutional restrictions does not have the power." *Id.* at vol. I, pt. 2, p. 182.

[32] 19 F. Supp. 285 (E.D. Pa. 1937).

[33] *Id. See also* Anti-Racketeering Act, 18 U.S.C. § 420 (1934).

[34] 122 F.2d 660 (8th Cir. 1941).

[35] 146 F.2d 524 (2d Cir. 1944), *cert. denied*, 324 U.S. 567 (1945).

[36] 315 U.S. 521 (1942).

ers" of trucks driven into New York from out of state money equivalent to the union wages for the day.

The inference to be drawn from the above-mentioned cases is that the Anti-Racketeering Act, as perceived by the prosecutors and some courts, was aimed at threats of labor strikes and violence to affect the stoppage of production by companies, and at direct stoppage of individuals trying to move across state lines to market goods. The fact that these cases involved actual stoppages of companies or individuals moving goods or accepting goods in interstate commerce suggests that the effect upon interstate commerce may have a significant relationship to a specific determination of the kinds of activity within the purview of this Act or the Hobbs Act.

The Court in *Local 807* did not uphold the conviction despite the serious danger involved in such activity. The Court questioned whether or not the defendants' purpose was to obtain "the payment and wages by a bona fide employee." It concluded that the activity fell under the labor proviso and was, in effect, a protection of wage demands.[37] The controversy stemming from the Court's substantial limitation of the Anti-Racketeering Act eventually induced Congress to pass the Hobbs Act so as to reach the activities condoned in *Local 807*.[38]

The reaction to *Local 807* and other legislative history of the Hobbs Act supports the view that the effect upon commerce is a necessary part of the intended proscriptions. Prior to the passage of the Hobbs Act, its sponsor, Mr. Hobbs, stated:

> I want to make it perfectly clear that the sole and simple purpose of this bill is to do the best we can to protect interstate commerce and free the highways and streets of this country of robbers.[39]

Representative Summer stated, "The right of a citizen of the country peacefully to proceed along a public highway, carrying his produce to market is a sacred right." [40] In reference to the purposes of the Hobbs Act, Representative Jennings stated:

> It is a trap for a man who is boob enough to go out and undertake to trample the rights of American citizens under his feet and commit highway robbery and interfere with them in their right to market these products across state lines. Properly, Congress could if it so desired occupy the whole field with respect to legislation affecting interstate commerce, but we do not choose to do that. It is true that the statutes of most States denounce robbery and extortion as crimes but this act is peculiarly appropriate because these offences many times are committed at State lines and may in the perpetration and consummation of the crimes cross and recross State lines.[41]

The 1947 hearings on the effectiveness of the Hobbs amendment in suppressing racketeering focussed on the direct obstruction of the interstate movement of non-union dealers who desired to market their goods.[42] This emphasis upon the interstate commerce aspect of the Hobbs Act and its apparent requirement of directness and substantiality lends support to the limitation of both the jurisdictional scope and substantive aspect of the Hobbs Act.

Although analysis of the Hobbs Act and its predecessor fails to reveal a clear notion of the Act's objective, the nature of the actions brought and the similarity of the language of both acts are instructive on this point.[43] The Hobbs Act sought to discourage two activities: labor extortion and obstruction of the movement of individuals across state lines for the purpose of marketing their goods. Both of these activities have direct effects upon com-

[37] *Id.* at 535.
[38] 91 CONG. REC. 11912 (1945).
[39] *Id.* at 11900.
[40] *Id.* at 11909.
[41] *Id.* at 11911.
[42] House Committee on Expenditures in the Executive Department report on "investigation of the Effectiveness of the Anti-Racketeering Laws and the Administration Thereof." H.R. REP. No. 238, 80th Cong., 1st Sess. (1947) (hereinafter cited as H.R. 238).

The major example considered in this report was the disruption of the Philadelphia fruit markets. Farmers that were trying to carry their goods to market were forced to unload their trucks and lose the value of both seasoned crops and perishable produce. Some of the farmers did make it to market only to find that no one would handle their goods. The report stated that "activity calculated to render their journey in commerce futile and meaningless comes well within the ambit of the legislative authority of Congress." *Id.* at 21.
[43] *See* United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967); United States v. McGlone, 19 F. Supp. 285 (E.D. Pa. 1937).

merce. In the case of labor extortion, the threat, if carried out, would stop the business or company from continuing because of the lack of labor. Such company would no longer need goods including those delivered from out of state. In the case of the obstruction of interstate movement, the threats were of violence towards the victim, taking of the goods while in transport, and forcing such victim to turn back.[44] It is difficult to be any more conclusive from this early history and prosecution. As Mr. Justice Frankfurter wrote:

> Unhappily, there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere. A painstaking, detailed report by a Senate Committee bearing directly on the immediate questions may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.[45]

The Hobbs Act has been extensively expanded since the 1940's and the early prosecution discussed above. The meaning of the word "racketeering" and the target of the Act as enunciated in the early prosecution has not constituted a barrier to expansion for either the prosecutors or the courts. Moreover, the expansion has been both jurisdictional and substantive. The jurisdictional expansion has become so intertwined with the substantive expansion that it is virtually impossible to separate them.

The Hobbs Act confers jurisdiction when an individual "in any way or degree obstructs, delays, or affects commerce."[46] Because the matter of jurisdiction, as indicated at the beginning of this comment, is auxiliary, it arguably is distinct from the primary substantive focus of the act. Accepting the above, this primary focus would be the general crime of robbery and extortion. Yet, "effect upon commerce" is included in the definition of the offense and therefore is a fundamental part of the crime itself.[47] Essentially two elements must be proved for a Hobbs Act conviction: (a) that there was either a robbery or an extortion and (b) that there was an effect upon interstate commerce by such extortion or robbery.[48] While an argument could be made that the effect upon interstate commerce is neutral and by itself involves no evil,[49] such an effect provides a definition of the boundaries within which the proscribed activity falls. Congress could have provided for other areas of jurisdiction in addition to "affecting interstate commerce" and thereby expand the scope of the Act. Because such additional areas were not established the

[44] *See* H.R. 238, *supra* note 42; United States v. Local 807, 315 U.S. 521 (1942); United States v. McGlone, 19 F. Supp. 285 (E.D. Pa. 1937).

[45] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) [hereinafter cited as Frankfurter].

[46] 18 U.S.C. § 1951 (1948). *See also* note 13 *supra*.

[47] *See* Abrams, *supra* note 1, at 33; Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948) [hereinafter cited as Schwartz].

[48] *See* United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Provenzano, 334 F.2d 678 (3d Cir. 1964).

[49] The effect the jurisdictional element has on determining the evil which arguably can be reached is an important part of this comment and is addressed later on. The jurisdictional element is a major feature of each offense. Abrams wrote in his consultant's report: "The jurisdictional element, by itself, is not a proper index of criminality nor, for that matter, does it involve undesirable conduct. Transportation in interstate commerce, use of mails and similar pegs are in themselves neutral activities." Abrams, *supra* note 1, at 40. It can be argued that certain effects upon interstate commerce can be considered in a negative manner (*i.e.*, obstructions, delay) given our industrial and interdependent society, but it is one step further to say that such delay or obstruction necessitates criminal sanctions.

The effect, though, can be very serious. The court in United States v. Compagna, 146 F.2d at 527, stated:

> [I]t was enough proof of the effect of their acts upon interstate commerce, that the group found it more effective, when they were blackmailing the producers, to threaten them with a strike against the theatres. Nothing could more completely illustrate the unity of the whole industry; all its parts were like those of a single elastic member in which an impact upon one part is instantly transmitted everywhere. Moreover, not only would the producers feel the check upon the interstate movements of their films when the exhibitors were tied up; but since many of the exhibitors did business on a small margin and must have a constant supply of films to keep going at all, a very short cessation of that supply at the sources might destroy them, and end them forever as outlets.

existing jurisdictional base has become increasingly important in defining the purposes of the Act. Its very use implies some limitation and that limitation relates substantively to the type of activity sought to be stopped.

The inquiry here is what meaning does "effect upon interstate commerce" bring to the Hobbs Act. The analysis necessitates two approaches. The first is whether the jurisdictional base is restricted by limitations placed upon it by the Constitution. The second approach, from a statutory perspective, involves the question of whether the jurisdictional base can also be considered a part of the statute where it is directly connected to the type of proscribed activity. Determination of these issues depends upon whether "effect upon interstate commerce" should be interpreted as it was at the time the Hobbs Act was passed or on a constitutional level as per the currently accepted scope of interstate commerce, thereby allowing for an expansive reading over time.[50]

The legislative history of the Anti-Racketeering Act, as indicated earlier, included much concern over federal intrusion into primarily "local" matters. Many legislators felt such activities should continue to be prosecuted on the local level.[51] The hearings also emphasized the importance of local matters remaining local as did the legislative history of the Hobbs Act.[52] Therefore the jurisdictional base logically could be construed as a distinct limitation on the scope of activities to be reached by the Act. The examination in this comment of the early history of both acts has demonstrated that the activities involved, labor extortion and obstruction of the interstate movement of goods, direct the substantial effects upon interstate commerce.[53] This application by prosecutors arguably reflects the desire to stay within the intent of the legislature by prosecuting only those activities in which jurisdiction can be constitutionally obtained while adhering to the legislative protestations for comity.

The factual situations prosecuted in the early years of both Acts indicated that the effect upon interstate commerce would be assumed from the logical result of the situation in which the victims refused to pay and thereby suffered the consequences of the extortioner's threats. The courts in effect declared that, but for the payment to the extortioner, there would be a direct and substantial effect upon interstate commerce.[54] This approach seems proper since to prosecute only those extortioners who carry out their threats because of non-payment would

[50] *See generally* Frankfurter, *supra* note 45; LEVI, *supra* note 6. Mr. Justice Holmes, in Missouri v. Holland, 252 U.S. 416, 433 (1920), wrote in reference to constitutional interpretation:

> With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Levi wrote in AN INTRODUCTION TO LEGAL REASONING (1949):

> A change of mind from time to time is inevitable when there is a written constitution. There can be no authoritative interpretation of the Constitution. The Constitution in its general provisions embodies the conflicting ideals of the community. Who is to say what these ideals mean in a definite way? Certainly not the framers, for they did their work when the words were put down. The words are ambiguous. Nor can it be the Court, for the Court cannot bind itself in this manner; an appeal can always be made back to the Constitution. Moreover, if it is said that the intent of the framers ought to control, there is no mechanism for any final determination of their intent. Added to the problem of ambiguity and the additional fact that the framers may have intended a growing instrument, there is the influence of constitution worship. This influence gives great freedom to a court. It can always abandon what has been said in order to go back to the written document itself.

Id. at 58–59.

[51] *See* Hearings, *supra* note 15. Assistant Attorney General Keenan remarked of his own definition of racketeering at these hearings:

> If this broad definition were accepted, any attempt to eradicate such evils would undoubtedly lead us into every branch of business that is conducted in the country today. . . . Basically the problem of law enforcement is and should be the task of each single local community.

Id. at vol. I, pt. 1.

[52] *See* 91 CONG. REC. 11839–11921, (1945).

[53] *See* text accompanying notes 1–45 *supra*.

[54] United States v. Compagna, 146 F.2d 524 (2d Cir. 1944); Nick v. United States, 122 F.2d 660 (8th Cir. 1941); United States v. McGlone, 19 F.2d 285 (E.D. Pa. 1937).

reward those who could create so much fear in their victims that payment would be virtually assured. The jurisdiction was derived, therefore, from a potential effect upon interstate commerce. As in *Nick v. United States,* the court indicated that if the threat had been carried out, there would have been a stoppage of certain items coming to Missouri from California.[55] While there was no actual effect, the potential clearly existed in the unarticulated probability of interference with interstate commerce based upon the nature of the business and seriousness of the threats. *Local 807* and *McGlone* both involved threats of direct obstruction or stoppage of individuals moving goods across state lines to market.[56] Actual effects in these cases met the jurisdictional requirement. If the strikes had occurred in *Nick* and *Campagna,* the business would have closed and their demand for goods from other states would stop.[57]

The interstate commerce aspect of the Hobbs Act is inextricably tied to the nature of the activity proscribed.[58] The validity of requiring a showing of substantial effect upon interstate commerce is bolstered by the interpretations of the Supreme Court at the time the Hobbs Act and Anti-Racketeering Act were passed as to what the necessary effect was to have on Constitutional authority for federal prosecution.[59]

[55] 122 F.2d 660 (8th Cir. 1941).

[56] United States v. Local 807, 315 U.S. 521 (1942); United States v. McGlone, 19 F.2d 285 (E.D. Pa. 1937).

[57] United States v. Compagna, 146 F.2d 524 (2d Cir. 1944); Nick v. United States, 122 F.2d 660 (8th Cir. 1941).

[58] *See generally* Abrams, *supra* note 1; Schwartz, *supra* note 47; Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause,* 1972 U. ILL. L.F. 805.

[59] *See* Note, *Racketeering, Bank Robbery, and "Kick-Back" Laws,* 1 LAW & CONTEMP. PROB. 445 (1934):

> The words of the Anti-Racketeering Act must be contrasted with "the insistence heretofore evidenced in the opinions of the Supreme Court that only such intrastate activities come within the commerce power of Congress as operate to obstruct or burden interstate commerce "directly", "substantially", or "unduly" to select but three of the most commonly employed restrictive adverbs.

Id. at 447. Although many cases decided during the 1940's were expansive in nature they still required significant effects upon interstate commerce to allow the application of statutes passed by Congress. The Court in United States v. Wrightwood Dairy, 315 U.S. 110 (1942) said that the commerce "power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." 315 U.S. at 119. The Court in Wickard v. Filburn, 317 U.S. 111 (1942) stated that the power could be extended to activities "if [they] exert a substantial economic effect on interstate commerce." 317 U.S. at 125. *See also* Live Poultry Dealers Protective Association v. United States, 4 F.2d 840 (1924).

As will be shown later in this comment, many of the activities prosecuted today under the Hobbs Act involve intrastate actions which may or may not have an indirect effect upon interstate commerce. *See* text accompanying notes 60–82 *infra.* Whether they fall within jurisdictional purview of the Hobbs Act depends upon the nature and extent of the effect. The Hobbs Act makes the effect an essential element of the offense. There was no finding by Congress of an effect whenever the substantive activity proscribed was prosecuted; such prosecution necessarily had to prove such effect to the satisfaction of the judge. As the Court in United States v. Five Gambling Devices, 346 U.S. 441 (1953) said when discussing the constitutional questions raised: "No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce." 346 U.S. at 446.

Arguably, in light of the decisions and the legislative history, the direct and substantial effects were the minimal levels required for the application of the Hobbs Act to be valid.

For more than twenty years after passage of the Hobbs Act the activity pursued by federal prosecutors almost invariably involved labor officials threatening strikes or work stoppages unless their victims consented to pay the extortionist fees.[60] These extorted payments were to

[60] *See, e.g.,* Stirone v United States, 361 U.S. 212 (1960) (labor official threatened obstruction of the movements of cement to victim's company and also threatened labor trouble if payments were not made to him); United States v. Kramer, 355 F.2d 891 (7th Cir. 1966) (payment of union officer to assure that there were good men on the job, otherwise there would be obstruction by delay in production); United States v. Critchley, 353 F.2d 358 (3d Cir. 1965) (union business agent threatened labor strikes or "lay downs" if he did not receive money; some lay downs actually occurred); United States v. Provenzano, 334 F.2d 678 (3d Cir. 1964) (union officer threatened labor trouble from his men if not paid off); United States v. Tolub, 309 F.2d 286 (2d Cir. 1962) (defendant, a business agent for a union threatened labor trouble if not paid a certain amount each week); Cape v. United States, 283 F.2d 430 (9th Cir. 1960) (union business agent told company that current labor troubles would cease if he were paid a certain amount of money).

At the circuit court level the conviction in *Stirone* was affirmed. The Supreme Court reversed on a variance issue. Judge Hastie dissented at the

ensure that no strike would occur and that negotiated settlements would be made. Courts continued to use the analysis that if the threats were carried out, they would cause stoppages or delays of interstate movement of goods essential to the businesses involved.[61] *United States v. Pranno*[62] and other early cases clearly demonstrate that there had to be some nexus between the threat and its potential effect upon interstate commerce in order to gain jurisdiction under the Hobbs.[63]

Prosecutors then developed a theory that in certain situations money paid to the extortioner or robber depleted the victim's assets, thus restricting the victim's buying power in interstate commerce and satisfying the requirement for "effect upon interstate commerce." In *United States v. Provenzano*[64] the court stated:

> When resources of a business are depleted or diminished in any measure or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the diminishment . . . of its resources likely to be impaired.[65]

Eventually many courts simply assumed the effect upon interstate commerce from the depletion of assets alone and not from the projected result of the threat if carried out.[66] The unarticulated probability or potential for effect upon interstate commerce have become increasingly more speculative in the recent decisions.[67] Now the courts consider the potential effect to the business of paying the extorted fees rather than the projected effect of the threat if carried out. One major problem with this change to a depletion of assets theory is in the likelihood that the "potential effect" from such depletion reaching a level where an "effect upon interstate commerce" can be assumed by the court for jurisdictional purposes. Thus far there has been little analysis of the possible ramifications of this change to a depletion of assets for jurisdictional purposes, or of the reasons why the problems originally attacked by the Hobbs Act did not suggest limitations upon the substantive and jurisdictional requirements for prosecution.[68]

In *United States v. Pacente*,[69] for example, the money extorted by the defendant from a bar owner was equated with the effect upon interstate commerce merely because the owner usually purchased beer which had been brewed in another state. The court thus resolved that the depletion of assets meant less buying power for the victim. This conclusion, however, would

---

circuit court level on the grounds that the Hobbs Act was being extended too far. He stated:

> Finally it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction.

262 F.2d 571, 579 (3d Cir. 1958).

See also United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958) (union business agent threatened labor strikes on construction project unless he was paid certain amounts of money); United States v. Varlack, 225 F.2d 665 (2d Cir. 1955) (union official threatened to cause and prolong work stoppages in the unloading of raw sugar from ships unless personal payments were made to him); Callanan v. United States, 223 F.2d 171 (8th Cir. 1955) (labor representative threatened labor trouble on pipeline construction project unless he was personally paid some money); Bianchi v. United States, 219 F.2d 182 (8th Cir. 1955) (union official used his position to threaten union strike and unrest unless he was personally paid money); Hulahan v. United States, 214 F.2d 441 (8th Cir. 1954) (labor official threatened labor strikes which would put construction company out of business unless money was paid to him personally); United States v. Kemble, 198 F.2d 889 (3d Cir. 1952) (union business agent stopped truckers and forced them to pay him money before they could unload).

[61] *See, e.g.*, Bianchi v. United States, 219 F.2d 182 (8th Cir. 1955); Hulahan v. United States, 214 F.2d 441 (8th Cir. 1954).

[62] 385 F.2d 387 (7th Cir. 1966).

[63] *See, e.g.*, United States v. Kramer, 355 F.2d 891 (7th Cir. 1966); United States v. Palmiotti, 254 F.2d 91 (2d Cir. 1958); United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).

[64] 334 F.2d 678 (3d Cir. 1964).

[65] *Id.* at 679.

[66] *See, e.g.*, United States v. Irali, 503 F.2d 1295 (7th Cir. 1974); United States v. Pacente, 503 F.2d 543 (7th Cir. 1974); Esperti v. United States, 406 F.2d 148 (5th Cir. 1969); United States v. Amabile, 395 F.2d 47 (7th Cir. 1968).

[67] United States v. Pearson, 508 F.2d 595 (5th Cir. 1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971).

[68] *Id.*

[69] 503 F.2d 543 (7th Cir. 1974).

not necessarily follow unless the amount extorted was sufficient to put him out of business or keep him from expanding. Otherwise, there would have been no effect upon interstate commerce. The more logical conclusion is that the bar owner continued to purchase to meet the customers' demands. The fact that minor extortions were made would not necessarily have affected his buying habits of beer, since to stay in business he had to meet the demands of his customers coming into the tavern. The court in this case disregarded any such analysis of the probabilities and assumed the extreme effect. While the temptation is strong to uphold the conviction for this sort of activity, particularly in light of the extortioner's official position, consideration must be given to the purposes of the statute, the jurisdictional requirements, and the need for consistency of decisions.

The depletion of assets theory alone has created significant basis for expansive use of the Hobbs Act by federal prosecutors. Judge Swygert of the Seventh Circuit stated in his dissent in *United States v. Amabile*:[70]

> If a depletion of reserves is all that is necessary to show the requisite affect [sic] on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely effect of the threat, simply because his stock in merchandise had in some measure moved in interstate commerce. I do not believe that the Hobbs Act was intended to have such a broad reach.[71]

In *United States v. Augello*[72] money was extorted from a hamburger stand which purchased meat from another state. Jurisdiction was founded upon the depletion of assets with the effect upon interstate commerce assumed therefrom.[73] The possibility for even further extention is exemplified in *United States v. Pearson*.[74] Here the defendant attempted to rob the safety deposit boxes of a hotel that had both in-state and out-of-state guests. The court quickly dismissed the contention that there was no federal jurisdiction, stating:

> The evidence established that this hotel entertained a large number of out of state visitors, thus establishing the required interstate nexus. Only slight evidence is required to show an interference with interstate commerce. [citations ommitted] This point lacks merit.[75]

The court in *Pearson* assumed the effect without any actual depletion of assets from the mere fact of the presence of customers from other states. Even if robbery had occurred there was no suggestion that future operations of the hotel would have been impaired or that guests would not have returned because of such robbery. The only evidence offered was that of the registration cards indicating that a number of the guests were from out of state.[76]

Carrying this jurisdictional rationale to its logical extreme, the requisite effect, albeit potential, is established when robbery or extortion is committed against any individual who has in the past purchased goods manufactured in another state. After all, these individuals are potential buyers of goods whose resources have been depleted. Is there a significant difference between the potential effect upon interstate commerce when $100 is taken from a hamburger stand or tavern and when $100 is taken from the pocket of an individual on the street? Furthermore, when a small amount of money is taken from a store or tavern owner, the threat to the existence of the enterprise is negligible. The enterprise more than likely will continue to purchase goods in interstate commerce to meet the demands of its customers and forego some profit because of the payoffs. An individual, on the other hand, is more likely to forego some goods which may be made out of state if such purchases are not essential to the continued existence of that individual. Assuming, *arguendo*, that this theory on the interstate commerce effect is valid, it is clear that the activities reached by recent prosecutions are not the same as those developed by the legislative history or prosecuted during the initial twenty years of the Hobbs Act.[77]

[70] 395 F.2d 47 (7th Cir. 1968).
[71] *Id.* at 55.
[72] 451 F.2d 1167 (2d Cir. 1971).
[73] *Id.*
[74] 508 F.2d 595 (5th Cir. 1975).
[75] *Id.* at 597.
[76] *Id.* at 596.
[77] *See* note 60 *supra*.

The Seventh Circuit, en banc, has carried the "potential effect upon interstate commerce" theory to what may be its furthest extent by holding in *United States v. Staszcuk*:[78]

> [T]hat the commerce element of the Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.[79]

The Court decided that it was for the jury to assess the probabilities of there being some effect upon interstate commerce at the time the extortion took place. As with the depletion of assets theory, the Court in *Staszcuk* did not articulate how the jury was to analyze the probabilities. In many other Hobbs Act prosecutions the Court has made the determination of whether there was sufficient effect upon interstate commerce to gain federal jurisdiction.

The purpose of the extortion in *Staszcuk* was to ensure a zoning change to enable the victim to build a particular building. The payoff was made but the building eventually built could have been built under the former zoning. The Court instructed the jury:

> It is not necessary for you to find that the defendant Staszcuk knew or intended that his actions would affect, delay or obstruct commerce or the movement of any article in commerce; it is only necessary that the natural effect of the act committed by him, whether he was conscious of it or not, would be to affect, delay or obstruct commerce.[80]

In footnote eighteen the Court further stated:

> The instruction in this case required the jury to find that the "natural effect" of the transaction would be to affect commerce. . . . We find no significant difference between that phrasing and a test phrased in terms of a "realistic probability" of such an effect.[81]

In *Staszcuk* the assessment of the probabilities rested upon the object of the payoff (the change in zoning so a particular building could be built) at the time it was made even though the payoff actually caused no effect upon interstate commerce and at the time of trial such effect was virtually impossible.

Apparently, the Court disregards any effect the jurisdictional element has upon the substantive nature of the offense by construing *"Whoever in any way or degree obstructs, delays or affects commerce . . .* by robbery or extortion . . ." as *only* the "Federal Jurisdictional fact." As was stated in Judge Pell's dissent in *Staszcuk:*

> The net effect of the majority decision is to construe the statute to read: 'Whoever in any way or degree potentially obstructs, delays, or affects commerce, even though he does not actually obstruct, delay, or affect commerce. . .'[82]

But Judge Pell does not point out that many of the earlier labor extortion Hobbs Act prosecutions involved a situation where but for the payoff there would have been an effect upon interstate commerce. In those cases it was the potential result, had the threat been carried out, which provided federal jurisdiction. With the depletion of assets theory this was reversed. There it was the actual payoff that prevented the carrying out of the threat which became the "effect" upon interstate commerce. The depletion of assets became, in these decisions, the "evil" to be stopped. In *Staszcuk,* if there had been no payoff the status quo would have remained intact. Also, the depletion of assets theory is not used. The prevention of a zoning change as a probable effect was not discussed. The Court only discussed the effect in terms of the building that required a zoning change before it could be built. This is taken further by saying that the object which may bring about an effect need only be in the mind of the person paying the money at the time of the extortion whether or not such object is carried out. On a substantive level the courts are disregarding the history and early prosecution of the Hobbs Act, and are reading the words as broadly as the United States attorneys are willing to argue.

[78] 517 F.2d 53 (7th Cir. 1975).
[79] *Id.* at 59–60.
[80] *Id.* at 56 n.6.
[81] *Id.* at 60 n.18.
[82] *Id.* at 62 (Pell, J., dissenting).

Disregarding the substantive deviations, one must question whether the courts have interpreted correctly the words "effect upon interstate commerce." The answer to this is in part dependent upon whether these words should be interpreted solely in a constitutional sense or by taking into consideration the statutory purposes behind the Hobbs Act itself. Even assuming that the words "effect upon interstate commerce" are literally coincident with the farthest constitutional extention of the commerce power, it does not necessarily follow that they should be interpreted as such for purposes of the Hobbs Act.

A constitutional interpretation of the jurisdictional element of the Hobbs Act would limit prosecution only to the extent the Supreme Court would limit Congress's power to regulate interstate commerce. There are both legal and policy reasons for opposing this kind of interpretation.

The argument for a broad constitutional reading of the jurisdictional base of the Hobbs Act is justified by using the recent civil rights cases and their apparent exhaustion of Congress' power to regulate commerce under the Constitution.[83] Substantively it is very difficult to analogize the civil rights proscriptions to the Hobbs Act because of the entirely different activities and circumstances involved.[84] The civil rights cases involve situations where "Congress itself has said that a particular activity affects Commerce. . ." [85] The Anti-Loan Sharking Act is another example where Congress made specific findings that a particular activity had the requisite effect upon interstate commerce.[86]

In *Katzenbach v. McClung*[87] the Court referred to hearing testimony that discrimination in restaurants had "a direct and highly restrictive effect upon interstate travel by Negroes." [88] In *Heart of Atlanta Motel v. United States*[89] the Court sustained the constitution-

[83] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). *See also* Perez v. United States, 402 U.S. 146 (1971); Abrams, *supra* note 1, at 36.

[84] *See* United States v. Amabile, 395 F.2d 47, 54 (7th Cir. 1968) (dissenting opinion). Judge Swygert stated in dissent:

> The majority quotes from *Katzenbach v. McClung*, 379 U.S. 294 (1964), to support the proposition that, "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." I respectfully submit that the abstract language quoted from *McClung* has no application to the instant case. A decision upholding the constitutionality of the Civil Rights Act of 1964 under the commerce power can hardly have pertinency to the intended scope of the Hobbs Act.

395 F.2d at 55 n.1.

[85] *See* Perez v. United States, 402 U.S. 146 (1971). The Court in *Perez* referring to *Heart of Atlanta Motel* said, "The Act declared that any inn, hotel, motel, or other establishment which provides lodging to transient guests affects commerce per se." 402 U.S. at 153. The Court in *Heart of Atlanta Motel* in reference to the Congressional power to pass the Act which allowed equal access to housing and motel accommodations stated:

> This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight . . . . These . . . practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well.

379 U.S. at 303.

The Court in *Katzenbach v. McClung* stated:

> Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court.

379 U.S. at 303.

[86] Anti-Loan Sharking statutes, Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891 *et seq.* The Court in *Perez v. United States*, in upholding the constitutionality of the Anti-Loan Sharking Act, discussed many committee reports and hearings which indicated the national problem with loan sharking and then stated:

> The essence of all these reports are hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses.

402 U.S. at 156. *See generally* 114 CONG. REC. 14391, 14392, 14395, 14396.

[87] 379 U.S. 294 (1964).

[88] *Id.* at 300.

[89] 379 U.S. 241 (1964).

ality of the Civil Rights Act requiring hotel or motel accommodations for Negro guests affects commerce per se." [90] The finding of unconstitutionality of this activity also rested upon the conclusion that it "substantially affected commerce" and constituted direct obstructions to an individual's right to travel because of the difficulty of getting accommodations at night.[91] The test of Congressional right to exercise power under the Commerce Clause, as enunciated in *Heart of Atlanta Motel,* was whether the "activity sought to be regulated is commerce which concerns more States than one and has a real and substantial relation to the national interest." [92]

The Supreme Court in these civil rights cases indicated that when Congress makes direct findings of effect upon interstate commerce, the judicial inquiry need only concern whether the finding of a "direct and adverse effect on the free flow of interstate commerce"[93] was rational and whether the activities involved were of the class of activities intended to be regulated by the Act.[94]

The prosecutions of the Hobbs Act, in contrast, have not relied on any legislative findings of effect upon interstate commerce. As has been indicated earlier, many of the activities now prosecuted under the Hobbs Act would have a great deal of difficulty falling into the class of activities that were being proscribed by Congress when the Act was passed. More important to the jurisdictional issue, however, is the fact that the effect upon interstate commerce for application of the Hobbs Act must be found at trial and not in the legislative history. It is a major part of the application of the Act itself.[95] The hearings before passage of the Anti-Racketeering Act did not make general findings of an effect per se, but indicated that the statute could only reach those actions which did, in fact, affect interstate commerce.

The Hobbs Act falls into the category described in *United States v. Darby*[96] in which the court is left to determine whether the activity has the prohibited effect upon interstate commerce. It therefore must be distinguished from the civil rights cases where Congress found an effect per se or made the determination within the Act itself and thereby reduced the evidentiary proof necessary for jurisdictional purposes. The Court in *Darby* stated:

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce . . . .[97]

The Hobbs Act history and application are inconclusive and ambiguous. The two clear substantive activities intended to be reached, especially in light of the early prosecution, involved (1) labor officials threatening work stoppage or strikes if money was not paid and (2) actual stoppage of truckers and other individuals moving goods across state lines for marketing. Both of these examples involve direct effects upon interstate commerce. Therefore, the substantial and direct effects which Congress specifically found in the civil rights situation must also be found by the courts in the Hobbs Act cases.

Courts in recent Hobbs Act interpretations, however, have reached activities not discussed in the legislative history, yet which are necessarily assumed to have a sufficient effect upon interstate commerce.[98] For example, the courts have assumed said effect in police shakedowns, the hamburger stand extortion, and the hotel

[90] *Id.*

[91] *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[92] 379 U.S. at 255.

[93] *See* Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[94] *Id.*

[95] *See* Abrams, *supra* note 1; Schwartz, *supra* note 2.

[96] United States v. Darby, 312 U.S. 100 (1941).

[97] *Id.* at 120.

[98] *See, e.g.,* United States v. Pearson, 508 F.2d 595 (5th Cir. 1975); United States v. Irali, 503 F.2d 1295 (7th Cir. 1974); United States v. Pacente, 503 F.2d 543 (7th Cir. 1974); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971); United States v. Amabile, 395 F.2d 47 (7th Cir. 1968).

[99] *See* note 98 *supra.*

robbery.[99] Many of the recent Hobbs Act cases have held that such obstructions upon interstate commerce do not have to be specifically proved despite the absence of legislative findings as to the effect upon interstate commerce that could be applicable to all activities which arguably fall into the class of activities regulated.[100] There was no indication in the legislative history that the payoffs were going to actually reduce the buying power of a tavern owner, hotel owner, or hamburger stand. Furthermore, these are not cases where the customers are precluded from entering the establishments.[101]

The Congressional hearings and legislative history of the Hobbs Act do not reflect the national character of all the possible activities that could arguably be included within the amorphous term "racketeering." Courts have not required actual proof of a national effect upon interstate commerce. Nevertheless, broad interpretations of the jurisdictional base should not become a pretext for evading legislative history or denying past precedent, especially where the activities reached could have been adequately described by the legislators.[102] As one commentator stated,

> The maintenance of order is the precondition of any freedom in a society, and where the subject matter of regulation is such as to make unfeasible modes of law administration other than those which involve *ad hoc* judgments, considerable pressures are created in favor of permitting an *ad hoc* judgment scheme. Whether those pressures will succeed depends not merely upon narrow questions as to the naked comprehensibility of a statutory phrase, but upon the entire context of the regulation attempted, the danger to the public interest of the activity as unregulated and the loss to the individual which results from its regulation.[103]

The damage to the individual is underscored mostly in terms of the difference between the state penalty and the federal penalty of up to twenty years and the nonapplicability of double jeopardy as the concept is presently interpreted.[104] The present extention of the Hobbs Act, jurisdictionally and substantively, indicates a disregard on the part of the courts of the legislative history and a significant deviation from the long standing policy of strictly construing criminal statutes.[105]

In 1960 Congress passed the Anti-Loan Sharking Act which proscribes an activity in which Congress specifically found a per se effect upon interstate commerce. Under the current statutory and jurisdictional interpretations, this activity clearly falls within the proscriptions of the Hobbs Act. The facts of *Perez v. United States*,[106] upholding the constitutionality of the Anti-Loan Sharking Act, involve the use of violence against a butcher store owner in order to extort payments of money and interest. The owner paid upon periodic demands and eventually went out of business. Either a depletion of assets theory or a direct effect theory could have brought this activity into the purview of the Hobbs Act.[107] It is unlikely, however, that Congress would have passed the Anti-Loan Sharking Act unless it felt that the specific activity of loan sharking was distinct from the kinds of activities covered by the Hobbs Act. Arguably, at the time that Congress passed the Anti-Loan Sharking Act, it assumed that the activities reached under the Hobbs Act were limited to the kind that had already been prosecuted. This was before federal prosecutors found new arguments for the extention of federal jurisdiction under the Hobbs Act.

Little has been said in recent prosecutions under the Hobbs Act, about the fact that when

---

[100] *Id. See also* H.R. 238, *supra* note 42, at 11840–11912.

[101] *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[102] *See generally* LEVI, *supra* note 6; Abrams, *supra* note 1; Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) [hereinafter cited as Amsterdam]; Frankfurter, *supra* note 45.

[103] Amsterdam, *supra* note 102, at 95–96. With the actual reach of the Hobbs Act in question, such vagueness could lead to selective and unfair enforcement by officials, license to prosecutors to make initial determinations of fact, license to courts to essentially write a law which substitutes the law-making by a judicial elite for lawmaking by elected representatives, and also undermines the assumption that every man is presumed to know the law.

[104] Bartkus v. Illinois, 359 U.S. 121 (1959).

[105] LEVI, *supra* note 6; Amsterdam, *supra* note 102; Frankfurter, *supra* note 45.

[106] 402 U.S. 146 (1971).

[107] *See* United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973).

it was passed the interstate commerce test was stricter than is now being allowed. To accept the interpretation of the commerce clause at the time of passage of the Act, an assumption must be made. That assumption is that Congress, in attempting to write laws which are constitutional, assumed the stricter test for effect upon interstate commerce.[108] This would mean that Congress, by adding the jurisdictional base as an essential part of the gist of the Hobbs Act, actually limited the scope of the Act, thereby not reaching activities under the presently interpreted reach of the commerce power.

An argument could be made that when Congress passed the Hobbs Act they expected that the jurisdictional base was to be as flexible as the future constitutional interpretations allowed. Moreover, an argument could be made that congressional acquiescence regarding the recent use of the Hobbs Act could be construed as a ratification of the broad interpretation. Congress, however, has a duty to write constitutional statutes and is not empowered to delegate unlimited authority to the courts. This violates the basic concept of separation of powers. Regarding the acquiescence argument, Mr. Justice Frankfurter wrote, "[W]hile authority conferred does not atrophy by disuse, failure over an extended period to exercise it is proof that it was not given." [109]

The first twenty years of prosecution of the Hobbs Act indicates a different meaning than is presently being allowed.[110] The acquiescence argument obviously assumes that Congress is continually monitoring the judicial interpretations of the criminal statutes including the Hobbs Act. This argument in support of the present expansion must be rejected for policy reasons. Such monitoring is not done in a public manner; therefore citizens cannot know what is criminal since the statutes will change meaning by gradual accretions which are not reflected in the legislative history or statutory language. The effect, if allowed, would be the creation of federal common law crimes tangentially based upon a statute. In addition, the present expansive interpretations of the Hobbs Act should be rejected because there is evidence that Congress at one time evaluated the Act's target as being the direct obstruction of interstate movement of goods.[111] Considerations of four factors: (1) legislative history; (2) the first twenty years of prosecution; (3) the congressional need to enact the anti-loan sharking stature which under present intepretations could have fallen within the purview of the Hobbs Act; and (4) the judicial policy of strict construction of criminal statutes, suggests that the Hobbs Act should be narrowed considerably and the legislative functions returned to the legislature.

In permitting the extension of the Hobbs Act the courts have also disregarded any consideration of comity. Although an acceptable definition of what constitutes a local activity has never been given, comity is a fundamental precept of a political system made up of a confederation of states with individual state governments.[112] As previously indicated, the history of the Hobbs Act included much discussion of the fear of intrusion into local matters. Substance must therefore be given to the concept of comity. When considering the anti-loan sharking bill, Congress had some of the same fears of intrusion into local matters. In contrast to the Hobbs Act, Congress found the effect upon interstate commerce to be per se in the loan sharking situation, making it clear that it desired the imposition of

[108] The Court in United States v. Five Gambling Devices, 346 U.S. 441 (1953) stated:

> This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere police gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power. The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.

346 U.S. at 449.

[109] Frankfurter, *supra* note 45.

[110] *See* note 60 *supra*.

[111] H.R. 238, *supra* note 42.

[112] *See, e.g.*, Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971); Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841 (1972); Note, *Federal Court Intervention in State Criminal Proceedings*, 85 HARV. L. REV. 301 (1971); Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870 (1970).

federal authority.[113] Yet, in *Perez v. United States,* the issue was still raised in the dissent. Mr. Justice Stewart said:

> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.
>
> Because I am unable to discern any rational distinction between loan sharking and other local crime I cannot escape the conclusion that this statute was beyond the power of Congress to enact.[114]

The fact that many of the activities now prosecuted under the Hobbs Act involve local considerations raises the question of whether the policy of comity should limit the expansion of the scope of Hobbs Act prosecution. Mr. Justice Frankfurter specifically referred to the importance of considering the states' interests when interpreting regulation based upon interstate commerce.

> More frequently still, in the interpretation of recent regulatory statutes, it becomes important to remember that the judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. In such cases, for example, it is not to be assumed as a matter of course that when Congress adopts a new scheme for federal industrial regulation, it deals with all situations falling within the general mischief which gave rise to the legislation. The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local regulations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.[115]

The nature of auxiliary jurisdiction indicates some potential infringement upon what was once regarded as a state matter.[116] Considering this policy and the legislative history of the Hobbs Act, the courts should be reluctant to expand the interpretation of the Act to activities not specifically addressed by the legislators.[117]

The above discussion of the expansion of the Hobbs Act by no means assumes that those activities should not be prosecuted by either a state or federal agency. It does illustrate, however, the potential effect of drafting statutes with auxiliary jurisdictional bases comprising a fundamental part of the offense in addition to general substantive provisions such as robbery and extortion. The jurisdictional link of "effect upon interstate commerce" has legitimized federal involvement to the point where the potential scope of federal prosecution is apparently without bounds.[118] The

[113] *See* Perez v. United States, 402 U.S. 146 (1971).

[114] *Id.* at 157 (dissenting opinion).

[115] Frankfurter, *supra* note 45, at 539–40.

[116] *See* Abrams, *supra* note 1; Schwartz, *supra* note 2.

[117] *See generally* LEVI, *supra* note 6; Frankfurter, *supra* note 45.

[118] Abrams writes:

> The use of the concept of "affecting commerce" in a Title 18 penal provision arguably could be relied upon to extend to Federal criminal law enforcement the scope of jurisdiction that attaches to other Federal regulatory legislation based upon a similar formula. In section 1951 Congress has used a jurisdictional formula which, if interpreted broadly and extended to all substantive offenses, would at least come close to being an exhaustive use of the Federal constitutional power over crime. Thus far, such a jurisdictional peg has

Court's reluctance to limit the expansion of these criminal statutes suggests two dangers intrinsic in this kind of legislative enactment: (1) Federal prosecutors hold virtually unlimited discretion to define both the meaning of the statutes as well as who they should reach; (2) the haphazard jurisdictional system adds to an increasingly overburdened federal judiciary with little, if any, focus on the development of federal expertise based on criminal statutes which peculiarly require the involvement of the federal justice and enforcement system.

Continued acquiescence by the courts to expanding interpretations of the Hobbs Act as set forth by the United States Attorneys' offices encourages discretionary "legislative" efforts on the part of the prosecutors as well as state abdication of previously held responsibility over "local crime." [119] The prosecutor then becomes the focal point upon which the legislation is defined and the criminal justice system is brought into force. Whether deference should be given to the prosecutor's interpretations of a statute if it appears reasonable on its face is a difficult problem to resolve. Prosecutorial discretion which ignores loan sharking incidents arguably within the language of the Hobbs Act but which reaches the activities, for example, in the *Pearson* case lends support to the conclusion that each United States Attorney is able to define for himself the evils within reach of the Hobbs Act.[120]

If the broad interpretation of the Hobbs Act by prosecutors and the subsequent acceptance by the courts is laudatory because of the type of individual and kind of activity reached, the enforcement reliance becomes imbedded in the method of selecting United States Attorneys which by its nature is political, rather than in the ability of Congress to formulate specifically what is being proscribed by a given statute. As Mr. Davis wrote:

> Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.[121]

The temptation to extend the legislation is great in cases where evil men otherwise would go free, but both the judges and the prosecutors have a responsibility to put aside private attitudes and avoid rewriting legislation. As Mr. Justice Frankfurter wrote:

> To go beyond it [the words of the legislature] is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.[122]

Broad jurisdictional bases as in the Hobbs Act enable prosecutors to arrive at far-reaching interpretations which may encourage haphazard application of a criminal statute. Many commentators have remarked that the solution is to better define auxiliary jurisdiction by prescribing the specialized role to be taken by the federal judiciary and the federal government.[123] L.B. Schwartz wrote in 1948:

> The [federal] intervention, moreover, will be haphazard and arbitrary until there is full comprehension of the *auxiliary* role of the government; *i.e.*, until we cease to regard the

---

been used in Title 18 only once and then only with respect to the substantive offenses of robbery and extortion.
Abrams, *supra* note 1, at 38.
Stern, in *Comment on Robbery,* WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1969), wrote:
By its terms then, the Hobbs Act can be taken to confer federal jurisdiction not only over every bank robbery but almost over any robbery of any business concern in the nation. The maker of federal law enforcement policy determines to what extent the broad jurisdiction is exercised.

[119] See Hearings, *supra* note 15; Abrams, *supra* note 1; Schwartz, *supra* note 2.

[120] *See* Perez v. United States, 402 U.S. 146 (1971); United States v. Beck, 511 F.2d 997 (6th Cir. 1975); United States v. Pearson, 508 F.2d 595 (5th Cir. 1975); United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971).

[121] K. DAVIS, DISCRETIONARY JUSTICE (1969).

[122] Frankfurter, *supra* note 45, at 533.

[123] *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 LAW & CONTEMP. PROB. 64 (1948). Judge Friendlly wrote, ". . . the present condition of the federal criminal code is in utter disarray. Different jurisdictional tests are provided without any sensible basis for distinction." FRIENDLY, *supra* note 1, at 58. Hufstedler wrote in *Comity and the Constitution: The Changing Role of the Federal Judiciary,* 47 N.Y.U.L. REV. 841, 856–57 (1972), that the federal code "is a grab-bag into which Congress has thrown grave national offenses, a myriad of offenses primarily or wholly of local concern and petty violations of federal administrative regulations."

jurisdictional circumstance, which gives the United States power to act, as the "gist" of the federal offense.[124]

One result of the expanding federal involvement in the criminal field is the case overload in the federal judiciary. Given increasing prosecutorial staffs and the broad jurisdictional base of the Hobbs Act, for example, one suggested solution has been to increase the future capacity of the federal judiciary rather than to reduce the number of federal crimes.[125] Another suggestion has been to narrow the jurisdictional base or exclude the "essentially local crime" by relegating them to the state courts.

To merely enlarge the federal judiciary, given the jurisdicitional development, would only encourage broader federal prosecution with little attention given to the issue of the specialized role to be played by the federal judiciary. In effect, it would encourage the use of the federal courts as a depository for any kind of case that arguably fits into the literal statutory language. The long-term effect may make a mockery of any legislative history or of any concept of separation of federal and state criminal justice systems. On the other hand, to summarily conclude that federal intervention must be reduced does not answer the dilemma. Given the present interpretation of interstate commerce as authority for federal intervention, it would be difficult to state generally that the "essentially local crime" be excluded since that term has little if any meaning today. It is apparent, though, from the present Hobbs Act prosecutions that many of these crimes have only remote and tangential effects upon the national policy.

To deal with this situation a proposed revision of the federal criminal code includes a section (207) which establishes standards by which a United States Attorney makes the decision to prosecute.[126] Section 207 requires that the United States Attorney question whether there is a substantial national interest in his prosecution of a given case. This essentially moves the inquiry from the courts to the prosecutor. However, this provision operates upon many questionable assumptions. First, it assumes that each United States attorney is capable of this type of assessment and that he will act consistently. At this point, it is unclear whether there will be any sort of rulemaking system or whether the decision will be made on a case by case basis. Second, the assumption is made that Congress is unable to limit the statute by its substantive terms. This is a matter sometimes discussed when the challenge to a statute is for "vagueness." The court may try to determine whether a narrower statute is possible or whether there is something in the nature of the subject matter which makes such drafting impossible. Section 207, in effect, provides the prosecutor with a procedure to rely on when arguing that the statute could not be narrowed in its drafting and that the "substantial national interest" must by necessity fall into the realm of administrative agencies because they can function on a case by case basis. The legal justification for

---

[124] Schwartz, *supra* note 2, at 70.

[125] *See, e.g.*, Tone, *supra* note 1.

[126] H.R. 333, 94th Cong., 1st Sess. (1975). Proposed section 207 reads as follows:

§ 207 Discretionary Restraint in Exercise of Concurrent Jurisdiction

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances, among others:

(a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201(b), the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local enforcement has been so corrupted as to undermine its effectiveness substantially.

Where federal law enforcement efforts are discontinued in deference to state, local or foreign prosecution, federal agencies are directed to cooperate with state, local or foreign prosecution, by providing them with evidence already gathered or otherwise, to the extent that this is practicable without prejudice to federal law enforcement. The Attorney General is authorized to promulgate additional guidelines for the exercise of discretion in employing federal criminal jurisdiction. The presence or absence of a federal interest and any other question relating to the exercise of the discretion referred to in this section are for the prosecuting authorities alone and are not litigable.

this seemingly disparate treatment could come from a broad jurisdictional base which could arguendo allow for virtually unlimited prosecution, but for the fact that the legislature is relying on their administrative bodies to draw the application of the statutes more narrowly. Finally, the section operates on the assumption that there is some method by which a deviation from the standards of section 207 will be both discovered and rectified. Even assuming it is administratively feasible to make each United States Attorney directly accountable for section 207 decisions, this allows the definition of national interest under broad statutes like the Hobbs Act to be made by an appointed cabinet official rather than by the legislature passing the statutes. Judicial review of this decision does not appear to be possible unless a formal administrative procedure is set up; problems would immediately emerge with the speedy trial rights which must be upheld. The only present review has involved decisions by the Justice Department, when an appeal has reached the Supreme Court level, to *nolle prosequi* because of a violation of some internal policy.[127] This has been done rarely and since these policies are not public it is unlikely that a defendant will have ready access to such information. If the defendant could use the standards set forth in section 207 and collaterally raise the issue of compliance with that section, the federal courts would become bogged down to an even greater degree than now with cases that may eventually end up in the state courts for prosecution. This would, in effect, turn over to the federal courts the task of applying national policy evaluations on a case by case basis. This runs directly counter to any notion that the federal judiciary is not a legislative body and even makes it look like an administrative agency. The implementation of section 207 will effectively remove from the legislature much of the responsibility of determining the national policy as per the criminal justice system.

One other suggestion is to separate the jurisdictional base from the substantive offense. This has been suggested by a proposed revised criminal code.[128] However, if the broad substantive language of the offense remains, the result is to allow the prosecution to draw on more than one jurisdictional link. The effect of this is an even greater expansion of the prosecution's discretion. The separation of the jurisdictional base may be an important step towards clarifying the definition of the auxiliary role of the federal government, but to do this without also narrowing the substantive offense as it involves a substantial federal interest does little to improve the situation. It merely removes the confusion of the jurisdictional link as to whether it has any effect upon the substantive offense proscribed.

The solution lies with Congress to more specifically define what they intend to proscribe, concentrating on whether the activities involved are of sufficient national concern to warrant federal prosecution. Congress should realize the potential both for future expansion of the legislation and for the possible negative effects upon the federal and state criminal justice systems. Such specific definition of the substantive offenses will enable the federal judiciary to develop their expertise focussing on specific areas determined by the legislative branch to be of vital national concern. If this is not done, as the Hobbs Act prosecution attests, crimes will be arbitrarily and inconsistently prosecuted in both federal and state courts with little consideration of judicial responsibility, comity, or the need for efficiency. The haphazard application of the Hobbs Act resulted in greater prosecutorial discretion which not only disregarded the legislative history and the first twenty years of prosecution, but also substantially disregarded any division between federal and state governments. Both the present prosecutors and the federal judiciary could take steps to curb this situation, but the major responsibility must remain with the legislature to develop a well-reasoned and organized criminal code.

[127] *See* Redmond v. United States, 384 U.S. 264 (1966) (per curiam).

[128] H.R. 333, 94th Cong., 1st Sess. (1975). *See generally* Dobbyn, *A Proposal for Changing the Jurisdictional Provisions of the New Federal Criminal Code,* 57 CORNELL L. REV. 198 (1972); Levine, *The Proposed New Federal Criminal Code: A Constitutional and Jurisdictional Analysis,* 39 BROOKLYN L. REV. 1 (1972).