Securities Law

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CASENOTES


Section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder protect investors against fraudulent or misleading practices employed by any person "in connection with the purchase or sale of any security." The rule has traditionally given rise to civil actions against corporations, insiders, and broker-dealers. Since the late 1960's however, rule 10b-5 has been expanded to proscribe the misleading conduct of accountants as well. Recently, the United States District Court for the Southern District of New York held in Herzfeld v. Laventhol, Krekstein, Horwath & Horwath that an accountant was liable under rule 10b-5 for issuing false and misleading financial statements despite compliance with generally accepted accounting principles. The district court's decision is significant in its


343
rejection of generally accepted accounting principles as the standard of fair and adequate disclosure, and concomitantly, for its extension of the parameters of accountants' liability.

Plaintiff Herzfeld, an investor, alleged that Laventhol, Krekstein, Horwath & Horwath (Laventhol) prepared an audited report of Firestone Group Limited (FGL) which was materially misleading. The audit was distributed to investors in connection with a 1969 private offering of FGL securities. The plaintiff had purchased two units of securities prior to the issuance of the Laventhol audited report. As a result of this audit, FGL offered to refund the payments of those investors who had already purchased in the private offering. Herzfeld contended that he relied on the Laventhol audit in deciding to decline the refund and retain his securities. Specifically, the plaintiff objected to Laventhol's inclusion in the financial statement of income from certain real estate transactions, which transformed FGL's substantial losses into a sizable profit for the year 1969. Plaintiff contended that these transactions were a sham, initiated solely to induce investment in the private offering. In fact, the real estate transactions were never consummated, and when FGL petitioned for bankruptcy the value of plaintiff's securities fell from $510,000 to $55,000.

The district court rejected plaintiff's contentions that the transactions in question were phony, or that they involved mere options to buy, finding instead that they constituted valid contracts. On the other hand, the court concluded that Laventhol's report was materially misleading because the accountants failed to reveal adequately their reservations concerning FGL's ability to collect the balance receivable on the contract of sale. The court

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6. FGL is a Delaware corporation engaged in real estate syndication which conducts its business primarily in California.

7. Herzfeld purchased one unit on his own and one in a partnership with his brother under the auspices of General Investors Co., added as a party plaintiff during trial.

8. FGL tendered this offer because investors had been led by the note and stock purchase agreement to expect a net of $315,000 for the company, rather than the audited net of $66,000.

9. These transactions involved the purchase and immediate resale by FGL of nursing home properties less than one month before the private offering was conducted.

10. The court found that "whether FGL appeared to be a profitable or unprofitable company... depended on the recognition of the sales proceeds and the profit from the [nursing home] transaction in the company's financial statements." [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,574, at 95,996.

11. Of the $2 million expected profit, plaintiff received one $25,000 down payment.

12. [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,574, at 95,999-96,000. The court stated: "We think the contracts, as a whole, are open to several interpretations, and the interpretation adopted by Laventhol was supportable."

was not persuaded by Laventhol’s contention that their compliance with generally accepted accounting principles\textsuperscript{14} constituted full and adequate disclosure which insulated them from liability for fraud. “Fair disclosure,” not compliance with accepted accounting principles, was the standard demanded by the district court. The court classified the action as one involving misrepresentation in which proof of reliance must be established,\textsuperscript{15} and conceded that plaintiff had not relied on the audit in making his original purchase.\textsuperscript{16} Nevertheless, the court found that a true statement of FGL’s financial condition might have caused the plaintiff to change his investment decision and demand a refund of his payments.\textsuperscript{17} Following a determination that this constituted substantial reliance, liability was imposed under rule 10b-5, the New York General Business Law,\textsuperscript{18} and common law fraud.

This note will concern itself with the demise of generally accepted accounting principles as a standard of professional due care and with the district court’s conclusion that the plaintiff relied on Laventhol’s audited report.

I. GENERALLY ACCEPTED ACCOUNTING PRACTICES AS A 10b-5 STANDARD OF CONDUCT

The elements of a statutory action brought under rule 10b-5 are derived largely from the common law concept of fraud.\textsuperscript{19} In his Herzfeld opinion, Judge MacMahon cited\textsuperscript{20} SEC v. Texas Gulf Sulphur Co.\textsuperscript{21} as having enu-

\begin{enumerate}
\item Laventhol qualified the report as “subject to the collectibility of the balance receivable on the contract of sale.” They also added to the report note 4, which stated the financial terms of the nursing home transaction contracts. Note 4 also described the treatment of the profit from the transactions and the liquidated damages provision. Laventhol contended that this constituted full and adequate disclosure in compliance with generally accepted accounting principles. \textit{Id.}
\item \textit{Id.} at 96,003.
\item \textit{Id.} at 96,004. Herzfeld’s interest in the securities was stirred by a partner in the underwriting firm for FGL’s private offering, Allen & Company Incorporated, and by a business-broker acquaintance.
\item \textit{Id.} at 96,004.
\item N.Y. GEN. BUS. LAW § 352-c (McKinney 1968).
\item The common law elements of fraud are: false representation of a material fact; knowledge by the defendant that his representation is false; intent by the defendant to deceive and induce others to rely on his representation; reliance by plaintiffs; and damage suffered as a result of such reliance. \textit{See} W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-86 (4th ed. 1971). \textit{See also} Ultramares Corp. v. Touche, 255 N.Y. 170 (1931).
\item \textit{[1973-1974 Transfer Binder]} CCH FED. SEC. L. REP. ¶ 94,574, at 95,998.
\item \textit{401 F.2d} 833 (2d Cir. 1968), \textit{cert. denied}, 394 U.S. 976 (1969). The Texas Gulf Sulphur case expanded the concept of insiders to include anyone in possession of material inside information and not merely officers or directors of a corporation,
\end{enumerate}
merated the elements of proof required by the Second Circuit to establish a rule 10b-5 claim: the defendant's representation was materially misleading; the defendant knew the representation was misleading; the plaintiff relied on the representation; and the plaintiff suffered damages as a result of such reliance. Missing from the formula was the common law concept of intent to deceive, proof of which the court in Texas Gulf Sulphur found as had previously been the case. The court of appeals found the corporation and several of its officers, directors, and employees liable under rule 10b-5 for taking advantage of their exclusive knowledge of material inside information concerning a possible ore discovery by purchasing company stock in national exchange transactions before the information became public. The court imposed an affirmative duty of disclosure upon the defendant insiders to reveal their information to the shareholders from whom they sought to purchase stock. The application of the affirmative duty of disclosure rule to stock exchange transactions was a novel one; courts had previously required disclosure only in face-to-face negotiations. For a more complete and thorough discussion of this case, see Sandler & Conwill, Texas Gulf Sulphur; Reform in the Securities Market Place, 30 Ohio St.J. 225 (1969). For the view that the court of appeals decision was an unfortunate one, see Leavell, The Texas Gulf Sulphur Opinion in the Appellate Court: An Open Door to Federal Control of Corporations, 3 Ga. L. Rev. 141 (1968).

22. Actually, the majority opinion in Texas Gulf Sulphur, authored by Judge Waterman, shed doubt as to whether proof of knowledge on the part of a defendant of the misleading nature of his action, that is, scienter, was required by the Second Circuit in rule 10b-5 damage claims. This uncertainty resulted from Judge Waterman's classification of the defendants' activities as negligence, despite the presence of undisputed knowledge, see 401 F.2d at 852-53, on their part. While Texas Gulf Sulphur involved an action by the SEC for injunctive relief and was not a private action for damages, Judge Waterman also indicated approval of a negligence standard in private damage claims brought under rule 10b-5. Thus, despite the presence of scienter in Texas Gulf Sulphur, Judge Waterman's discussion raised serious doubts as to whether the Second Circuit would consider it a necessary element of proof in future rule 10b-5 actions. In a separate concurrence Judge Friendly, joined by Judges Kaufman and Anderson, took specific exception to Judge Waterman's apparent abandonment of the scienter requirement. This internal conflict among the judges led at least one lower court to categorize the Second Circuit's scienter stance as "an open question." Marx & Co. v. Diner's Club, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,881 (S.D.N.Y. 1970). The confusion was subsequently eliminated by the Second Circuit in Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971), a private damage action in which the court explicitly held that knowledge, or scienter, was an essential element of rule 10b-5 claims, and concomitantly, that mere negligent conduct by a defendant would not be sufficient to justify application of rule 10b-5. In so stating, the court cited Judge Friendly's concurring opinion in Texas Gulf Sulphur while ignoring the majority opinion. See id. at 445.

23. Common law intent to deceive involves several factors, not all of which have been deemed unnecessary to prove in rule 10b-5 actions. These factors include actual knowledge, that is, scienter; intent to make a misleading statement; and intent that the misleading statement be related to certain persons who will act upon it. See W. Prosser, supra note 19, at 700. The scienter aspect of intent to deceive is separable from the aspects involving specific intent to mislead. Scienter involves actual knowledge of falsehood or reckless disregard for the truth, as opposed to mere negligence, which involves conduct which is not wholly innocent but may be excusable. Such actual or constructive knowledge remains a required element of proof in Second Circuit rule 10b-5 claims.
unnecessary in determining whether rule 10b-5 had been violated. Several
circuits have expressed a similar conviction with regard to the scienter re-
quirement; the plaintiff need not demonstrate that the defendant knew the
particular representation was misleading. Still further erosion of the strict
common law fraud concept occurred in Affiliated Ute Citizens v. United
States, where the United States Supreme Court dispensed with the reliance
requirement in actions involving total nondisclosure.

Absent indications to the contrary, however, it is apparent that the Affil-
iated Ute view of reliance does not extend beyond actions involving total non-
disclosure. Thus, with the exception of those circuits that have abolished
the scienter requirement, the Texas Gulf Sulphur formula enunciates the
guiding criteria in rule 10b-5 claims for misrepresentation. A plaintiff must,
as a result, establish material misrepresentation, which the defendant knew
was false, reliance, and consequential damages.

While courts have more precisely defined the elements of proof required
in a rule 10b-5 action, the standard of care an accountant must satisfy re-
mains subject to dispute. Accountants themselves have traditionally looked
to the usual practices of their profession—the generally accepted accounting
principles—in order to protect themselves from possible liability. For ex-

Proof of intention to mislead, however, has been almost universally eliminated as a re-
quirement in rule 10b-5 actions. Consequently, elimination of intent to deceive as a
requirement of proof does not involve abolition of the scienter requirement as well. See

24. See, e.g., Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S.
951 (1970) (liability imposed on defendants under section 10b of the act when they
purchased stock from plaintiffs without informing them of company’s optimistic future
prospects); Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965) (defendants held liable
under rule 10b-5 for untrue statements and omission of material facts made while sol-
licitating purchase of stock in corporation yet to be formed); Ellis v. Carter, 291 F.2d
270 (9th Cir. 1961) (defendant held liable under rule 10b-5 for fraud in connection
with joint venture by stockholders to acquire control of corporation).

It must be noted, however, that elimination of the scienter requirement by the above
courts has been limited to rule 10b-5 actions for injunctive relief; courts have apparently
been unwilling to impose liability on defendants in damage actions where mere negli-
gence was involved, without proof that defendant knew his representations were false,
either actually or constructively. See Bucklo, supra note 23, at 563.

25. 406 U.S. 128, 153-54 (1972) (defendants induced holders of corporation’s stock
to dispose of their shares without informing shareholders of great demand for their
stock, which defendants themselves had largely created). The rationale behind the Su-
preme Court’s abolition of the reliance requirement in actions involving total nondis-
closure was to avoid situations where a defendant escapes liability because of the diffi-
culty involved in proving reliance on an omission. To ease the burden in such a situa-
tion the Court required the plaintiff to prove only that the facts withheld were material
insofar as a reasonable investor might have found them important in making his in-
vestment decision. Id. at 153-54.

26. See note 24 supra.
ample, accountants typically “qualify” their opinion of a company’s financial condition when they are uncertain of the validity of figures represented in the company’s financial statements. Essentially, this procedure is utilized to notify anyone relying on the financial statements that the accountants cannot guarantee the accuracy of the figures represented and, in fact, that they have reservations about the accuracy of these representations. The question of whether compliance with such a procedure will constitute fair and adequate disclosure has prompted differing reactions from the courts.

Several judicial decisions follow the practice of the industry itself and have adopted the view that compliance with generally accepted accounting principles will insulate accountants from civil liability for fraud. In *Shahmoon v. General Development Corp.*, the United States District Court for the Southern District of New York held that since certain practices employed by the defendants were endorsed by the accounting profession, the plaintiff’s contention of fraud could not stand. Similarly, in *Escott v. BarChris Construction Corp.*, the same court stated conclusively that “[a]ccountants should not be held to a standard higher than that recognized in their profession.” In yet another case, *Donovan Construction Co. v. Woosley*, the sole issue for the court’s determination was whether generally accepted accounting principles had been satisfied. The finding that normal accounting practices were adhered to was held to refute the plaintiff’s assertion of fraud.

On the other hand, at least one court has stated that compliance with generally accepted accounting principles is not an absolute defense against liability in civil actions. In *Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs*, the Fourth Circuit declared that gen-

27. [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,308, at 95,035 (S.D.N.Y. 1973). Among other things, the accountants in *Shahmoon* made it a practice to record the development company’s sale of a homesite as completed after the first monthly payments. *Id.* at 95,039. Since that and other procedures objected to by the plaintiff were normal practices of the accounting profession, the court was unwilling to sustain the allegations of fraud.

28. 283 F. Supp. 643 (S.D.N.Y. 1968); see note 4 supra. The court in *BarChris* found that the extent of the accountants’ investigation into the company’s financial condition for purposes of preparing an S-1 review did not satisfy generally accepted accounting standards; thus, liability was imposed.

29. *Id.* at 703.

30. 358 F. Supp. 375 (W.D. Ark. 1973). The court found that by personally viewing certificates of deposit which were included in the company’s financial statements as current assets and by using other audit procedures to verify the existence of valuations placed on the certificates of deposit, the accountants satisfied the requirements of their profession and were free from liability.

31. 455 F.2d 847 (4th Cir. 1972). Accountants were held negligent for their failure to conduct any independent investigation into the existence or nonexistence of leasehold
erally accepted accounting principles were a minimum standard which accountants must satisfy to avoid liability, and that compliance with industry standards would not bar liability in all situations. 82

A more radical departure came in United States v. Simon, 83 a criminal case in which the Second Circuit rejected as inconclusive expert testimony that the defendants had complied with generally accepted accounting principles. The court was concerned more with whether the accountants had made a fair presentation of the company’s financial statements than with their adherence to accepted accounting standards. The Simon decision may be subject to alternate interpretations: first, that generally accepted accounting principles in and of themselves will not serve as a defense to a lawsuit; second, that compliance with the usual practices of the profession will serve as a complete defense in those situations where an official pronouncement of the accounting profession is at issue. The generally accepted accounting principles disputed in Simon were recognized as being extensively used, but they had not been expressly set out in an official pronouncement. Thus, compliance with them failed to insulate the defendants from criminal culpability. 84

These conflicting decisions have not clarified the legal significance of generally accepted accounting principles. Shahmoon, BarChris, and Donovan at least facially stand for the proposition that adherence to industry standards would render accountants free from liability in civil actions for fraud. On the other hand, Rhode Island Hospital Trust held that generally accepted accounting principles were a minimum standard by which to measure liability

improvements listed on a company's financial statements as substantial business costs. On rehearing, 482 F.2d 1000 (4th Cir. 1973), the court of appeals found that the plaintiff bank relied on the negligently prepared financial statements in extending loans to the audited company by virtue of which the bank incurred losses.

32. 455 F.2d at 852.
33. 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970). Evidence indicating that the accountant-defendants knew of looting by the corporate president, certified as an asset a receivable whose collectibility was essential but collateralized by securities of the same corporation whose solvency was in question, and failed to reveal a known increase in the receivable, was sufficient to sustain a finding of criminal intent to draw up and certify a false and misleading financial statement.

34. While it is far from the predominant view, the latter interpretation is derived from Judge Friendly's statement that the expert testimony on compliance with generally accepted accounting principles should not be a complete defense for defendants, “at least not when the accountants' testimony was not based on specific rules or prohibitions to which they could point.” Id. at 806. The witnesses in Simon testified on the need for an auditor to make an honest judgment, and they expressed their belief that nothing contained in the financial statements negated the conclusion that an honest judgment had been made. Obviously, this testimony was not specific enough to satisfy the court.
in civil actions for fraud. And in Simon, reliance on industry standards was apparently rejected altogether as a defense to criminal liability. Viewed together, these cases well illustrate the inconsistent treatment which generally accepted accounting principles have received from the courts.

II. THE HERZFELD CASE

The issue of the legal significance of the accounting industry's standards was squarely presented for the district court's consideration in Herzfeld. In determining whether the defendant's audited report was materially misleading, the court inquired into the correct procedure for an accountant to follow while recording real estate transactions. As a consequence, the question became whether Laventhol could be held liable for fraudulent conduct despite adherence to accounting procedures recognized and endorsed by the profession.Judge MacMahon stated that it was incumbent on Laventhol to fully reveal to investors its reservations concerning the real estate transactions and the information on which those reservations were founded. Although Laventhol insisted, despite threats of suit from FGL and the underwriters, on listing only a relatively small portion of the $2 million profit from the transaction as current income, and although they qualified their opinion, stating that the report was "subject to collectibility of the balance receivable on the contract of sale," the court found that their disclosure was inadequate due to the absence of certain facts essential for an informed investment decision.


36. Of particular significance to the investor was such information as the fact that the buyer's net worth was only $100,000; that some ambiguities existed in the contract language to suggest to some that they resembled options to buy; that the transaction was the largest in which FGL had ever participated; and that if the income from the transactions was not realized, FGL would show a loss for the year 1969. Id. at 96,001-02. The court cited an article by a member of the SEC's legal staff in support of its contentions: Sonde, The Responsibility of Professionals Under the Federal Securities Laws—Some Observations, 63 NW. U.L. REV. 1 (1973).


38. This current income included two $25,000 cash payments from the purchaser and $185,000 in liquidated damages payable under the contract should the purchaser fail to comply.

Thus, Judge MacMahon placed on Laventhal the heavy burden of exposing all the facts which an investor might need to decipher the financial statements accurately. In so doing the court relied on United States v. Simon,\textsuperscript{40} thus extending that decision's holding, that generally accepted accounting principles will not relieve an accountant from responsibility for fraud, to civil as well as criminal cases.

In order for the court to impose liability on the accountants for their misleading report, the plaintiff had to prove that he had relied on the audit in making his unfortunate investment. Perhaps in anticipation of problems of proof, the plaintiff attempted to invoke the Affiliated Ute rule which abolished the reliance requirement in cases involving total nondisclosure. Judge MacMahon, however, believed that the conduct before him was merely that of affirmative misrepresentation, upon which reliance must be demonstrated.\textsuperscript{41}

The plaintiff's initial interest in the securities was generated by sources other than the defendant.\textsuperscript{42} In fact, both of his units were purchased prior to the issuance of the Laventhal audit. Herzfeld admitted that even when he received the audit, accompanied by FGL's offer to refund, he read only the income statement and the FGL letter. Laventhal contended in court that this negated any possibility of reliance, since the essential qualification and explanatory note were ignored. Judge MacMahon disagreed, finding that the income statement supported Herzfeld's impression that FGL was a profitable business. The court felt that a true version of the company's finances would have altered the plaintiff's positive impression of the company and as a result may have convinced him to terminate his investment. Consequently, the court concluded that the picture the report painted of FGL's financial condition was "a substantial, even crucial, factor"\textsuperscript{43} in causing Herzfeld's losses.

**CONCLUSION**

It can be argued that the court's position is a tenuous one. It is clear that Herzfeld did not rely on Laventhal in undertaking his original investment. Only by virtue of FGL's refund offer did any possibility of reliance arise, and then only to the extent that the plaintiff might have depended on

\textsuperscript{40} 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970); see note 33 supra.

\textsuperscript{41} 1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,574, at 96,003.

\textsuperscript{42} See note 16 supra.

\textsuperscript{43} According to Prosser, for reliance to be found, "[i]t is enough that the misrepresentation has had a material influence on the Plaintiff's conduct, and been a substantial factor in bringing about his action." W. PROSSER, supra note 19, at 715.
the audited report in deciding whether to rescind his purchase. If Herzfeld had read the entire report and then made his decision to retain the securities, a finding of reliance would be defensible. Absent this, the court's conclusion that reliance was established seems dubious.

Problems arise as well with the court's rejection of generally accepted accounting principles as establishing a standard of fair and adequate disclosure. While at first glance the Herzfeld decision appears to be an innovative attempt to protect investors against fraudulent inducement, the case's broad implications warrant closer inspection. If generally accepted accounting principles no longer afford protection from liability, the role of an accountant may change radically. To avoid liability, the auditor may become merely a reporter, disclosing endless amounts of information, tending to confuse investors rather than advise them. Accountants may be sued each time an investment fails for not revealing facts which subsequently become known. They may be held liable for the transgressions of corporate management solely because they provide an easier target; and survival may dictate that they assume responsibilities properly belonging to issuers and underwriters.44

Undoubtedly, accountants must make their accepted practices conform to higher levels of judicial expectation. However, rejecting the standards of the profession entirely, and replacing them with a standard as ambiguous as "fair presentation" may only compel professional resistance to heightened responsibility.

Christopher FitzPatrick


The sixth amendment guarantee of "assistance of counsel" in all criminal prosecutions has been significantly expanded in recent years. In 1963 this right was made a due process requirement in certain state prosecutions1 and

44. For a vigorous criticism of the district court's opinion, see Address by Carl D. Liggio, California State CPA Society Annual Meeting, June 26, 1974.

in 1972, the assistance of counsel guarantee was extended to any defendant threatened with loss of liberty.\(^2\) The expansion of the right to representation has inevitably raised questions as to how to supervise the quality of appointed counsel. Although these issues are most frequently confronted by courts in a post-conviction forum, the Superior Court of the District of Columbia dealt directly with the nature of defendants' assistance during the pre-trial stage in *United States v. Chatman*.\(^3\)

The case arose after funds under the Criminal Justice Act\(^4\) for the Superior Court of the District of Columbia were frozen. In lieu of counsel appointed under the Act, Chatman and his co-defendant, Crawford, were each assigned court-appointed attorneys to defend them against felony charges arising from an alleged second degree burglary. At their arraignment, they expressed dissatisfaction with the performance of these counsel.

Specifically, Chatman alleged that he had seen his lawyer only once during his three months of incarceration and that no bond review motion had been filed despite the availability of a third-party custodian. Moreover, Crawford, who was also incarcerated, had seen his lawyer only once at his preliminary hearing. Repeated attempts to determine from his attorney the status of grand jury action in his case had proved unsuccessful.\(^5\)

When counsel for Chatman asked to be relieved of the case, his request was granted by the court.\(^6\) Moreover, the court granted the defendant Crawford's request for vacation of appointment after discovering that his lawyer was counsel in fifty-eight active and pending cases.\(^7\)

The Public Defender Service was then requested to assume the defense in these cases but their eleven staff lawyers, each of whom was already involved in more than the thirty case recommended maximum, maintained that acceptance of additional felony cases would be inconsistent with the requirements of the sixth amendment.\(^8\) Consequently, the court requested the as-

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5. Criminal No. 28538-74 at 1-2.
6. Only in rare cases have trial lawyers declared their own inadequacy, particularly when their adequacy has been challenged by neither court nor client. *See Johnson v. United States*, 328 F.2d 605 (5th Cir. 1964). *See also* Criminal No. 28538-74, at 6, where the court cited a letter received from a member of the District of Columbia Bar specializing in patent law summoned to defend an indigent defendant in an unrelated case. The attorney commendably claimed that acceptance of the appointment would "be in direct violation of the ABA Code of Professional Responsibilities, Canon 2(30)."
7. The felony trial caseload per attorney in the Public Defender Service for the District of Columbia is restricted to thirty. *See Memorandum of the Board of Trustees Regarding Caseload Levels of Staff Attorneys* 3 (1973).
8. Criminal No. 28538-74, at 4-5.
assignment of two lawyers qualified to litigate felony cases from a pool of members of the District of Columbia Bar. At that time, however, none were available to assume additional appointments. Confronted with the unavailability of competent counsel, the court was unable to proceed with the arraignment and, as a result, ordered the indictments dismissed without prejudice.

Recognizing dismissal as a severe sanction, the court justified its decision by balancing the defendant's sixth amendment right to adequate representation with the community's interest in orderly and lawful prosecutions. Concluding that the community as a whole has a vital interest in the "health and vitality of the adversary system," the court found that the unavailability of qualified counsel rendered the balancing process ineffectual.

The purpose of this note is to analyze what constitutes adequate "assistance of counsel" under the sixth amendment, in a pre-trial setting. Additionally, this note will consider the appropriate remedy a court can fashion once it has determined that effective assistance of counsel is not available.

I. The Standards of Effectiveness

A. Post-trial Setting

When courts have addressed the problem of ineffective assistance of counsel, a variety of standards have been established which place varying burdens of proof upon a defendant. The most common, and the one which requires a defendant to assume the heaviest burden, is the "mockery of justice" standard, where counsel's efforts must be found to be so perfunctory as to render the trial a farce. Frequently, courts require appellants to show not only that they were denied the right to effective counsel but also that such denial was prejudicial.

In Scott v. United States the District of Columbia Court of Appeals held arraignment to be a "critical stage" in the prosecution requiring the presence of counsel.


13. See Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 26 (1973). Chief Judge Bazelon argues that this proof of prejudice must overcome a well established presumption of regularity that as long as the defendant's lawyer was present, there was an adequate defense.

of Appeals required the defendant to show that counsel’s "gross incompetence blotted out the essence of a substantial defense."\textsuperscript{15} In \textit{Dillane v. United States},\textsuperscript{16} the United States Court of Appeals for the District of Columbia Circuit required the defendant to show an "extraordinary inattention" on the part of his lawyer to his interests to warrant a finding of ineffective counsel.\textsuperscript{17}

The practical effect of these standards is to minimize a defendant’s chances of successfully raising the issue of the quality of his attorney’s representation. Consequently, a few courts have attempted to devise standards placing a less onerous burden on the defendant. For example, the Third Circuit, in \textit{Moore v. United States},\textsuperscript{18} adopted a standard of adequate performance on the part of an attorney, which is common to other professions, requiring the defendant to show only that his counsel did not "exercise . . . the customary skill and knowledge which normally prevails at the time and place."\textsuperscript{19} This "community standards" test has been analogized to the law of torts in that it recognizes a duty of care without the requirement of proven damage.\textsuperscript{20}

In the Fourth Circuit, a defendant may challenge his legal representation by showing that his counsel did not meet with him as early and often as required, advise him of his rights, ascertain all available defenses, develop those which are appropriate, conduct all necessary investigations and allow enough time for reflection and preparation.\textsuperscript{21} It has been suggested by another court that requiring less of counsel would "convert the appointment of counsel into a sham" and be merely a pro forma compliance with the Constitution's sixth amendment guarantee.\textsuperscript{22}

While these standards\textsuperscript{23} for determining whether counsel was ineffective

\textsuperscript{15.} Bazelon, \textit{supra} note 13, at 29. This is the test applied by the United States Court of Appeals for the District of Columbia Circuit, which, Bazelon argues, is still too vague and places a heavy burden of proof upon a defendant.

\textsuperscript{16.} 350 F.2d 732 (D.C. Cir. 1965). The court of appeals upheld the denial of the defendant's petition to appeal, without prejudice to his filing a motion under the post-conviction relief statute.

\textsuperscript{17.} \textit{Id.} at 733.

\textsuperscript{18.} 432 F.2d 730 (3d Cir. 1970).

\textsuperscript{19.} \textit{Id.} at 736.

\textsuperscript{20.} \textit{See} Bazelon, \textit{supra} note 13, at 31, for a discussion of the Third Circuit's approach.


\textsuperscript{23.} In the same vein, one author has suggested another, more lenient test: "The test of effective assistance of counsel should be whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are \textit{fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar}." Finer, \textit{supra} note 12, at 1080. The author would apply this test to actions or omissions of counsel by inquiring whether counsel's behavior "was such that reasonably competent and fairly
may ease the burden of proof, problems still exist for defendants when this issue is raised after a full trial. The possibility that dismissal may be warranted because of ineffective counsel does not remedy the fact that the defendant may have been subjected to "undue and oppressive incarceration prior to trial, and anxiety and concern accompanying public accusation." Additionally, the government and the courts will have expended valuable time, money and personnel during the course of a trial, the outcome of which may be overturned. Thus, even if applied in a post-trial setting, use of these standards provides no assurance that defendants' rights will be vindicated.

B. Pre-trial Standing

In spite of the fact that courts generally appear reluctant to apply the prevailing standards of effective representation within their jurisdictions in a pre-trial setting, a few courts have recognized sub-standard assistance of counsel at this early stage. In United States v. Germany, denial of counsel within the meaning of the sixth amendment was found at the pre-trial stage. In this case, the government refused to reimburse court-appointed counsel for expenditures incurred in traveling to interview an informer and visiting the scene of the crime. Concluding that this refusal constituted a denial of assistance of counsel, the court found that the sixth amendment requires the appointment of "competent counsel, effective counsel and counsel that have an opportunity and time to prepare and present their indigent clients' cases."

In United States v. Products Marketing, a similar question arose concerning the availability of advance funding for the trial preparation of a court-appointed attorney. In this case, involving conspiracy to use the United States mails to defraud, court-appointed counsel and the defendants did not reside

24. Smith v. Hooey, 393 U.S. 374, 377-78 (1968), quoting United States v. Ewell, 383 U.S. 116, 120 (1966), where the Court, in considering the right to a speedy trial, discussed the three basic demands of the criminal justice system which the constitutional guarantee was designed to protect. The third demand is "to limit the possibilities that long delay will impair the ability of an accused to defend himself." Id.

25. The "mockery of justice" and "gross incompetence" standards are workable only in a post-conviction context because evidence of the failure of counsel is apparent only at this time. Those standards requiring the defendant to demonstrate the prejudicial effect of ineffective counsel are similarly limited in effectiveness.


27. It was conceded by the government that the witness was material in the case pending against Germany. Id. at 422.

28. Id. at 423.

in nearby districts, witnesses were located throughout the country, and ade-
quately preparation for defense would have required a considerable expend-
iture of money. Because the government refused to advance the requisite 
funds for trial preparation, the defendants were held to have been deprived 
of effective assistance of counsel.

These varying attempts to define the performance required of an attorney 
demonstrate the prevailing confusion which surrounds this constitutional 
right.

II. SIXTH AMENDMENT RIGHTS VINDICATED

A. The D.C. Superior Court Test

United States v. Chatman represents a significant attempt to clarify the 
parameters of the sixth amendment right to effective assistance of counsel 
and to fashion a just remedy. Judge Halleck found that the prevailing test 
of counsel's performance in the District of Columbia was "whether taken as 
a whole, the trial was a mockery of justice and whether the representation 
was so incompetent as to blot out the essence of a substantial defense or de-
prive the defendant of a trial in any real sense." This test, which is closely 
related to the more stringent tests discussed above, places a heavy burden 
of proof upon a defendant. Acknowledging that these tests may be appro-
riate when used in an appellate or collateral challenge, the court rejected 
their use at the trial level, claiming that "a court cannot be blind to injustice 
occurring in its presence." To avoid this injustice, Judge Halleck adopted 
the formula of adequate representation stated in United States v. De Coster,

30. The court noted that it was clear that advancement of funds required to prepare 
an adequate defense given this set of circumstances was not contemplated within the 
provisions of the Criminal Justice Act. Id. at 351.
31. See Griffin v. Illinois, 351 U.S. 12 (1963), where the Court would not allow 
a defendant's indigency to thwart his sixth amendment rights. See also Douglas v. Cali-
33. Id. at 3. For an interesting discussion of the frequency of such occurrences, 
see Burger, The Special Skills of Advocacy: Are Specialized Training and Certification 
there adopts a working hypothesis "that from one-third to one-half of the lawyers 
who appear in the serious cases are not really qualified to render fully adequate repre-
sentation." Id. at 234. He proposes that priority be given to the certification of law-
yers in the "one crucial specialty of trial advocacy that is so basic to a fair system 
of justice and has had historic recognition in the common law systems." Id. at 240. 
For further discussion of the need for legal specialization, see Cheatham, The Growing 
Need for Specialized Legal Services, 16 Vand. L. Rev. 497 (1963); Derrick, Specializa-
tion in the Law—Texas Develops Pilot Plan for Specialization in Criminal Law, Labor 
where the trial court took all possible steps to guarantee a defendant a reason-
ably competent attorney acting as a "diligent and conscientious advocate."85 Using this test as the basis of its decision, the court concluded that
defendants had not received adequate legal representation and therefore had
been deprived of their sixth amendment rights.

B. Comparison of Chatman With the Third and Fourth Circuits

The Superior Court of the District of Columbia has adopted a test which
parallels those of the Third and Fourth Circuits. The requirement adopted
by the Chatman court, that an attorney be a "diligent and conscientious ad-
vocate" is similar to the "community standards" test of the Third Circuit.
Both tests entitle a defendant to the quality of counsel prevalent in
the jurisdiction at the time of trial. Furthermore, pre-trial application of this
standard results in recognition of a duty of care on the part of the attorney
at this key stage without the tort law requirement of proven dam-
age.86 Additionally, a "diligent and conscientious advocate" must of nec-
essity meet the five minimal requirements of effective counsel established by
the Fourth Circuit.87

The Chatman standard will aid in lessening defendant's onerous burden
of proof. Once a supportable challenge is made to counsel's performance,
the burden of proof will shift to the government to prove that performance
was commensurate with the sixth amendment right which it represents.
Moreover, by abolishing the prevailing damage requirement, the court has
eliminated an element of proof which may only become demonstrable after
a full trial.

CONCLUSION

In the instant case, the government conceded the unavailability of qualified
counsel as defined by the Chatman court, and requested a continuance. The
court, however, viewed the situation as one of indefinite duration and, in re-
jecting the government's request, concluded that it could not "in conscience
leave these defendants in limbo, suffering all the disabilities and anxiety at-
tendant to a criminal prosecution."88

35. Criminal No. 28538-74, at 3.
36. See p. 355 & note 20 supra.
37. See p. 355 & note 21 supra.
38. Criminal No. 28538-74, at 6. Although the sixth amendment right to a speedy
    trial was not specifically mentioned by the court, on the facts before it, continuance
    in the case of defendant Crawford would have been "tantamount to indefinite incar-
    ceration. . . . [a] patently unconstitutional result." Id. at 5.
The only alternate remedy available to the court was dismissal. While recognizing that this is a severe sanction, the court was motivated by several overriding considerations. First, it recognized the right to counsel as possibly the most important right of those contained in the first ten amendments, “for without counsel, few would be sophisticated or knowledgeable enough to assert any other constitutionally secured right.”

Secondly, dismissal was viewed in the public interest as a means of insuring a healthy, viable adversary system of justice. Finally, the court acknowledged dismissal as the “long-accepted remedy for violations of other sixth amendment guarantees.”

The Chatman decision provides a valuable contribution to sixth amendment case law. The standards adopted by the court are designed to result in a more equitable shift of the burden of proof when a defendant chooses to challenge the adequacy of assigned counsel. Dismissal in this situation protects the interests of both society and the defendant by ensuring the maintenance of the adversary system of justice while at the same time giving meaning to sixth amendment rights at a “critical stage” in a criminal proceeding.

Wayne Keup

39. Id. at 7.
40. Id. at 9. The court cited Strunk v. United States, 412 U.S. 434 (1973), which held dismissal to be the only remedy capable of vindicating the sixth amendment right to a speedy trial. Use of a continuance in cases involving lack of funds for trial preparation is particularly suspect in view of the sixth amendment requirement of a speedy trial. This requirement becomes dependent upon a non-judicial decision either to allocate or to withhold funds. See United States v. Germany, 32 F.R.D. 421, 424-25 (N.D. Ala. 1963), where the court held the denial of effective assistance of counsel to so prejudice the defendant's case as to warrant dismissal of the indictment and release of defendant from government custody; and United States v. Products Marketing, 281 F. Supp. 349, 353 (D. Del. 1968), where the court granted defendant's motion to dismiss stating that to rule otherwise "would be to patently ignore the serious deprivation of Sixth Amendment rights and render chimerical defendants' guarantees of effective counsel." Dismissal in Chatman was entered without prejudice, a solution satisfactory to both the government and the defendant. Employment of this remedy preserves the defendant's right to effective assistance of counsel, while at the same time it allows the government to reinstitute the action when the funding crisis has passed.

The scope of the rights afforded criminal defendants with respect to lineup identifications has been heavily litigated in recent years. This litigation is due in great part to the frequency and materiality of mis-identifications, and to the reality that the identification of the accused can for all practical purposes be determinative of a verdict of guilt or innocence. In *Evans v. Superior Court*, the Supreme Court of California has recognized the importance of identification evidence and, as a matter of discovery due process, the right of a criminal defendant, in appropriate cases, to a pre-trial lineup.

1. See, e.g., United States v. Ash, 413 U.S. 300 (1973) (the sixth amendment does not grant an accused the right to have counsel present at a post-indictment photographic identification display); Kirby v. Illinois, 406 U.S. 682 (1972) (the per se exclusionary rule of *Wade* and *Gilbert* does not apply to pre-indictment identification confrontations); Stovall v. Denno, 388 U.S. 293 (1967) (violation of due process in an identification confrontation depends on the totality of surrounding circumstances); Gilbert v. California, 388 U.S. 263 (1967) (when there is an illegal lineup, a subsequent in-court identification can be admitted only if it is of independent origin); United States v. Wade, 388 U.S. 218 (1967) (an accused has a sixth amendment right to counsel at a post-indictment lineup).

2. The lineup discussed in *Evans* is a corporeal lineup, as distinguished from other forms of lineups such as a photographic display. This distinction can be important, as it was in United States v. Ash, 413 U.S. 300 (1973), in which the Court held that the sixth amendment does not grant a defendant the right to counsel at a post-indictment display of photographs to a witness for identification purposes since, unlike an actual lineup, the display can be made in the physical absence of the defendant and thus does not constitute a "critical stage" of the prosecution.

3. In United States v. Wade, 388 U.S. 218, 228 (1967), Justice Brennan, writing for the majority, stated that "[t]he vagaries of eyewitness identification are well known; the annuals of criminal law are rife with instances of mistaken identification." Judge Jerome Frank has stated that "perhaps erroneous identification of the accused constitutes the major cause of known wrongful convictions." *J. Frank & B. Frank, Not Guilty* 61 (1957). Felix Frankfurter, while still a professor at Harvard, remarked:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.

F. Frankfurter, *The Case of Sacco and Vanzetti* 30 (1924).

Evans involved a robbery in which, within minutes of the commission of the crime at a drive-in restaurant, the police arrested Vernel Evans and his co-defendant. The suspects were taken by the police to the scene of the crime for the purpose of identification by the robbery victims. At this encounter the suspects were seated in the back of a police car, and the robbery victims identified them by viewing only the backs of their heads and shoulders. The basis on which the victims made their identification was that the suspects had the same general build as the robbers. During this encounter the victims never viewed or identified the suspects face-to-face, in spite of the fact that the robbers had faced the victims during most of the robbery.

At the preliminary hearing, one of the robbery victims identified Evans by pointing him out in the courtroom. Prior to trial, Evans filed a notice of motion for lineup. The trial court agreed that the defendant should have been given the opportunity to participate in a lineup, but the court denied Evans' motion because, in its view, it lacked the discretion to compel the state to conduct a pre-trial lineup. Evans' subsequent petition to the California Court of Appeals for a writ of prohibition or mandamus was denied. The California Supreme Court granted Evans' petition for a hearing and ordered that an alternative writ of mandate issue, with the trial court proceedings stayed pending final determination of the supreme court proceedings.

The Supreme Court of California, in an opinion by Chief Justice Wright, reversed the trial court, requiring it to vacate or show cause why it should

5. It was argued in support of the motion that the limited identification of Evans was faulty, and that because of the witnesses' commitment to their identifications they would be reluctant to change their minds later at trial, even if in error. The defendant also argued that the witnesses would be highly unlikely to reappraise conscientiously their identification of the defendant because he was black, would be in jail denims, and would be seated at the defense table. Id. at 621, 522 P.2d at 683, 114 Cal. Rptr. at 123.

6. A writ of prohibition is a remedy available to correct an improper denial of discovery. It is a petition to an appellate court to prevent the trial of a defendant on grounds that the trial court lacks jurisdiction. The basis of this petition in a discovery context is that, because of certain conditions which prevailed at the preliminary hearing, the defendant has been committed without probable cause. See Comment, Discovery in California Criminal Cases: Its Importance and its Pitfalls, 38 S. Cal. L. Rev. 251, 257 (1965). A writ of mandamus is another remedy available to correct an improper denial of discovery. It is issued only when the lower court has abused its discretion. For a more complete analysis of the remedies available to challenge improper discovery rulings, see Comment, supra.

7. Cal. CIV. PRO. CODE § 1084 (West 1955) defines a writ of mandate as the equivalent of the writ of mandamus.

not vacate its order which denied Evans the right to a lineup prior to his trial. The supreme court held that a criminal defendant had a right to a pre-trial lineup when his identification was a material issue in the trial, and when there was a reasonable likelihood of mistaken identification which a lineup would tend to rectify. In reaching its decision, the California Supreme Court utilized the discovery principles inherent in the concept of due process fairness to give the accused access to reliable, concrete, pre-trial identification evidence. This note will explore these discovery due process principles and their application to pre-trial identification evidence.

I. PERSUASIVE AUTHORITY AND THE DUE PROCESS DISCOVERY PRINCIPLES

A general judicial policy against criminal discovery has long existed and currently persists. Many courts and commentators have stated that the Constitution does not require the granting of any right to defense discovery. While the United States Supreme Court has favored the development of broad defense discovery, it has been restrained in developing the constitu-

9. 11 Cal. 3d at 625, 522 P.2d at 686, 114 Cal. Rptr. at 126.
12. One description of the aims of criminal discovery is as follows:
To enable each side in a suit to obtain relevant information from the other about the issues in dispute; to safeguard against surprise at trial; to define the issues narrowly and clearly so the parties can focus the evidence on them; to assist in ascertaining truth and detecting perjury; to encourage settlements by educating the parties in advance on the courtroom chances of their claims and defenses; and to assure the availability of probative evidence to the party whom it helps.
Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C.L. REV. 437 (1972). The reasons for this restraint are not altogether clear, though one possible reason may be judicial concern for the integrity of the criminal justice system. There may also be a concern over eroding the prosecution's ability to convict guilty defendants. See Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 WASH. U.L.Q. 279. Chief Justice Arthur T. Vanderbilt set forth four arguments, in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953), against criminal discovery. He argued that a defendant who knew the whole case against him would perjure himself and suppress evidence, and that he would attempt to bribe witnesses who would be reluctant to offer evidence. Also, because of the de-
tional foundation that would require such discovery. In a line of cases beginning in the 1930's and climaxing in Giles v. Maryland and Brady v. Maryland, the Supreme Court developed the first of its three narrow discovery principles mandated by the Constitution, holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The corollary to this principle is that the prosecution has a duty to disclose such evidence to a defendant. However, this language has never been construed to require pre-trial disclosure; disclosure only of evidence that is material, and exculpatory or favorable to the defendant is all that is required.

The second discovery principle evolved by the Court is a requirement of disclosure of certain types of evidence, regardless of whether it is exculpatory. The defendant is entitled by "the fundamental requirements of fairness" to pre-trial disclosure of the name and address of an informant who might have information pertinent to the defendant’s guilt or innocence.

Although no new discovery principles were developed in Williams v. Florida, the Supreme Court reiterated its support for criminal discovery. In Williams, the Court found that Florida's notice of alibi statute did not deprive the defendant of due process or a fair trial, due to the fact that Florida's law provided for liberal discovery by the accused, and contained reciprocal duties for the state to perform. As far as the Court was concerned, the adversary nature of a trial is not a legitimate end in itself. In terms of due process, the Court found ample room in the adversary system for the Florida statute.

13. 386 U.S. 66 (1967). The Supreme Court remanded this case to determine whether the accused was denied due process. At the trial for rape, the prosecution had suppressed evidence favorable to the accused, and had used testimony that it knew was perjured.
14. 373 U.S. 83 (1963) (the defendant was denied due process by the prosecution's withholding of the co-defendant's extrajudicial statement in which the co-defendant admitted the actual homicide).
15. Id. at 87. See Nakell, supra note 12, at 452. See also Moore v. Illinois, 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967).
19. Id. at 82; see, e.g., Brennan, supra note 12.
ute, “which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.”

In *Wardius v. Oregon*, the Supreme Court developed its third discovery principle based on the rationale of fundamental fairness. The Court unanimously held that the Oregon notice of alibi statute violated due process since it prevented defense introduction of alibi evidence in the absence of a notice of alibi, and did not provide reciprocal discovery for the defense. The Court did not hold that the due process clause necessitated criminal discovery for a defendant, rather it found that the due process clause spoke to the reciprocity of evidence and the “balance of forces between the accused and his accuser.” The Court held “that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a ‘search for truth’ so far as defense witnesses are concerned, while maintaining ‘poker game’ secrecy for its own witnesses.”

There is little, if any, authority dealing with the rationale of the Supreme Court's discovery principles in the specific context of a pre-trial discovery right to a lineup. Generally speaking, the accused has no absolute right to compel a lineup, whether it be an in-court identification during trial or, absent a pre-trial request, an out-of-court lineup. Some courts have recog-

20. 399 U.S. at 82.
22. 412 U.S. at 474.
23. Id. at 475. In a footnote to this statement the Court says that “the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor.” Id. n.9. Within this note the Court supported this viewpoint by quoting extensively from Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972).
24. See, e.g., United States v. Williams, 436 F.2d 1166 (9th Cir. 1970), cert. denied, 403 U.S. 912 (1971) (the defendant does not have a right to an in-court identification whenever he requests it, but it is left to the trial judge's discretion); People v. Finch, 47 Ill. 2d 425, 266 N.E.2d 97 (1960) (a request for a pre-trial lineup and an in-court lineup was denied); Commonwealth v. Jones, 287 N.E.2d 599 (Mass. 1972) (ruling on a motion to seat a defendant in the courtroom audience or for an in-court lineup is within the sound discretion of the trial judge).
25. See, e.g., United States v. King, 461 F.2d 152 (D.C. Cir. 1972) (failure to hold a corporal lineup does not transgress the due process clause); Moye v. State, 122 Ga. App. 14, 176 S.E.2d 180 (1970) (a prior lineup identification is not a prerequisite to every in-court lineup); People v. Solomon, 47 Mich. App. 208, 209 N.W.2d 257 (1973) (the accused is not entitled to a lineup every time eyewitness testimony and identification is contemplated in court); State v. Haselhorst, 476 S.W.2d 543 (Mo. 1972) (the state does not have a duty to conduct a pre-trial lineup as a precondition to conducting an in-court identification).
nized that a request for a pre-trial lineup is addressed to the discretion of the trial court. A California decision, People v. London, recognized the inherent suggestiveness of an in-court identification of a defendant who is seated at a counsel table, but denied defendant's request for a lineup concluding that "it is not for this court, operating at our intermediate level, to introduce an additional requirement on police and prosecutors." Five years after this decision, the California Supreme Court relied on the due process clause to create a right to a pre-trial lineup.

II. THE DUE PROCESS DISCOVERY PRINCIPLES AND Evans

By recognizing the right to a pre-trial lineup, the California Supreme Court indicated that it was not concerned with "whether the people's affirmative evidence of identification is so impermissibly unfair that its receipt would infringe an accused's rights of due process." Rather, the court focused on the question of "whether prior to the in-court receipt of evidence of identification the accused can insist that procedures be afforded whereby the weakness of the identification evidence, if it is in fact weak, can be disclosed." Since the accused may not be deprived of liberty in the absence of procedures which comport with due process requirements, the Evans court identified the issue as one of "fairness to an accused on pretrial discovery."

In determining what kind of pre-trial discovery process must be afforded the criminal defendant the California Supreme Court scrutinized the established discovery rights in that state. The court found that the pre-trial lineup fell within the scope of the prosecution's duty to disclose, based on the fact that it has substantial and material evidence which is favorable to the de-

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26. See, e.g., United States v. MacDonald, 441 F.2d 259 (9th Cir.), cert. denied, 404 U.S. 840 (1971) (the decision on a motion for a pre-trial lineup is a matter committed to the sound discretion of the trial judge); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970). In Ravich, Judge Friendly stated:

We would likewise not be disposed to hold a line-up to be so essential to the presentation of a proper defense concerning identification that refusal to arrange one on a defendant's request is a denial of due process of law. On the other hand, we can well see how a prompt line-up might be of value both to an innocent accused and to law enforcement officers. A pre-trial request by a defendant for a lineup is thus addressed to the sound discretion of the district court and should be carefully considered.

Id. at 1203.

28. Id. at 243, 78 Cal. Rptr. at 849.
29. 11 Cal. 3d at 621-22, 522 P.2d at 684, 114 Cal. Rptr. at 124.
30. Id. at 622, 522 P.2d at 684, 114 Cal. Rptr. at 124 (emphasis in original).
31. Id.
fense. Such disclosure is based upon the fundamental principle that a trial is a search for truth, rather than a game.

In Evans, the court found that “[e]vidence of identification in criminal proceedings is not only material but is also frequently determinative of an accused’s guilt.” Building on this finding, the court utilized the rationale of Williams to support its conclusion that there is no reason why the criminal defendant should be denied a lineup by which he might gain material identification evidence, since the prosecutor already enjoys that same right. Williams approved the use of such reciprocal discovery because it allowed “the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.” Wardius went beyond simple approval of reciprocal discovery by holding that the Constitution requires it. Evans interpreted Wardius as requiring that discovery must be a two-way street in light of the mandate of due process fairness.

The Evans court further found that the state cannot refuse to disclose evidence that is within its reach and unavailable to the accused merely on the grounds that the evidence sought is not within the state’s present knowledge. The larger resources that a prosecutor possesses along with the court’s desire that justice be done are factors which place duties as well as restraints on the prosecution. In a number of varying fact situations the California Supreme Court has recognized the duty that the state bears in not only disclosing information but in acquiring information that is material to the defense of the accused.

32. The state recognized this duty to disclose. In addition to this category of discovery, the state also recognized the discovery categories set out in the following cases: People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) (statements by a codefendant or alleged conspirator to state agents); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959) (statements by prospective witnesses to agents of the state); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957) (prior statements by the defendant to the police or prosecution authorities); Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (the names and addresses of eyewitnesses known to the prosecution); Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957) (physical evidence in possession of the prosecution). While Evans was pending on appeal, the California Supreme Court recognized another category in Hill v. Superior Court, 10 Cal. 3d 812, 518 P.2d 1353, 112 Cal. Rptr. 257 (1974) (prior felony convictions of prosecution witnesses).

33. See p. 363 supra.

34. 11 Cal. 3d at 623, 522 P.2d at 685, 114 Cal. Rptr. at 124-25.
35. 399 U.S. at 82.
36. See Nakell, supra note 21, at 59-66.
37. See People v. Golday, 8 Cal. 3d 771, 505 P.2d 537, 106 Cal. Rptr. 113 (1973) (location of informer); Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966) (submission of a complaining witness in a sex case to a psychiatric examination when defendant shows a compelling reason); People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673, 3 Cal. Rptr. 1 (1960) (disclosure of identity of informer); In re
Evans followed this line of California cases. The defense in Evans had moved for discovery of material identification evidence not then within the state's knowledge. Chief Justice Wright found that the denial of that motion had the same net effect as intentionally suppressing existing evidence. Employing the principle of Brady, the court found that the intentional suppression of material evidence violates due process in that it denies the accused a fair trial.

The Evans court enumerated certain criteria that must be satisfied before the accused is entitled to a lineup. The issue of identity must be material; there must be a reasonable likelihood of a mis-identification having occurred, and the situation must be one in which a lineup would tend to resolve any mistake. The determination of whether these criteria are satisfied rests within the broad discretion of the trial judge, who must balance the rights of the accused against the burdens such lineup procedures would entail for the prosecutor.

III. Conclusion

The decision in Evans v. Superior Court established a right which has been previously denied by the courts. Pre-trial lineup procedures are necessary if the accused is to obtain reliable and independent evidence which enables him to challenge, in a concrete manner, an identification that may be inaccurate. In California the accused can come to trial fully prepared to attack the identification evidence presented.

When viewed in light of Brady and Wardius, Evans clearly indicates a continued expansion of criminal discovery. Evans bases its rationale firmly within the constitutional requirement of due process fairness, providing the accused with a right that the prosecution has long enjoyed as a matter of investigative discovery. A firm resolution of whether the recent discovery principles developed by the Supreme Court will be viewed as compelling additional defense access to the evidence developed through the investigative procedures of the prosecution is, of course, yet to be rendered. Nevertheless, Evans takes a significant step in expanding the defendant's right of discovery consistent with the concept of due process fairness.

Edward C. Monahan

The use of polygraph tests as evidence in criminal trials has generated considerable controversy.\(^1\) Few courts have allowed polygraph evidence to be admitted, and even where it has been admitted, its use has been qualified by requiring that the prosecution and the defense agree to written stipulations\(^2\) allowing admission of the test results regardless of their outcome.\(^3\) The Massachusetts Supreme Judicial Court recently reevaluated the polygraph issue in *Commonwealth v. A Juvenile (No. 1)*\(^4\) and held polygraph

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1. The vast majority of cases deciding the admissibility of polygraph evidence have adopted total exclusion. For a catalogue of those cases, see 3A J. Wigmore, EVIDENCE § 999 n.2 (Chadbourn rev. ed. 1970).


evidence admissible in limited situations. Significantly, the decision did not require written stipulations\(^5\) to allow evidentiary use of the polygraph.

The defendant, a juvenile, was charged with the murder of a nine year old boy. At a preliminary hearing, the defendant filed a motion\(^6\) to introduce evidence of his polygraph test because the results had shown that he was telling the truth\(^7\) when he denied having caused, directly or indirectly, the victim's death. Although the trial judge found polygraph tests generally accepted in the scientific community, he was not convinced of their "widespread acceptance" in the courts.\(^8\) Citing prior case law,\(^9\) the judge denied the defendant's motion.

Based largely on circumstantial evidence,\(^10\) a superior court jury verdict found the juvenile "a delinquent by reason of manslaughter."\(^11\) On this second appeal\(^12\) to the Massachusetts Supreme Judicial Court, the defendant argued that polygraph tests should be generally admissible as scientific evidence. Although holding that only "limited admission" would be allowed, the court conditionally reversed\(^13\) the verdict on the ground that the trial court had denied the defendant's motion to introduce polygraph evidence. Its decision was based upon a finding that significant progress had been made in the

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5. For a sample written stipulation, see State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); J. REID & F. INBAU, TRUTH AND DECEPTION 251 (1966) [hereinafter cited as REID & INBAU].

6. The defendant filed supplemental oral motions requesting that (1) the court appoint a polygraph expert to re-test the juvenile, or that (2) the Commonwealth be ordered to examine the juvenile with their own experts. The results of these tests would be admissible along with the defendant's test results. 313 N.E.2d at 123.

7. The polygraph does not detect lies. Its only function is to "distinguish between the whole truth and something less than the whole truth." Ferguson, Polygraphy v. Outdated Precedent, 35 TEXAS B.J. 531, 536 (1972).

8. 313 N.E.2d at 123.


10. The evidence consisted of several incriminating statements made by the juvenile concerning little known facts of the crime, his inability to account for his whereabouts shortly after the victim was last seen alive, and a pair of slightly bloodstained shoes that the police found in his closet.

11. 313 N.E.2d at 122. Pursuant to MASS. ANN. LAWS ch. 119, § 58 (1974), the juvenile was found to have violated the penal laws of Massachusetts and was adjudged a delinquent child.

12. The first appeal, Commonwealth v. A Juvenile, 280 N.E.2d 144 (Mass. 1972), resulted in the reversal of a verdict of delinquency by reason of second degree murder on the ground that the defendant had been prevented from using the transcript of the district court delinquency hearing for impeachment purposes in the superior court trial. Id. at 146.

13. The reversal was contingent upon the defendant's success on a motion for a new trial. The motion for a new trial was limited to the question of the admissibility of polygraph evidence. See 313 N.E.2d at 132.
polygraphic profession which had resulted in increased polygraph examiner competence and improved test reliability.\textsuperscript{14} By confining the Juvenile (No. 1) decision to limited admission of polygraphic evidence, the court avoided overruling precedent which had barred the general admission of polygraph evidence in criminal trials.

In dissent, Justice Quirico argued that restrictions should be imposed on polygraph testing if it was to be admitted into evidence and suggested a court-appointed commission to study polygraphs. This idea was supported in the dissent of Justice Kaplan.\textsuperscript{15}

The primary significance of the Juvenile (No. 1) decision stems from its admission of unstipulated polygraph evidence. Therefore, this note will concentrate on the standards required by the court to insure the quality of polygraph evidence in criminal trials.

I. THE EXCLUSION RULE

The first appellate decision to address the question of the admissibility of polygraph evidence was \textit{Frye v. United States},\textsuperscript{16} where it was held that the results of a systolic blood pressure test\textsuperscript{17} were inadmissible at trial due to the test's lack of "general acceptance in the particular field [of science] in which it belongs."\textsuperscript{18} In light of the early stage of development of the polygraph, it can be argued that there was legal validity for the rule which was

\textsuperscript{14} One estimate of polygraph accuracy is 87.75%. Horvath & Reid, \textit{The Reliability of Polygraph Examiner Diagnosis of Truth and Deception}, 62 J. CRIM. L.C. & P.S. 276, 278 (1971). Another commentator found the accuracy to be 95%. Wicker, \textit{supra} note 2, at 713. The authors of an authoritative text on the polygraph found its accuracy to be 94%. Reid & Inbau 234-35. But see Highleyman, \textit{The Deceptive Certainty of the "Lie Detector}," 10 Hastings L.J. 47, 62 (1958), citing findings of only 75% accuracy.

\textsuperscript{15} Justice Kaplan referred to the polygraph by saying that "in the family of scientific aids to the forensic search for truth, the polygraph remains a rather remote relation of shabby gentility." 313 N.E.2d at 138.

\textsuperscript{16} 293 F. 1013 (D.C. Cir. 1923). It should be noted that the test taken in \textit{Frye} showed that he was not guilty of the murder for which he was convicted. He was released from prison three years later after a third party confessed to the crime. \textit{See Fourteenth Annual Report of the New York Judicial Council} 265 (1948) as cited in Wicker, \textit{supra} note 2, at 715. \textit{See also} Bailey, Book Review, 1 Suffolk U.L. Rev. 137 (1967).

\textsuperscript{17} The systolic blood pressure test measured the blood pressure only, and the examiner had only that factor to rely on in making his interpretations. The present polygraph measures the blood pressure, pulse, respiration, psychogalvanic skin response, and muscular activity, and the examiner considers all of these factors in making his prognosis. \textit{See Reid & Inbau 2-5.}

\textsuperscript{18} 293 F. at 1014.
The Frye precedent has survived since 1923, though the determination it called for, whether the polygraph has gained scientific acceptance through improvements, has rarely been undertaken.

Drawing upon the Frye precedent, the Supreme Judicial Court of Massachusetts, in Commonwealth v. Fatalo, sustained a trial court rejection of polygraph evidence. Justice Spiegel, writing for the majority, relied upon several outspoken critics of the polygraph test to illustrate the human "defects" which could adversely affect the test results. Pointing out the wide spectrum of opinions on polygraph reliability, the court found that such a controversy was conducive to creating a "battle of the experts" with the determination of guilt or innocence of little consequence. This possibility compelled the Fatalo court to adopt the standard for admission enunciated in Frye, with the caveat that admission would be allowed upon the resolution of the "substantial doubts which presently revolve about the polygraph test."

A small number of jurisdictions have advanced positions contrary to


20. For other legal objections to the admissibility of polygraph evidence, see Comment, supra note 2, at 245 n.4.

21. 346 Mass. 266, 191 N.E.2d 479 (1963). This was a question of first impression for the Massachusetts courts. In Fatalo, the defendant's favorable test results were not admitted in a prosecution for assault.


23. The "defects" pertain to physical infirmities such as allergies, coughing spells, hiccups, high or low blood pressure, shock, "circumscribed amnesia," and to a variety of psychological abnormalities. See Highleyman, supra note 14, at 55-60; Note, The Polygraph Revisited: An Argument for Admissibility, 4 Suffolk U.L. Rev. 111, 121-22 (1969).

24. See note 14 supra.


27. In addition to those cited above, see note 2 supra, state decisions accepting polygraph evidence with written stipulations include: State v. Brown, 177 So. 2d 532 (Fla. 1965); State v. Free, 255 Iowa 1334, 125 N.W.2d 825 (1964); State v. Fields, 434 S.W.2d 507 (Mo. 1968); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974). See also People v. Potts, 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966).
those taken in *Fatalo* and *Frye* on the admissibility of polygraph evidence. *State v. Valdez*28 is representative of a line of cases allowing admission contingent upon written stipulations and limited to corroboration of testimony.29 The court in *Valdez* also required special jury instructions to counteract the “supposed” conclusive weight of polygraph evidence on judges and juries.30 This decision emphasized that the trial court was the final arbiter of the validity of the test and of the reliability of the examiner.

A more recent case, *United States v. Ridling*,31 also rejected the total exclusion principle of the *Frye* line of decisions by holding that polygraph reliability was to be determined on a case-by-case basis.32 Recognizing the lack of standardized competence in the polygraphic profession, the court held that, prior to admission, testing by a court-appointed examiner would be necessary “to provide an independent check on the opinion of the defendant's expert and to make certain that the subject is testable.”33 The *Ridling* court also found that where the defendant’s truthfulness is not directly in issue, the polygraph evidence could only be used by the prosecution to impeach the defendant’s credibility and could be used by the defendant only to offset attacks on the veracity of his testimony.34 The *Ridling* decision thus delineated the outer limits which courts had previously approached in the admission of polygraph evidence.

II. **Admission Rule under Juvenile (No. 1)**

In *Juvenile (No. 1)*, the Massachusetts Supreme Judicial Court established certain safeguards to limit the admission of polygraph evidence and to maintain a consistent level of qualified examiners.35 These precautions were

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29. See 91 Ariz. at 283-84, 371 P.2d at 900.


   The problem which has traditionally caused the courts the greatest concern in this regard is the possibility that the jury might consider the examiner's opinion to be so conclusive on the issue of guilt or innocence as to intrude and usurp its historical role and prerogatives.


32. Id. at 94.

33. Id. at 97. The *Ridling* court specifically focused on the expert's opinion. This is due, in part, to the fact that at least 10% of all polygraph tests are “uninterpretable by even the most skilled examiner.” Horvath & Reid, supra note 14, at 278.


35. Implicit in the control of examiners is the assumption that better examiners pro-
necessitated by the warning in *Ridling* that "the chance of serious impropriety on the part of polygraph examiners must be considered."

Concern for examiner competence compelled the *Ridling* requirement that defendant's tests be independently checked for conclusiveness of interpretation. The *Juvenile (No. I)* decision reflected this need for closer supervision of the defendant's examiner by requiring the trial judge to go through an extensive voir dire inquiry into the examiner's qualifications. As in *Valdez*, the final determination of the examiner's competence is left up to the trial judge's discretion. Despite contrary opinions by some legislatures and legal commentators, the *Juvenile (No. I)* court declined to set specific standards of competence, but did emphasize that the "combination of training, experience and demonstrated ability" were determinative criteria in the trial judge's inquiry. The court maintained that exacting guidelines created collateral problems and that the trial judges should not be "unduly shackled in the exercise of their judgment."

By placing discretion with the trial judge to supervise examiner competence, *Juvenile (No. I)* demonstrated an approach different from that advanced by the *Ridling* court concerning the admissibility of polygraph evidence. Moreover the decision exemplifies a trend towards general admission of polygraph tests by its rejection of the *Valdez* requirement of written stipulations.

Where prior cases had required that the prosecution and the defense agree to admission of polygraph tests through written stipulations, the Massachusetts
settts Supreme Judicial Court required only that the individual defendant agree to its admission. After such agreement, only the defendant can move to have a test administered; further, the examiner can be chosen only in carefully defined situations. These requirements allow the defendant maximum flexibility either to choose his own examiner or to have the Commonwealth or the court select an examiner for him. Thus the lack of written stipulations allows the defendant much greater latitude in the use of polygraph evidence while the trial court can still maintain control over the quality of test evidence.

In addition to rejecting written stipulations, the Juvenile (No. 1) court also declined to require the special jury instructions which Justice Quirico, in dissent, found necessary to offset the "undue influence that polygraphic evidence may have on a jury . . . ." Although Juvenile (No. 1) does not directly address this problem of "trial by polygraph," there is an inference that a vigorous cross-examination can be relied upon to establish the proper weight of polygraph evidence. The defendant's participation in cross-examination, regardless of who chose the examiner, is intended to insure the examiner's thoroughness in interpreting the test results.

III. PROTECTION OF FIFTH AMENDMENT RIGHTS

Based upon its finding that polygraph tests are "essentially testimonial in nature," the Juvenile (No. 1) court imposed certain restrictions upon the administering of the test which would act to protect defendant's constitutional rights. The decision required the trial judge to advise the defendant that by submitting to the polygraph test he had "to that extent waived his Fifth Amendment rights." Additionally, the trial judge had to determine that

43. The four situations are when (1) the defendant moves to have an examination administered by an expert of his choice; (2) the defendant moves to have an examination administered by an expert chosen by the Commonwealth; (3) the defendant moves to have examination administered by an examiner or examiners jointly selected by the Commonwealth and the defendant; and (4) the defendant moves to have an examination administered by a court-appointed expert. 313 N.E.2d at 126.
44. Id. at 136.
46. The right of cross-examination is, of course, dependent upon the party who called the expert as a witness.
47. For an example of an effective cross-examination of a polygraph examiner, see F. Bailey, The Defense Never Rests 20-25 (1971).
48. 313 N.E.2d at 127.
49. Id.
the waiver was made “voluntarily, knowingly and intelligently.”

Although the true evidentiary nature of polygraph tests remains in dispute, the United States Supreme Court has held that the defendant cannot be compelled to “provide the State with evidence of a testimonial or communicative nature.” Therefore, it is apparent that the restrictions imposed by *Juvenile (No. 1)* act to protect the defendant from being compelled to take a polygraph test on the Commonwealth’s motion. In guaranteeing the defendant’s complete and voluntary cooperation in taking the test, the court further insures the quality of polygraph evidence.

**IV. CONCLUSION**

The holding of *Commonwealth v. A Juvenile (No. 1)* does not make polygraph evidence generally admissible in Massachusetts criminal trials, but it is more than a “cautious first step” in that direction. By not requiring written stipulations, corroborative testing or other severe restrictions, the Massachusetts Supreme Judicial Court vests the trial judge with complete discretion in ruling on the polygraph issue. The court’s decision further provides the defendant with considerable flexibility in his choice of prospective polygraph examiners.

Despite the court’s reservation of the right to limit this trend if the polygraph experiment proved to be a failure, it can be argued that with increased use the polygraph will earn ready acceptance among the trial courts of Massachusetts. The *Juvenile (No. 1)* court acknowledged the novelty and complexity of the polygraph issue without concern for the lack of judicial acceptance of polygraph evidence.

*Stephen P. Murphy*

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51. Schmerber v. California, 384 U.S. 757, 761 (1966). The Schmerber Court also stated, in dicta, that

[s]ome tests seemingly directed to obtain “physical evidence,” for example, lie detector tests measuring changes in body functions during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

*Id.* at 764.
53. 313 N.E.2d at 127.

Despite widespread acceptance of the national goal of equal opportunity in employment, the statutory basis for a claim alleging alienage discrimination in private employment has remained uncertain. Title VII of the Civil Rights Act of 1964\(^1\) was enacted to eliminate discriminatory employment practices which were based on race, color, religion, sex, and national origin.\(^2\) Because the Act was aimed primarily at racial discrimination, most of the cases brought under Title VII have involved black workers. Only recently has Title VII been applied to remedy discrimination based on the other prohibited classifications. Whether the proscription of employment discrimination based on national origin reaches discrimination based on alienage is a question which has been the subject of very little litigation,\(^3\) but one which is now settled in view of the Supreme Court's recent holding that alienage does not fall within the national origin category.\(^4\) Nevertheless, section 1981 of the 1866 Civil Rights Act\(^5\) may be emerging as a viable alternative for attacking alienage discrimination in employment. The United States Court of Appeals for the Fifth Circuit reached this conclusion in Guerra v. Manchester Terminal Corp.,\(^6\) the first reported decision to address this question.

Plaintiff Guerra was a Mexican national registered in the United States as a resident alien. From 1960 until 1967 he was employed by defendant Manchester Terminal Corporation. Pursuant to contract negotiations between defendant and Local 1581, International Longshoremen's Association,

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5. 42 U.S.C. § 1981 (1970) (originally enacted as An Act to protect all Persons in the United States in their Civil Rights, ch. 31, § 1, 14 Stat. 27). This section provides:
   
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
6. 498 F.2d 641 (5th Cir. 1974).
the corporation agreed to hire its employees through the union hiring hall. Subsequently, the union membership voted approval of a plan under which job placement in the corporation's dock and compress departments would be made on the basis of the employee's citizenship. The rates of pay for all of the job classifications in dock were higher than for any of the jobs in compress, and, under the union's plan, the jobs in dock were to go first to United States citizens, then to citizens of Mexico whose families resided in the United States, and finally to citizens of Mexico whose families had remained in Mexico.

At the union's insistence, Guerra was transferred from the dock department to a lower paying position in the compress department in September 1965. He was told that until he became a United States citizen or moved his family to the United States he could not be employed in dock. Guerra voluntarily left his job with Manchester in 1967 and brought suit in the United States District Court for the Southern District of Texas in January of 1971, basing his claim of unlawful employment discrimination on both Title VII and section 1981. The district court dismissed that part of plaintiff's claim based on Title VII, but held that the suit was maintainable under section 1981, and the court of appeals affirmed.

While several issues were presented in Guerra, the purpose of this note

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7. In 1966 Guerra filed a sworn charge with the Equal Employment Opportunity Commission (EEOC) alleging that his transfer was unlawfully discriminatory under Title VII. In August 1970, the EEOC found reasonable cause to believe that defendants Local 1581 and Manchester had committed violations of the 1964 Civil Rights Act, and in December 1970, notified Guerra of his right to sue, pursuant to section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) (1970).

Guerra had initiated proceedings along an alternative avenue of relief beginning in October 1965, when he filed an unfair labor practice charge with the National Labor Relations Board. In May 1971, the Board issued a complaint alleging that Local 1581 had violated sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), (b)(2) (1970), and, in May 1971, ordered defendant local to desist from maintaining its discriminatory agreement with Manchester and to award back pay to Guerra. The Fifth Circuit enforced that order, NLRB v. Longshoremen's Local 1581, 489 F.2d 635 (5th Cir. 1974).

9. Id. at 538.
10. 498 F.2d at 653-54.
11. The Fifth Circuit concluded that citizenship discrimination was encompassed by section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(1)(A), (b)(2) (1970). The court found that section 8 of the NLRA, like Title VII, partially overlaps with § 1981 and was not intended to preempt or repeal that statute. 498 F.2d at 650-51. See NLRB v. Longshoremen's Local 1581, 489 F.2d 635 (5th Cir. 1974); Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971).

The court also found that, "[a] union's role as party to a collective bargaining agreement can be legally sufficient to impose back pay liability on the union if the agreement violates Title VII, Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1381 (5th
is to explore the approach taken by the court in harmonizing two statutes, both of which are applicable in cases of alleged employment discrimination, and more generally, to investigate the impact of Guerra and section 1981 on the role of Title VII of the 1964 Civil Rights Act.

I. APPLICATION OF SECTION 1981 TO PRIVATE EMPLOYMENT DISCRIMINATION AGAINST ALIENS

Neither the legislative history nor the judicial treatment of section 1981 clearly defines the nature of the protection offered and the scope of the class protected by the statute. In Guerra, the court of appeals considered the defendants' assertion that section 1981 is applicable only to racial discrimination and dismissed this argument summarily. Finding that aliens are within section 1981's coverage, the court indicated that since this issue had been so widely litigated in the past and the district court's analysis had been so

12. 42 U.S.C. § 2000e-5(g) (1970) sets forth the remedies available under Title VII:
   If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) . . . .


13. The defendants premised their argument on the Supreme Court's decision in Georgia v. Rachel, 384 U.S. 780 (1966), in which the Court considered the legislative history of the Civil Rights Act of 1866, and found that "Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." Id. at 791. Several courts have disallowed suits based on section 1981 that did not relate to racial discrimination. See Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51 (W.D.N.Y. 1972) (section 1981 applies only to racial discrimination); Marshall v. Plumbers Local 60, 343 F. Supp. 70 (E.D. La. 1972) (section 1981 applies only to racial discrimination); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (section 1981 does not extend to employment discrimination based on sex); Schetter v. Heim, 300 F. Supp. 1070 (E.D. Wis. 1969) (section 1981 does not extend to discrimination based on religion or national origin).

14. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). In Takahashi the Court invalidated a state statute forbidding the issuance of commercial fishing licenses to persons ineligible for citi-
thorough and accurate,\textsuperscript{15} it was unnecessary to give it more than cursory
attention.

The court found even less persuasive the defendants' argument that an
action based on section 1981 requires a showing of state action.\textsuperscript{16} In an
earlier opinion, \textit{Sanders v. Dobbs Houses, Inc.},\textsuperscript{17} section 1981 had been
extended to private employment discrimination. The Fifth Circuit had
repeatedly affirmed \textit{Sanders},\textsuperscript{18} so there seemed to be no compelling reason to
re-explore the issue. In addition, the district court had pointed out that since
the Supreme Court's decision in \textit{Jones v. Alfred H. Mayer Co.}\textsuperscript{19} it was well
settled that suits brought under section 1981 did not require state action.\textsuperscript{20}

zenship. The Court found that the statute violated section 1981. After quoting the sec-
ton the Court said:

\begin{quote}
The protection of this section has been held to extend to aliens as well as citi-
zens. Consequently the section and the Fourteenth Amendment on which it
rests in part protect "all persons" against state legislation bearing unequally
upon them either because of alienage or color.
\end{quote}

\textit{Id.} at 419-20 (footnote omitted).

Referring to section 1981 the Court said in \textit{Graham}: "The protection of this statute
has been held to extend to aliens as well as citizens." 403 U.S. at 377. \textit{See also}
\textit{Roberto v. Hartford Fire Ins. Co.}, 177 F.2d 811 (7th Cir. 1949), cert. denied, 339 U.S.

15. 350 F. Supp. at 532-38. The inclusion of aliens within the protection of sec-
tion 1981 is based upon the reenactment of section 1 of the Civil Rights Act of 1866
in the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144. Section 16 provided that
"all persons within the jurisdiction of the United States" shall have the rights set forth
in section 1 of the 1866 Act. The language of the 1870 Act was virtually the same
as that used in the 1866 Act. The 1866 Act had conferred rights only upon "all persons
born in the United States," whereas, as the district court noted, Senator Stewart, the
sponsor of the bill which included section 16, explained that the 1870 Act, which
expressly mentions "all persons within the jurisdiction of the United States," would
protect aliens as well. \textit{Cong. Globe}, 41st Cong., 2d Sess. 1536 (1870), \textit{quoted in}

16. For an analysis of section 1981 and the state action issue generally, see \textit{Larson,
The Development of Section 1981 as a Remedy for Racial Discrimination in Private
Employment, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972); Comment, Racial
Discrimination in Employment Under the Civil Rights Act of 1866, 36 U. CHI. L. REV.
615 (1969).}

18. \textit{See}, e.g., \textit{Franks v. Bowman Transp. Co.}, 495 F.2d 398, 405 (5th Cir. 1974);
\textit{Johnson v. Goodyear Tire & Rubber Co.}, 491 F.2d 1364, 1378 (5th Cir. 1974);
\textit{Belt v. Johnson Motor Lines, Inc.}, 458 F.2d 443, 445 (5th Cir. 1972);
\textit{Caldwell v. National Brewing Co.}, 443 F.2d 1044, 1045 (5th Cir. 1971);
\textit{Boudreaux v. Baton Rouge Marine Contracting Co.}, 437 F.2d 1011, 1016-17 (5th Cir. 1971).

19. 431 F.2d 1097 (5th Cir. 1970).
20. \textit{See}, e.g., \textit{Franks v. Bowman Transp. Co.}, 495 F.2d 398, 405 (5th Cir. 1974);
\textit{Johnson v. Goodyear Tire & Rubber Co.}, 491 F.2d 1364, 1378 (5th Cir. 1974);
\textit{Belt v. Johnson Motor Lines, Inc.}, 458 F.2d 443, 445 (5th Cir. 1972);
\textit{Caldwell v. National Brewing Co.}, 443 F.2d 1044, 1045 (5th Cir. 1971);
\textit{Boudreaux v. Baton Rouge Marine Contracting Co.}, 437 F.2d 1011, 1016-17 (5th Cir. 1971).

The court appeared impatient with the defendants' interposition of this issue, remarking, "[i]t is very late in the
day for disgruntled defendants to be questioning such an unequivocal holding by this
Court." 498 F.2d at 654-55.
(prohibiting discrimination in the sale or rental of real property), it explicitly over-
16.
On this question also, the court of appeals adopted the district court's analysis.\textsuperscript{21}

\textbf{A. Confronting Precedent}

Having disposed of the defendants' substantive challenges to the application of section 1981 to private discrimination based on alienage, the court turned its attention to the earlier legislative and judicial treatment of the issues which \textit{Guerra} had raised. In doing so it dealt squarely with prior case law which denied a remedy to aliens on facts strikingly similar to those before it.

In 1972, in an attempt to clarify the status of citizenship discrimination under Title VII of the 1964 Civil Rights Act,\textsuperscript{22} the Equal Employment Opportunity Commission [EEOC]\textsuperscript{23} issued a guideline stating that national origin discrimination does include discrimination based on alienage.\textsuperscript{24} Notwithstanding the Commission's pronouncement, the United States Supreme Court held, in \textit{Espinoza v. Farah Manufacturing Co.}, that citizenship discrimination was not included within Title VII's coverage.\textsuperscript{25}

The Court maintained that the term "national origin" plainly referred to the country where a person was born or the country from which one's ancestors came,\textsuperscript{26} and that the legislative history of Title VII clearly precluded a finding that national origin refers to a person's citizenship.\textsuperscript{27} Furthermore,
the federal government has discriminated against aliens for years in federal employment. The majority stated: "We cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of federal employment and, at the same time, prevent private employers from doing likewise."

Regarding the EEOC guideline, the Court acknowledged that it was entitled to "great deference," but disagreed with the notion that citizenship discrimination was tantamount to national origin discrimination. Because more than 96% of the employees at defendant company's plant, including the plaintiff, were of Mexican ancestry, the Court reasoned that the defendants did not discriminate against persons of Mexican national origin. It was not unreasonable, then, to hold that the plaintiff had failed to prove any unlawful activity which Title VII could remedy.

Unlike Espinoza, the claim in Guerra was based on both Title VII and section 1981. As in Espinoza, the Title VII claim was dismissed for failure to demonstrate that plaintiff had suffered from discrimination based on his national origin rather than on his status as an alien.

II. APPLICATION OF THE TOLLING RULE

Having overcome the obstacle posed by Espinoza to a suit brought on the basis of alienage discrimination, Guerra was still faced with defendants' argument that his suit was barred by the statute of limitations. It was held in Guerra that the plaintiff's filing of a complaint with the EEOC, which initiated Title VII proceedings, tolled the statute of limitations applicable to his suit under section 1981. Prior to Guerra, this relationship between Title VII, in which specific procedural requirements are clearly set out, and section

28. Id. at 89. Civil Service Commission regulations exclude aliens from competitive civil service. 5 C.F.R. § 388.101(a) (1974).
29. 414 U.S. at 91.
30. Id. at 94.
31. The Court noted that in some situations a citizenship requirement might be part of a wider scheme of national origin discrimination, and that Title VII prohibits citizenship discrimination whenever its purpose or effect is to discriminate on the basis of national origin. Id. at 92.
32. Id. at 93.
33. 498 F.2d at 646-47. The Fifth Circuit acknowledged that Title VII would apply to a situation in which an alien could prove that a policy of discrimination against aliens was a guise for national origin discrimination. Id.
34. Id. at 647-48.
35. Id. at 648.
1981, which is a general statement of congressional intent, was undefined.\(^{36}\)

Guerra did not bring suit until more than five years after his transfer occurred. The district court found that because there was no statute of limitations for section 1981, the Texas statute of limitations for claims not otherwise provided for,\(^{37}\) or for contract claims,\(^{38}\) both of which run for four years, applied.\(^{39}\) Although this seemed to bar the claim, the court held that the filing of a complaint with the EEOC in March 1966 tolled the running of the statute for the claim based on section 1981.\(^{40}\) While the court of appeals disagreed as to the applicable Texas statute of limitations, it upheld the district court's finding that the statute was tolled by the filing of a complaint with the EEOC.\(^{41}\) Thus, despite Title VII's unavailability to an alien plaintiff following Espinoza, his attempt at invoking the procedural mechi-

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Section 1981 is not limited in applicability to employers of a minimum number of persons as Title VII is. 42 U.S.C. § 2000e-b (Supp. III 1973). Title VIII's remedial provisions allow injunctive relief, reinstatement, and back pay liability. 42 U.S.C. § 2000e-5(g) (Supp. III 1973). Before filing a complaint with the EEOC, plaintiff must first avail himself of the state remedies if any exist. 42 U.S.C. § 2000e-5 (e) (Supp. III 1973). Sixty days after the commencement of the proceedings, charges may be filed with the EEOC. Id. The EEOC investigates discrimination complaints filed by the aggrieved persons and attempts to remedy unlawful employment practices by conciliation when it finds that probable cause exists to believe that there has been a violation of Title VII. 42 U.S.C. § 2000e-5 (b) (Supp. III 1973). If attempts at conciliation do not produce results, the aggrieved party is so informed and a civil suit may be brought within thirty days. 42 U.S.C. § 2000e-5 (f) (Supp. III 1973).

38. Id. art. 5527.
39. 350 F. Supp. at 532. The statutes of limitations which the district court found applicable each permit a four year period.
40. Id.
41. 498 F.2d at 648. Guerra's suit included an action for back pay. In Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), which was decided subsequent to the oral argument of Guerra, the Fifth Circuit had held that section 1981 actions for back wages brought in federal court in Texas are to be governed by Tex. Rev. Civ. Stat. Ann. art. 5526 (1958), which permits recovery of back pay for only a two year period. Thus, Guerra's claim would have been barred on September 7, 1967, two years after his transfer from dock to compress, but Guerra's filing of a complaint with the EEOC during 1966 (the exact date was in dispute but all parties agreed that it was no later than August 1966) was held to have tolled the statute. 498 F.2d at 653.
nisms of that statute permitted him to pursue his section 1981 claim.\textsuperscript{42}

The court noted that its application of the tolling rule rested on its recognition that Congress intended Title VII to be an important, but not the only remedy for employment discrimination, and that Congress, in enacting Title VII, had no intention of preempting or repealing section 1981.\textsuperscript{43} The application of the tolling rule, then, implemented Title VII’s policy of encouraging settlement of grievances short of courtroom litigation through the use of an administrative body, while preserving section 1981 intact. The statutes are concurrently available; recourse to one does not preclude utilization of the other, nor is one subordinate to the other.\textsuperscript{44}

The court asserted that the interests of defendants were not adversely affected by extending the limitations period applicable to section 1981. When the plaintiff has pursued his complaint in an alternative forum, such as the EEOC, the defendant cannot complain of stale claims or lost evidence. Having to defend in several forums may burden a defendant, but the court saw this burden as the result of congressional action in creating multiple remedies for the same discriminatory action and refused to lessen the burden at the cost of jeopardizing the viability of one of those remedies.\textsuperscript{45}

The Fifth Circuit had held in prior decisions, and affirmed in \textit{Guerra}, that resort to Title VII is not a prerequisite to suit under section 1981.\textsuperscript{46} In this,

\begin{itemize}
\item 42. Actually, Guerra’s letter to the EEOC, coming in August 1966, or even if filed as early as March 1966 as he claimed, was not a timely Title VII complaint. \textit{See} 42 U.S.C. § 2000e-5(d) (1970). The district court, however, held that Guerra’s filing of an unfair labor practice charge with the National Labor Relations Board had tolled the ninety day limitation on filing a charge with the EEOC. 350 F. Supp. at 532. The court of appeals, on the other hand, held that the possible untimeliness of the EEOC charge in this particular case was irrelevant to the tolling of the limitations period for the section 1981 claim. The rationale was that it would have been unfair to deprive Guerra of the 1981 remedy after the EEOC had accepted the complaint, though it was an "apparently untimely" one, and "proceed[ed] with it as though nothing were amiss," thereby leading Guerra reasonably to conclude that he could refrain from bringing court action until the EEOC proceedings had ended, as the Fifth Circuit had decided earlier in \textit{Boudreaux} and \textit{Franks}.
\item 43. 498 F.2d at 650.
\item 44. \textit{Id.} at 651.
\item 45. \textit{Id.} at 652. The conclusion that the plaintiff’s pursuit of remedies under Title VII tolled the statute of limitations applicable to section 1981 did not quite end the problem of limitations. The complaint filed with the EEOC did not name the defendant Longshoremen’s Local. The court found that charges brought before the EEOC had no tolling effect in suits against a party not named in the complaint, absent a closer relationship between the parties than appeared on the record. \textit{Id.} at 652-53.
\item 46. \textit{Id.} at 650. \textit{See} Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 n.2 (5th Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), \textit{cert. de-}
\end{itemize}
it is in conflict with the Seventh Circuit's decision in *Waters v. Wisconsin Steel Works of Int'l. Harvester Co.* There, in attempting to reconcile the apparent inconsistencies between Title VII and section 1981, the court held that a plaintiff could avail himself of section 1981 only if he had first exhausted his administrative remedies under Title VII, or could advance a reasonable excuse for failure to do so. The court found that plaintiffs had sufficiently justified their failure to employ Title VII procedures, and emphasized that they had indeed demonstrated that their failure to do so was not unreasonable.

The *Waters* opinion framed the issue as whether Congress would have intended to repeal section 1981 if it had been aware of that statute when enacting Title VII, and concluded that the legislative history of Title VII demonstrated that Congress intended to preserve previously existing causes of action. Thus, as in *Guerra*, the Seventh Circuit opted for reconciling the two statutes, though in *Waters* it was willing to limit the applicability of section 1981 in order to implement the Congressional preference for conciliation reflected in Title VII.

III. RAMIFICATIONS AND CONCLUSION

*Espinoza* held that Title VII's prohibition against national origin discrimination does not prevent a private employer from discriminating on the basis of alienage. Aliens, however, are not always excluded from Title VII's coverage. Title VII protects all persons from discrimination on the basis of race, color, religion, sex, or national origin. The *Espinoza* Court emphasized that if discrimination on the basis of alienage had as its purpose or effect
discrimination based on one of these prohibited classifications, Title VII's remedies could be invoked.53

The Espinoza Court did not recognize a Title VII claim when a majority of the people employed by the defendant were of the same national origin as the alien plaintiff. Thus, when it is impossible to demonstrate that an employer's action toward an alien is actually the manifestation of a policy of discrimination on the basis of one of Title VII's prohibited classifications, the alien plaintiff is without a remedy.54 In effect, Espinoza permits alienage discrimination unless it can be shown that the employer in question is using alienage as a pretense, while systematically discriminating de facto on the basis of national origin. In Guerra, a majority of the defendant's employees were also of the same national origin as plaintiff, but because of the broader scope of section 1981, the court was not constricted by Espinoza's narrow construction of Title VII.

The decision in Espinoza that the Civil Rights Act of 1964 cannot be construed as including discrimination against aliens perhaps represents a correct construction of congressional intent.55 This conclusion seems to militate against the national interest in ensuring equal protection of the laws to all persons. Nevertheless, the legislative history of Title VII is vague at best with respect to its protection of aliens. However, the legislative history of section 1981 shows that Congress specifically intended to include aliens with-

53. 414 U.S. at 92.

54. The Espinoza Court cited Griggs v. Duke Power Co., 401 U.S. 424 (1971), as authority for its discriminatory effects doctrine. 414 U.S. at 92. Griggs held that Title VII prohibits de facto racial discrimination even when no unlawful discriminatory intent can be attributed to the employer. Griggs was easily distinguishable from Espinoza in that in the latter case, a pattern of de facto discrimination was virtually impossible to prove in light of the district court's finding that 96% of the employees of the defendant corporation were of the same national origin as Espinoza. The position of the EEOC, on the other hand, was that the question of de facto discrimination, at least in the sense in which the Espinoza majority had considered it, was irrelevant, for "discrimination based on birth outside the United States . . . is . . . discrimination based on national origin in violation of Title VII." Brief for EEOC as Amicus Curiae at 5, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). See Das, Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Laws, 35 U. Pitt. L. Rev. 499, 543-46 (1974).

55. It is arguable that citizenship discrimination is prohibited by Title VII. An introductory section to Title VII reads: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any state . . . ." 42 U.S.C. § 2000e-1 (1970). If this section is read conversely, it could be interpreted as meaning that Title VII does reach the employment of aliens within the United States. This point was raised by the district court in Espinoza v. Farah Mfg. Co., 343 F. Supp. 1205 (W.D. Tex. 1971), but the Fifth Circuit declined to adopt this reasoning. 462 F.2d at 1335. In Guerra no mention was made of this.
Thus, Guerra has significantly added to the usefulness and desirability of bringing an employment discrimination action under section 1981. The availability of section 1981 as an alternative, less cumbersome means for remedying employment discrimination is invaluable. In courts which accept the Guerra rationale the alien will be relieved of the practically impossible burden of proving that an employer's refusal to hire or promote him is grounded in a policy of national origin discrimination.

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56. See note 13 supra.