Constitutional Law

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The past decade has been witness to a rapidly mushrooming concern about the inequitable treatment of women before the law. Even the Supreme Court has evinced tacit recognition of this fact. While sex discrimination seems pervasive throughout our society, the discrimination evidenced by the differential sentencing of male and female criminal offenders presents a particularly egregious example.

Disparate sentencing procedures in New Jersey were declared unconstitutionally void in State v. Chambers, where female defendants had been sentenced for indeterminate terms in the Correctional Institution for Women at Clinton. New Jersey's statutory scheme provided for the sentencing of

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2. 63 N.J. 287, 307 A.2d 78 (1973). Six cases were consolidated on appeal. All six female defendants either pleaded guilty or were tried and found guilty of gambling offenses. One defendant had challenged her sentence by petition for a post-conviction hearing after which the trial court concluded that the state had failed to justify its sentencing scheme and ordered the defendant to be resentenced for a minimum-maximum term; the state appealed that order. In the other five cases, the defendants appealed challenging the constitutionality of the sentencing scheme on equal protection grounds. These six cases were certified for appeal to the New Jersey Supreme Court while pending unheard in the Superior Court.

   Any female above the age of sixteen years, convicted of a crime which would be punishable by imprisonment in the State Prison if she were a male, shall be committed to the Correctional Institute for Women.

The several courts in sentencing to the Correctional Institution for Women shall not fix or limit the duration of the sentence, except as otherwise provided for herein, but the time which the prisoner shall serve in the reformatory or on parole shall not exceed 5 years . . . or the maximum term provided by law for the offense of which the prisoner is convicted and sentenced if such maximum is less than 5 years; provided, however, that the court,
women for indeterminate terms and men to minimum-maximum terms within the statutory maximum for the same offense. The court declared this scheme an unconstitutional violation of the equal protection clause of the fourteenth amendment\(^4\) insofar as it provided for the disparate sentencing of female offenders over the age of 30.\(^5\)

Applying a strict scrutiny test to determine "... whether a fundamental constitutional right is being impaired,"\(^6\) the Chambers court found the state unable to sustain its burden of substantial justification with any empirical support that penological goals were furthered by sentencing women differently than men for the same offense.\(^7\)

Historical Analysis

Shortly after the end of the Civil War, a movement to establish separate prison facilities for women was initiated.\(^8\) This movement was coincidental with the development of new theories of penal reform which had gained general acceptance by the end of the 19th century. Earlier notions were rejected in favor of the goals of rehabilitation and re-education.\(^9\) Thus emerged the reformatory concept, and contemporaneously the parole system and the indeterminate sentence, the purpose of which was to provide sufficient time for the penal institution to perform its rehabilitative function,\(^10\) by keeping the offender confined "... as long as his own good or the welfare of the state shall justify his detention. . . ."\(^11\) Acting upon precisely this rationale, the early women's institutions were based upon the reforma-
tory model and sought to remove women from the debilitating influence of the penitentiary system. This new reform penology was gradually reflected in the sentencing practices adopted by various states.

In 1919, the Kansas Supreme Court, in State v. Heitman, declared a statute substantially similar to that in Chambers to be neither arbitrary nor unreasonably discriminatory in violation of the equal protection clause. The opinion of the Kansas court exemplified the type of early 20th century thinking which virtually insured the results reached through its application of a "rational basis" test when it stated that there "... is a feminine type radically different from the masculine type, which demands special consideration in the study and treatment of nonconformity to law."

Over half a dozen cases were decided in the decade following Heitman involving various forms of statutory sentencing discrimination on the basis of sex. Most of these concerned situations similar if not identical to Heitman and Chambers. The courts upheld these statutory schemes in the face of equal protection challenges. Continuing a rational basis approach, they supported the right of the legislature to classify according to sex as neither arbitrary nor unreasonable in light of the different penal philosophies supporting the reformatory as opposed to the state penitentiary, and the different moral and social problem presented in the rehabilitation of women offenders as opposed to men.

The few cases to be decided during the next forty years continued to uphold the constitutionality of the disparate sentencing schemes on the basis of the power vested in the legislatures to make reasonable classifications according to sex for the purposes of punishment and reformation.

12. ROBINSON 32-52. At this time there was a relatively small number of female offenders, proportionately one female to every nine males. ROBINSON 85.
14. Deference is given to legislative classification as long as the classification was based upon "... some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. . . ." Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897).
15. 105 Kan. at 143, 181 P. at 634.
16. Ex parte Dunkerton, 104 Kan. 481, 179 P. 347 (1919); State v. Adams, 106 Kan. 278, 187 P. 667 (1920); Territory v. Armstrong, 28 Hawaii 88 (1924) (males given 3-12 month sentences while females only 2-4 months, for adultery); Ex parte Fenwick, 110 Ohio St. 350, 144 N.E. 269 (Ohio 1924); Platt v. Commonwealth, 256 Mass. 539, 152 N.E. 914 (1926); Ex parte Brady, 116 Ohio St. 512, 157 N.E. 69 (1927). See also, Note, Sex Discrimination and the Constitution, 2 STAN. L. REV. 691, 723-24 (1950).
17. State v. Beddow, 32 N.E.2d 34 (Ct. App. Ohio 1939); Ex parte Gosselin, 141 Me. 412, 44 A.2d 882 (1945), appeal dismissed, 328 U.S. 817 (1946). It is interesting to note that the great bulk of litigation in this area occurred in the years surrounding the passage of the nineteenth amendment in 1920, and the passage of the proposed Equal Rights Amendment in 1972.
The turning point was reached in 1968, when the Connecticut Superior Court struck down that state's statutory provisions for sentencing women to an indefinite period with a maximum longer than the statutory maximum applicable to males. Turning away from the rationale of the earlier cases, the court found no reasonable basis for such a sexual differentiation. Following this decision came three others, all of which declared unconstitutional similar statutory sentencing provisions. The first of these, United States ex rel. Robinson v. York, criticized the simplistic view that the sole purpose of sentencing was rehabilitative. While the early courts were too caught up in their ideological and moralistic theories regarding women and the reformatory experience to appreciate objectively the patent inequities of longer incarceration based on sex (placing the burden upon the challenger to demonstrate that such classification was arbitrary and unreasonable), the modern courts were not so handicapped. Comparing sex classifications to those based upon race, the court in Robinson suggested for the first time the use of a "strict scrutiny" test, and found that "... the state has failed to carry its burden in support of the proposition that a greater period of imprisonment is necessary for the deterrence of women than men."

It was in this judicial climate that State v. Costello, the forerunner of Chambers involving the same sentencing scheme, was decided. Finding the statutes to constitute treatment of a class which impinged "... seriously on fundamental personal interests," the New Jersey Supreme Court utilized a strict scrutiny standard and remanded the case for an adversary hearing to allow the state to present its substantial justifications.

During the time between the Costello and Chambers decisions, however, the Supreme Court handed down its decision in Frontiero v. Richardson wherein four members of the majority agreed:

25. 59 N.J. at 341, 282 A.2d at 754.
26. Id. Subsequently, the defendant cooperated with prosecuting authorities and was resentenced for a three month term in the Camden County Jail, thereby mooting the constitutional issue in her case.
27. 411 U.S. 677.
... classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.²⁸

The first to treat the disparate sentencing issue in the wake of Frontiero, the Chambers court was presented with an opportunity to reinforce the position of sex as a suspect classification. Unfortunately, Chambers failed to decisively seize that opportunity.

Fundamental Interest vs. Suspect Class

Traditional equal protection analysis applies a strict scrutiny standard (as opposed to a rational relationship test) generally in two instances: where a classification is inherently suspect, or where a classification impinges upon a fundamental personal interest.²⁹ In its decision, the Chambers court followed its own lead in Costello and applied a strict judicial scrutiny standard in determining that New Jersey's disparate sentencing scheme impinged upon "... a fundamental constitutional right. ..."³⁰—indeed a basic right involving restraint upon one's liberty.

Whereas application of a rational basis standard virtually insures that sex distinctions will never be held violative of the equal protection clause, application of a stricter standard would seem to virtually insure the opposite result, since most sex classified legislation has been based upon false, stereotyped conceptions of female ability, and this type of standard places the burden upon the state to show substantial justification for the classification. Yet it is important to realize that this result does not necessarily follow. There can be little doubt that the Chambers court would have applied a strict scrutiny standard regardless of whether it labeled the discriminatory sentencing scheme an infringement upon fundamental interest or an instance of discrimination against members of a suspect class. Nor can it be denied that the same immediate result would have been reached. When considering the long-term consequences, however, the comparison fails. Reliance upon a fundamental interest approach is necessarily ad hoc in nature and narrow in scope. Declaration of a fundamental interest in one area offers no guarantee of a like result in any other. In contrast, the declaration of sex as a suspect class would subject any legislative classification based

²⁸ Id. at 682 (judgment of the Court, written by Brennan, J., in which Douglas, White, and Marshall, JJ. joined).
³⁰ 63 N.J. at 295; 307 A.2d at 82.
thereupon to constitutional challenge; it may be suggested that much of such legislation would fall.

**Conclusion**

Had Chambers relied squarely upon sex as an inherently suspect classification rather than upon its glib and indiscriminate interchange of two different standards in order to render lip service to the plurality opinion of Frontiero, it could have greatly clarified the long-range implications of its decision. Chambers chose to ignore those implications.

While its effort was commendable, Chambers failed to capitalize upon the opportunity with which it was presented, leaving equal protection in the area of sex discrimination a concept with shadowy outlines rather than real form and substance.

*Deirdre Dessingue*

**Jury Trial: The Trial of a Criminal Defendant in a State Proceeding by a Jury Drawn to Systematically Exclude Residents of the District in Which the Crime was Committed Violates the Vicinage Provision of the Sixth Amendment, People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108, Cal. Rptr. 345 (1973).**

**Introduction**

The sixth amendment guarantees a criminal defendant a trial by jury in federal and state criminal proceedings. However, not all of the elements of the common law jury have been preserved in the sixth amendment. Only those features that are essential to the function of the jury are embodied therein. The common law right of the accused to a jury of the vicinage, obscure in modern usage, was recognized as an element of the sixth amendment guarantee by the California Supreme Court in *People v. Jones.*

Leon Dwight Jones, a black resident of the Watts area of inner city Los Angeles, was charged with the sale of marijuana in his own neighborhood.

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1. *Id.*
2. Jones was a resident of the 77th Street Los Angeles Police Department Pre-
The trial was held in an overwhelmingly white judicial district of suburban Los Angeles County. Jones was convicted by a jury drawn exclusively from that judicial district. He contended that the jury could constitutionally have been selected from the entire county or from a portion of the county, providing that the alleged crime was committed within that portion. A jury drawn from a part of the county that excluded the locale of the crime, however, failed to satisfy the sixth amendment vicinage requirement of a jury of the district where the crime was committed. Jones' argument was rejected at the trial and on appeal.

In reversing the lower appellate decision and ordering a new trial, the California Supreme Court held that the sixth and fourteenth amendments guarantee a criminal defendant in a state trial the right to be tried by a jury selected from the judicial district in which the crime was committed.

Recent interpretation of the sixth amendment right to jury trial by the United States Supreme Court, outlined in Jones, has focused attention on the historical features of the jury. In Duncan v. Louisiana, the sixth amendment right to jury trial was incorporated into the fourteenth, extend-
ing that right to defendants in state criminal trials. It was subsequently held in Williams v. Florida that not all of the elements of the common law jury must be preserved by the states, only those essential to the function of the jury. The Jones court further relied upon a line of Supreme Court decisions, the most recent of which is Peters v. Kif, emphasizing the accused's right to a jury representing a cross-section of the community.

In light of the Supreme Court decisions in this area, the Jones holding, that the accused's sixth amendment rights are violated when the jury is drawn to systematically exclude persons from the vicinage, asserts not only that the common law vicinage requirement was included in the sixth amendment, but that it is presently promotive of the function of the jury.

**A Brief Narrative on the History of Vicinage**

Available historical evidence supports the assertion that a jury of the vicinage, considered an essential feature of the common law right to jury trial, was included although redefined in the sixth amendment when it was adopted.

Trial by jury of the vicinage is deeply embedded in English common law tradition. Originally, jurors served as witnesses and, as a result, had to be familiar with the facts of each case. They were of necessity residents of the area where the crime was committed, the vicinage. As the jury function was transformed from witness to trier of fact, jurors continued to be drawn locally. What originated as an administrative necessity developed into an important democratic institution: the protection of the accused from arbitrary government prosecution through community representation on the jury.

By the eighteenth century, the right to be tried by a jury of the vicinage was considered the inalienable right of all English subjects. Whether it travelled across the Atlantic Ocean with the English colonists, however, was a highly controversial issue. Repeated attempts by the Crown and Parliament to abolish the jury of the vicinage as it pertained to certain crimes

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13. "This idea of the jury representing the public of a particular locality had enormous consequences in an age when representative institutions were rapidly developing." Plucknet, A Concise History of the Common Law 126 (2d ed. 1936).
helped precipitate the American revolution.\textsuperscript{14}

The sixth amendment as originally proposed provided for the right to trial by "jury of the freeholders of the vicinage."\textsuperscript{15} This language was opposed on the grounds that it was unnecessary in light of the then pending Judiciary Bill.\textsuperscript{16} There was further disagreement over whether the word vicinage imposed too strict or too flexible a requirement. The resulting language of the sixth amendment providing for a jury "of the State and district wherein the crime shall have been committed" reflected a compromise between broad and narrow definitions of the term and left Congress to determine the outer boundaries of the area from which the jury was to be selected.\textsuperscript{17} The sixth amendment, although not employing the term vicinage itself, did include the juror residence requirement.

That the jury of the vicinage was originally provided for in the sixth amendment does not determine its present application in state trials. It is a generally accepted proposition that when interpreting the provisions of the constitution, deference is given to the meaning of the terms as used historically in England and in the United States at the time of their adoption. The Supreme Court in \textit{Williams v. Florida} substituted a different test in the sixth amendment area. In order to justify including a common law feature of the jury, "... the function that the particular feature performs and its relation to the purposes of the jury trial" must be demonstrated.\textsuperscript{18} In \textit{Jones}, the issue becomes whether a jury of the vicinage is functionally essential to the purpose of the jury trial.

\textbf{The \textit{Jones} Court Fails the \textit{Williams} Test by Avoiding the Question}

Unfortunately the \textit{Jones} court chose not to confront this issue squarely. Instead of exploring the relationship between the contemporary jury function and the ancient common law vicinage requirement, the court merely concluded that "[i]t thus seems abundantly clear that the ‘vicinage’ requirement

\begin{itemize}
  \item \textsuperscript{14} The Stamp Act provided for revenue offenses to be tried in Admiralty Court where trial by jury was traditionally unavailable. On May 16, 1769, the Virginia House of Burgesses met to protest against the transporting of Massachusetts colonists to England for trial under an old English statute, 35 Hen. 8, and drew up the Virginia Resolves asserting that, "thereby the inestimable Privilege of being tried by a Jury of the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away. . . ." Virginia Resolves of May 16, 1769, JOURNALS OF THE HOUSE OF BURGESSES, 1766-69 at 214 (Kennedy ed. 1906). In 1776 the colonists' grievances culminated in the Declaration of Independence, in which the Crown was condemned "for transporting us beyond the seas for pretended offenses."
  \item \textsuperscript{15} 1 Annals of Congress 435 (1789), cited in Williams v. Florida, 399 U.S. at 94, n.36.
  \item \textsuperscript{16} HELLE at 31-32.
  \item \textsuperscript{17} \textit{id.} at 32.
  \item \textsuperscript{18} 399 U.S. at 99.
\end{itemize}
... is an essential feature of the jury trial. . . .”

To conclude from its history that vicinage is essential to the jury trial is to miss the thrust of Williams. It can be demonstrated that the common law required a twelve man jury. This did not prevent the Williams court from dismissing the number twelve as an historical accident and holding that the states were not required to provide a jury of twelve. The superficiality of the discussion in Jones leaves vicinage open to the same attack and conceivably the same fate in future cases.

Reliance on Peters v. Kiff only adds to the dubiousness of the court's reasoning. Although Peters discusses “a fair possibility for obtaining a representative cross-section of the community,” the sixth amendment was not brought into play in that case. The concern in Peters is with the exclusion of a recognizable class of the population, not residents of certain neighborhoods. Representation is not unrelated to vicinage in that both are concerned with the makeup of the jury, but the lack of clear distinction drawn between them in Jones detracts from the force of its reasoning.

Ferreting Out Precedent

Recognizing that vicinage was not clearly mandated by Supreme Court decisions and that it has rarely been judicially recognized, the Jones court relied on two lower court cases, Alvarado v. State and State v. Brown, as persuasive authority for their decision.

Alvarado receives particular attention despite the fact that vicinage was confused therein with cross-sectional representation and is therefore susceptible to a reading not encompassing vicinage whatsoever. The facts of the case are highlighted as illustrating the purpose of the vicinage requirement. Alvarado, a native Alaskan from a remote area of the state, was charged with rape and convicted by a jury selected from within fifteen miles of Anchorage, a large metropolitan area. The issue, stated as whether Alvarado's jury was drawn from a fair cross-section of the community, encompassed vicinage when community was defined as including the location of the alleged offense. In light of the vast cultural differences between the resi-

19. 9 Cal. 3d at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.
20. 399 U.S. at 98-100.
21. Id. at 87-90.
22. 407 U.S. at 500, quoting language from Williams v. Florida, 399 U.S. at 100.
23. Peters' prosecution was begun in state court before Duncan was decided and went off on due process rather than sixth amendment grounds.
26. 486 P.2d at 892.
27. Id. at 898.
28. Id. at 902 n.28.
dents of Anchorage and the minority native population, the Supreme Court of Alaska held that the jury did not represent the neighborhood where the crime took place, and thus violated Alvarado's sixth amendment rights. Further ambiguity was added by a footnote stating that if the jury was representative of the neighborhood in which the alleged offense occurred, it need not be drawn from there. In spite of its equivocation, Alvarado specifically promotes a vicinage provision within the sixth amendment and the Jones court had no clearer precedent upon which to rely.

State v. Brown, the first case to recognize a defendant's constitutional right to a jury of the vicinage in a state criminal case, was also advanced in support of the Jones holding. Brown, despite cogent historical analysis, is of limited use as precedent. It is a lower federal court case from a different circuit and its vicinage discussion is dicta. It was held that the removal of the trial from the county in which the crime was committed over defendant's objection did not violate his sixth amendment rights. Vicinage was distinguished from venue when the Brown court added that the defendant could later move to have jurors from the original county impaneled.

After demonstrating the inclusion of a vicinage provision into the sixth amendment, the California Supreme Court relied upon an essentially irrelevant decision in Peters, the logic if not the phraseology of Alvarado and dicta in Brown, in support of its decision. The lack of clear precedent for the Jones decision reflects the near extinction of vicinage in modern usage, but not necessarily its merit. A clear and more forceful presentation of the function of vicinage and its relation to the purpose of the jury trial would have been more persuasive.

If the Decision is Correct There Must be a Reason

Alternative arguments existed that might have more directly met the Wil-
liams issue. For example, Duncan v. Louisiana, in which the right to jury trial was extended to the states, might have been utilized to greater advantage. Duncan recognized the essentially political nature of the jury, its traditional function being the protection of the accused from government oppression and arbitrary prosecution, the same function vicinage was traditionally considered to have performed.

If vicinage is indeed promoting the ends of contemporary justice, it is because subcommunities exist isolated from each other, albeit in a different way than in common law England. Jones lived in Watts and was tried by

34. The guarantees of jury trial in the federal and state constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and the compliant, biased or eccentric judge. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. 391 U.S. at 155-56 (italics added).

35. See Note, Trial by Jury in Criminal Cases, 69 COLUM. L. REV. 419 (1969). It is pointed out there that Duncan's extension of the right to jury to the states cannot be satisfactorily explained in terms of fairness to the defendant without proof of judicial partiality in state courts. Nor can it be said that a jury is a more accurate finder of fact than a judge. Id. at 422-24. The jury as described in Duncan is a democratic institution, a sort of mini-legislature to check against the majority will. See note 34 supra.

One aspect of the jury as a democratic institution is jury nullification. Id. at 425. According to the doctrine of jury nullification, jurors have the inherent right to set aside the instructions of the judge and reach a verdict of acquittal based upon their own consciences, and the defendant has a right to have the jury so instructed. This doctrine has been adversely settled in most jurisdictions. This is not to say, however, that with or without instructions on nullification, juries do not refuse to enforce harsh laws either at all or to their full measure. One commentator has described jury nullification as a "kind of repository of grass roots democracy" since ordinary citizens can effectively say no to their rulers when their policies and laws are no longer in touch with the will of the people. L. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE 215 (1970). See also Schefflin, Jury Nullification: The Right to Say No, 45 So. CAL. L.R. 168 (1972) discussing jury nullification at length and advocating its formal restoration.

36. The court of appeals in upholding Jones' conviction, denied the contemporary utility of the vicinage provision. "Seemingly, it arose as a requirement of English law at a time when communities were isolated by limited facilities of communication and transportation. No longer are the social mores and customs of a community developed in isolation, uninfluenced by the conduct and thinking of others which now may be learned about through newspapers, or through radio, television or other facilities of communication, or from travel." 103 Cal. Rptr. at 479. This interesting and debatable question, whether Watts is more isolated from suburban Los Angeles than one community was from another in old England, is not addressed by the Jones court.
suburbanites of Los Angeles County. If Jones could get a different reaction from those jurors than from the residents of Watts and if the two areas view the criminality of the sale of marijuana differently, vicinage serves a purpose. Different communities have different lifestyles and different notions of justice which through the vicinage requirement can be injected into an otherwise arbitrary criminal system. This is implied but never sufficiently articulated by the Jones court.

The overall effect of vicinage upon society could also have been emphasized. To require that a jury be drawn from the locale of the crime induces community participation in the criminal process serving to legitimize the system itself.

The weakness of the reasoning in Jones is not only that these particular suggestions were not pursued, but that no real effort was made to demonstrate the contemporary function of vicinage in response to the obvious argument that vicinage is a mere anachronism.

Conclusion

People v. Jones is noteworthy in its recognition of the right to a jury of the vicinage as an independent provision of the sixth amendment and its acknowledgement of the present vitality of an ancient common law protection. If we are to be persuaded that Jones is anything more than a peculiarly strict common law interpretation of the constitution, and if other courts are to accept this reading of the sixth amendment, clearer distinctions and more forceful advocacy will be needed.

William W. Osborne Jr.


38. The Alaskan Supreme Court discussed community participation in the jury in Alvarado. "As an institution, the jury offers our citizens the opportunity to participate in the workings of our government, and serves to legitimize our system of justice in the eyes of both the public and the accused." 486 P.2d at 903. See also notes 34 and 37 supra.
CONSTITUTIONAL LAW — Fourteenth Amendment — Equal Protection—By creating classifications which have no rational basis, the California Guest Statute violates both state and federal equal protection guarantees. Brown v. Merlo, 8 Cal.3d 855, 506 P.2d 212, 106 Cal.Rptr. 388 (1973).

During the late 1920’s and early 1930’s, 30 states passed so-called “guest” statutes. With one notable exception guest statutes had survived both federal and state constitutional attack until the decision in Brown v. Merlo.

The fact pattern in Brown was not unusual, as it is continually encountered in one form or another in automobile guest/host litigation. Two friends on a hunting trip were involved in an accident allegedly caused by the ordinary negligence of the driver-host. Guest passenger Brown suffered severe injuries. Finding the plaintiff to be within the ambit of the guest statute, the superior court granted summary judgment to the defendant. The California Court of Appeals upheld the lower court decision, but two of the three affirming judges concurred only because the California Supreme Court had refused to grant hearings in two earlier cases which had questioned the legitimacy of the guest statute.

This article will review both federal and state handling of the equal protection issue in guest statute cases, discuss the California experience and judicial climate presaging Brown, examine the Court’s analysis of the arguments offered to support guest legislation in California, and analyze the methodological approach taken by the Brown Court.

The Equal Protection Issue—Federal and State

Under the common law of most states, a rider was protected against the or-

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1. The gist of all guest acts is that persons riding for free in automobiles are owed no duty of ordinary care by their driver-hosts. Rather, recovery for negligently inflicted injuries is limited to cases involving egregious misconduct by the driver. For a listing of guest legislation, as well as a summary of the types of driver behavior falling beyond the pale of what might be termed permissibly negligent conduct, see Bennington, The Ohio Guest Statute, 22 Ohio St. L.J. 631, 632 (1961).
2. Ludwig v. Johnson, 243 Ky. 534, 49 S.W.2d 347 (1932). Although guest acts in Oregon and Delaware were declared unconstitutional as originally written, they were upheld in amended form in Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935), and Gallegher v. Davis, 37 Del. 380, 183 A. 620 (1936).
4. The exceptions are Georgia (Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921)), Massachusetts (Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917)), Virginia (Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931)), and Washington (Saxe
dinary negligence of his driver. With the advent of the guest statutes, the question arose whether the statutory exclusion of an automobile guest from recovery (absent some form of recklessly negligent behavior by the driver-host) was a violation of the guest's fourteenth amendment equal protection rights. The Supreme Court answered the question in Silver v. Silver by upholding the validity of the Connecticut guest act. After first taking judicial notice of an increasing frequency of vehicular guest/host litigation, the Court deferred to the judgment of the legislature as to whether such actions had become seriously vexatious. The Court pointed out that the legislation need not strike at every class to which it might be applied, thus permitting specific distinctions between gratuitous passengers in motor cars and those in other forms of conveyance. Silver marked the last federal constitutional challenge to guest acts.

Most state courts reaching the equal protection question have cited Silver, and some have ventured beyond the broad assertion of legislative authority made by the Silver Court to fill in the underlying purposes behind the legislative decision to enact guest statutes. Recurring throughout these decisions are the theories that guest statutes deter fraudulent lawsuits concocted by a driver and guest against the driver's insurer, and that a gratuitous guest passenger should not be permitted to repay his host's generosity by bringing a tort action for ordinary negligence against him. Reciting either or both of these justifications, state courts uniformly concluded that they constituted sufficient rational bases to support legislative passage of guest acts. Even

v. Terry, 140 Wash. 503, 250 P. 27 (1926)). The latter two states passed guest acts subsequent to the common law decisions. For a fine articulation of the majority rule, see Munson v. Rupker, 148 N.E. 169 (Ind. App. 1925).
5. 280 U.S. 117 (1929).
7. The Court continued, "[In] this day of almost universal transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers . . . do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it. . . ." 280 U.S. at 123-24 (emphasis added). Note that this theory of rationality is based upon a broad presumption of the suitability and validity of legislative acts generally. The Court did not deal with specific purposes underlying the Connecticut act.
8. See Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1944) (hospitality); McMillan v. Nelson, 149 Fla. 334, 5 So. 2d 867 (1942) (hospitality); Bailey v. Resner, 168 Kan. 439, 214 P.2d 323 (1950) (collusiveness); Roberson v. Roberson, 101 S.W.2d 961 (Ark. 1937) (hospitality plus citation of Silver); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935) (hospitality and collusiveness). See generally Naudzius v. Lahr, 253 Mich. 216, 219-20, 234 N.W. 581, 583-84 (1931) for a catalog of possible reasonable bases for guest legislation. It is submitted that a state purpose ostensibly to provide decreased insurance rates by keeping the insurer out of court, thus benefitting the motoring public, could be conceived of as effecting a reasonable legislative result (though less than enlightened social policy), and might be sufficient to withstand rational basis scrutiny. Although various authors have questioned the validity of claims that guest acts have produced lower insurance rates (See Tipton, Florida's Automobile
the severest judicial and academic critics of guest legislation, seemingly conceding the constitutional issues as settled, have urged legislative repeal as the appropriate redress.10

The California Experience

In California, the constitutionality of the original guest act had never been adjudicated,11 but the traditionally proffered rationale of preventing collusive lawsuits had been undermined by a series of cases12 which eliminated the entire range of interfamilial tort immunities. Since these immunities were premised on the theory that negligence actions between family members would be fraught with collusive possibilities, the judicial rejection of collusive interfamilial justifications applied a fortiori to host/guest situations often involving unrelated or even unacquainted persons.13 Furthermore, the Cal-

Guest Statute, 11 U. Fla. L. Rev. 287, 304-07 (1958), and Bennington, supra note 1, at 642-43), statistical surveys linking lower (or higher) insurance premiums to guest legislation are inconclusive. For some support of the money motive theory, see Comment, The Illinois Guest Statute: An Analysis & Reappraisal, 54 Nw. U. L. Rev. 263, 265 n.4 (1959).

9. See Brown v. Merlo, 8 Cal. 3d 855, 883 n.22, 506 P.2d 212, 232 n.22, 106 Cal. Rptr. 388, 408 n.22 for a listing of judicial and academic opinions opposing guest statutes. See also Casper, The Ohio Guest Statute, 10 CINN. L. Rev. 289 (1936). This writer was able to find only two academic articles unabashedly supporting the desirability of guest acts. For a ride down memory lane on solid tires, see Meissner, Liability of Automobile Drivers to Gratuitous Passengers Under the Wisconsin Law, 18 Marq. L. Rev. 1 (1933), and Note, Validity of Statute Limiting Liability of Automobile Owner to Gratuitous Passengers (U.S. (Conn.) 1930), 2 Rocky M. L. Rev. 263 (1960).


[The] plaintiff asserts that the provision of the Michigan guest passenger statute . . . is unconstitutional, because it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution . . . . That an argument in support of plaintiff's claims can be asserted is not in contest. However, the United States Supreme Court and Michigan Supreme Court have ruled the act constitutional. Plaintiff's appeal for a change in the law is made in the wrong forum. It should be addressed to the legislature for attention.

11. In Patton v. LaBree, 60 Cal. 2d 606, 608, 387 P.2d 398, 400, 35 Cal. Rptr. 622, 624 (1963), the California Supreme Court upheld the classification created by amendment to the original act which included the owner riding as a passenger under guest act coverage. The Court held that the legislature may have considered the owner's right to control the driver of the vehicle to legally distinguish the owner from a paying passenger, thus supplying a rational basis for the amendment. Note the dissent by Justice Peters on the ground that there is no rational reason to differentiate between a paying nonowner passenger and a paying owner passenger, but stopping short of the broader question of the distinction between paying and nonpaying guests. The expressed theory of equal protection analysis utilized by both the majority and dissent differs little from the standard federal test outlined by the United States Supreme Court in Lindsley v. Natural Carbonic Gas Co., note 28 infra.


13. 8 Cal. 3d at 875, 506 P.2d at 222, 106 Cal. Rptr. at 402.
fornia Supreme Court, in *Muskopf v. Corning Hospital District*, had discarded the governmental immunity doctrine, largely on the ground that unequal treatment was being afforded similarly situated persons.

Although the immunity decisions involved the common law and were therefore not controlling in the area of guest statutes, they indicated a clear judicial desire to provide negligently injured parties with legal remedies whenever possible. The decisions also showed specific judicial antipathy toward overinclusive classifications (infringing upon the legal remedies of many in order to protect against possible collusive recovery for a few), and toward underinclusive categories (allowing happenstance of time, location, etc., to determine recovery rights of negligently injured persons).

In *Olson v. Clifton*, specific judicial interest in the question of guest act constitutionality was manifested by the court of appeals.

>Cogent reasons have been advanced to show that the guest act should be abolished or declared unconstitutional. . . . Nevertheless, until it is repealed or adjudged unconstitutional when properly so attacked, it represents the mandate of the Legislature. . . .

The California Supreme Court chose the *Brown* case to delineate the proper line of attack. Speaking through Justice Tobriner, the Court first distinguished *Silver* as outmoded in its 40 year old emphasis upon the unique-

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15. "[Some] who are injured by government agencies can recover, others cannot: one injured while attending a community theatre in a public park may recover . . . but one injured in a children's playground may not. . . ." *Id.* at 214, 359 P.2d at 460, 11 Cal. Rptr. at 92. Similar types of providence, or the lack thereof, in guest statutes, include requirements that the injury take place, "during the ride," "in any vehicle" and "upon the highway," in order for recovery to be restricted to instances of extraordinary negligence.
16. For an example of the type of overinclusive classification referred to by the Brown Court, see *Carrington v. Rash*, 380 U.S. 89 (1965).
17. So many technical limitations had become incorporated in the guest act that, as stated in *O'Donnell v. Mullaney*, 66 Cal. 2d 994, 998, 429 P.2d 160, 162, 59 Cal. Rptr. 840, 842 (1967), "the relationship between the driver and occupant of a motor vehicle may fluctuate during the course of a single trip, as circumstances bring them within or without the language of the statute." Thus, in *Prager v. Israel*, 15 Cal. 2d 89, 98 P.2d 729 (1940), the critical distinction was the positioning of the guest's feet vis-à-vis the automobile, while in *Olson v. Clifton*, 273 Cal. App. 2d 359, 78 Cal. Rptr. 296 (1969), the location of the vehicle in relation to the road was controlling and in *O'Donnell*, the situs of the accident was determinative. Since the above factors bear no relation to the express legislative purposes of protecting hospitality or preventing collusion, they have no foundation in the realities of life, and are underinclusive indicators that similarly situated persons receive dissimilar treatment before the law. For a precise, scholarly treatment of equal protection requirements relating to overinclusive and underinclusive legislatives classifications, see Tussman and ten-Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).
19. *Id.* at 370, 78 Cal. Rptr. at 302 (emphasis added).
ness of automobiles and out of focus in its treatment of the guest statute as merely one of many automobile regulatory devices which had developed during the 1920's. It held that the Silver Court had confined its decision solely to the categorical distinction between vehicular guests and guests in all other conveyances, thereby ignoring legislatively created classification discriminations between paying and nonpaying guests, between automobile and all other types of social invitees, and between various subclasses of vehicular guests ("in a car," "on a highway," etc.). Whatever the anachronistic flavor of Silver, and however many types of classifications may have been overlooked or ignored by the Silver Court, the Brown Court faced the heavy burden of overcoming the presumption of validity (explicit in Silver) accompanying legislative acts. This the Brown Court attempted to do by scrutinizing the "hospitality" and "collusive lawsuit" rationales and rejecting them as irrational, arbitrary and therefore insufficient to support the guest statute.

Protection of Hospitality as Rational Basis

The Court held that even if protection of hospitality were a legitimate state purpose, there would still be no adequate explanation why automobile guests are distinguished from other guests and recipients of hospitality. Since California law requires that hosts generally owe a duty of ordinary care to their guests, the failure of the guest act to provide a similar duty where automobile guests were concerned created an arbitrary discrimination between classes of guests. The Court also felt that the existence of almost universal personal liability insurance coverage eliminated the personal nature of suits for damages, and thus removed any inherent aspects of ingratitude from the legal proceedings.

Possibility of Collusiveness as Rational Basis

While admitting that "[a] small segment of that class [automobile guests] may file collusive lawsuits", the Court held that the guest act "[presents] a classic case of an impermissibly overinclusive classification scheme, that

20. 8 Cal. 3d at 863 n.4, 506 P.2d at 217 n.4, 106 Cal. Rptr. at 393 n.4.
21. Id. at 863-64 n.4, 506 P.2d at 217-18 n.4, 106 Cal. Rptr. at 393-94 n.4. Since these other forms of classification discrimination had been ignored by the Silver Court, the Brown Court held that "[n]o prior case has adjudicated the present constitutional claim. . . ." Id. at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393. See 8 Cal. 3d at 863-64 n.4, 506 P.2d at 217-18 n.4, 106 Cal. Rptr. at 393-94 n.4, for the Brown court rejection of Silver.
22. 280 U.S. at 123.
23. 8 Cal. 3d at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.
25. 8 Cal. 3d at 867, 506 P.2d at 221, 106 Cal. Rptr. at 397.
is, a scheme in which a statute's classification 'imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims.'

It is noted that the very premise of collusive relations among parties presupposes a willingness to commit perjury, to violate insurance statutes, and otherwise to subvert efforts to obtain fair results. Since the host and guest passenger need only state that compensation in some form was rendered—a simple and totally effective method to avoid application of the provisions of the guest statute—parties denied recovery by the guest act would logically only include those whose sense of fair play and honesty, or whose lack of personal acquaintanceship, would inherently contradict the collusiveness rationale.

Rational Basis Standards—Federal and State

In California, the expressed standard for rationality to determine the constitutionality of legislative enactments differentiating among classes of persons had closely followed the four part test set forth in Lindsley v. Natural Carbonic Gas Co. The most pertinent part therein required that "[I]f any state of facts reasonably can be conceived that would sustain [the statute], the existence of that state of facts at the time the law was enacted must be assumed." The Brown Court refused to strain its imagination to come up with any highly improbable, though conceivable, legislative purpose. Justice Tobriner cited examples of what he felt were "artifical analyses" used by the United States Supreme Court to uphold state statutes, contrasting these with recent Supreme Court decisions requiring more substantial justifications. By limiting its inquiry to the two justifications dist-

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26. Id. at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403, citing Tussman and ten-Broek, supra note 17, at 351. "[Overinclusive] classifications fly squarely in the face of our traditional antipathy to assertions of mass guilt by association. . . ." Id. 27. 220 U.S. 61 (1911). In searching for only a rational basis test to uphold the guest legislation, the Brown Court rejected the plaintiff's contention that automobile guests constitute a "suspect classification" which would require "strict scrutiny" of the statute. Interestingly, the Court included in its definition of suspect classes ". . . racial or sexual classifications . . ." 8 Cal. 3d at 862 n.2, 506 P.2d at 216 n.2, 106 Cal. Rptr. at 392 n.2 (emphasis added). 28. 220 U.S. at 78. In Patton v. LaBree, 60 Cal. 2d at 608, 387 P.2d at 400, 35 Cal. Rptr. at 624, the California Supreme Court (with Justice Tobriner part of the majority) asserted that a legislative classification would be sustained unless "[n]o set of facts reasonably can be conceived that would sustain it. . . ." Justice Peters in dissent employed a similar test: "[I]f any state of facts reasonably can be conceived that would sustain [the statute] there is a presumption of the existence of that state of facts. . . ." Id. at 611, 387 P.2d at 403, 35 Cal. Rptr. at 627. 29. 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7, citing Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947), and Goesuert v. Cleary, 335 U.S. 464 (1948). 30. For a listing thereof, see 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.
cussed above, the Brown Court followed what it considered the trend in federal equal protection decisions.81

Conclusion

If it is essentially correct that "[I]t has been several centuries since an English jurist could assert with a straight face that, 'An act of Parliament can do no wrong . . . though it may do several things that look pretty odd,"82 then why must such queer legislative creations as guest statutes have persisted for 40 odd years when such a seemingly straightforward remedy as that advanced in Brown has been available? The answer lies in the previously mentioned extremely heavy presumption of constitutionality attending every statute and the concomitant theory that "... the legislature is the body best suited to the eradication of pernicious statutes and the ballot box is the best stimulus to achieve that end."83 However, where there exists a class of potential plaintiffs whose membership in the class is not foreseeable (negligently injured guest passengers are prime examples), the repeal of unwise legislative acts fails for lack of sufficient spokesmen, particularly against large, well-financed groups (such as the insurance industry) for whom the legislation has proven economically advantageous.84

For those state courts which have recited with more clarity than logical support the "hospitality" and "collusiveness" rationales, the Brown decision provides new material for judicial consideration.85 The larger question remains

31. Whatever the accuracy of its prediction of a federal trend, the Court held that "... it would be inappropriate to ... sustain the present statute in the face of our state constitutional guarantees" thus carving out an independent state ground for its decision in Brown. Id. at 865-66 n.7, 506 P.2d at 219-20 n.7, 106 Cal. Rptr. at 395-96 n.7.


33. Id. at 7.

34. The Kansas experience is typical:

[Legislatively], numerous efforts have been made—in 1941, 1945, 1949, 1951 and 1953—to repeal the guest statute. Only one of these, Senate Bill No. 196 in 1949, succeeded in passing the legislative body in which it originated, but even it later died in the House. As recently as the 1957 legislative session, the Senate judiciary committee killed a measure proposed to repeal the guest statute. The bill was supported before the committee by the Kansas Plaintiffs Attorneys Association and opposed by insurance companies and corporations. . . .

See Comment, Gross and Wanton Negligence: A Quarter Century Under the Kansas Guest Statute, 5 U. KAN. L. REV. 722, 724 (1957). Note that almost 20 further years have elapsed since this recitation of legislative efforts to repeal the guest act but the guest act remains, in Kansas as elsewhere.

35. Language such as the following, without more, should no longer suffice: "[The] vehicle is the means by which the guest is able to enjoy the generosity and cordiality extended him. . . . Thus [the court] believe[s] the classification on the basis of
as to whether use of fourteenth amendment equal protection guarantees to strike down legislative acts such as the California guest statute is a legitimate judicial approach. Those courts finding validity in the Brown methodology will be able to fashion remedies under the law for those unable to find effective relief at the statehouse.

David W. Huston


What standard of proof should be required to deprive an individual of his freedom? Should the answer depend upon the specific grounds on which society seeks to confine a person? The United States Court of Appeals for the District of Columbia Circuit has just recently considered these due process issues within the context of involuntary civil commitment. In In Re Ballay the court concluded that regardless of the reason behind institutionalization, the magnitude of individual interests at stake requires the same standard of proof as that needed to imprison.

Pursuant to the District of Columbia Code,¹ involuntary civil commitment proceedings were instituted in the United States District Court for the District of Columbia after John Ballay had returned to the White House for the second time within one month to request an audience with the President. He had presented himself as both a senator from Illinois and the husband of Tricia Nixon. Ballay was ordered committed to Saint Elizabeth’s Hospital upon a jury determination that he was “mentally ill and, because of that illness, . . . likely to injure himself or other persons if allowed to remain at liberty. . . .”² The district court instructed the jury that commitment ownership is clearly reasonable, and certainly it cannot be said to be devoid of reason and to be wholly arbitrary and capricious. . . .” Romero v. Tilton, 78 N.M. 696, 700, 437 P.2d 157, 163 (1967) (Decision upholding the constitutional validity of the New Mexico guest statute.

² In re Ballay, 482 F.2d 648, 649 (D.C. Cir. 1973). 21 D.C. Code Ann. § 545(b) (1973) in relevant part provides:
required finding the presence of both statutory elements by a preponderance of the evidence. Confronted with the issue of whether Ballay was denied due process of law because the jury did not determine beyond a reasonable doubt that he was both mentally ill and consequently dangerous, the court of appeals could find no individual or state interest sufficient to offset the greater potential for a wrongful deprivation of liberty inherent in the lesser standard of proof. Consequently, the court held that Ballay had been deprived of due process by the lower court's failure to instruct the jury that they must be convinced of the dual allegation beyond a reasonable doubt.

The standard of proof required by the district court clearly reflected that of prior case law. However until the instant appeal, no District of Columbia case had ever presented a direct challenge to this aspect of civil commitment procedure. In reversing the district court, the court scrutinized the interests at stake, analyzed the standard of proof itself and extrapolated the reasoning of relevant due process case law to arrive at its decision. The court found that each of these levels of analysis converged on but one clear outcome. In holding proof beyond a reasonable doubt to be the requisite standard for involuntary civil commitment, the court's opinion represents a triumph of substance over form.

The Precedential Background

It has been said that one out of every three American families is likely to experience the commitment of one of its members. However, the magnitude of litigation focusing upon the rights of the mentally ill has been surprisingly slight. It is only within the last few years that significant progress

If the court or the jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or the jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public.


4. Hearings on S. 3261 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., at 11 (1961). Presently, there are at least 600,000 persons in mental hospitals. Furthermore, approximately 250,000 more individuals labeled as mentally retarded are confined in other forms of residential institutions. Mental Health Law Project, Basic Rights of the Mentally Handicapped, 1973 p. 1.

5. In Jackson v. Indiana, 406 U.S. 715 (1972), the Court invalidated the summary commitment, until “certified sane”, of a mentally defective deaf mute and commented upon the infrequency of challenges to state power in this area:

Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated. 406 U.S. at 737. (Footnote omitted)
has begun to be generated in the area of mental health law.\textsuperscript{6} In substantiating its holding, the scant case law addressing the issue of the standard of proof in commitment procedure was put to little use by the court.\textsuperscript{7} Rather, the court wholly relied on a broader base of precedent by utilizing an analysis which placed involuntary civil commitment beside comparable situations found in recent due process cases considered by the Supreme Court.

\textit{In re Winship}\textsuperscript{8} held that a juvenile, charged in a juvenile proceeding with an act that would constitute a crime if committed by an adult, must be afforded a standard of proof beyond a reasonable doubt as one of the essentials of due process. Underlying \textit{Winship} is the concept that when individual liberty is at stake, procedural safeguards must duly reflect and provide for this immense concern unless weightier interests work to qualify this general principle. A more recent case, \textit{Morrissey v. Brewer},\textsuperscript{9} addressed the issue of whether due process applies to a revocation of parole, and if so, what procedural safeguards must be followed. The Supreme Court held that, at minimum, due process requires that the revocation procedure afford a prompt preliminary hearing to determine if reasonable ground exists, as well as a more formal revocation hearing prior to a final decision by the parole board.\textsuperscript{10} \textit{Morrissey} reaffirmed the rule in \textit{Winship} and tailored it to provide for certain procedural guarantees in a situation where, unlike the complete freedom held by the juvenile facing charges, the form of liberty jeopardized is already restricted to a considerable degree by the conditions of parole imposed on the parolee. Both \textit{Winship} and \textit{Morrissey} were to represent a compelling line of authority for the circuit court's resolution of the jury instruction issue in involuntary civil commitment.

\textit{The Circuit Court's Analysis}

The court proposed that given the nature of the personal interests at stake


\textsuperscript{7} The court merely referred to the handful of cases, all of which are in accord, in a footnote. See \textit{Lessard v. Schmidt}, 349 F. Supp. 1078 (E.D. Wis. 1972) appeal docketed, No. 73-568, 42 U.S.L.W. 3277 (U.S. Sept. 28, 1973); \textit{In re Pickles Petition}, 170 So.2d 603 (Fla. Ct. App. 1965); \textit{Denton v. Commonwealth}, 383 S.W.2d 681 (Ky. 1964); and \textit{Ex parte Perry}, 43 A.2d 885 (N.J. 1945). The Lessard case presents a due process challenge to the entire Wisconsin statutory scheme relating to involuntary civil commitment, including the requisite burden of proof. However it also contains threshold procedural issues which could entail disposal of the case without reaching the merits.

\textsuperscript{8} 397 U.S. 358 (1970).

\textsuperscript{9} 408 U.S. 471 (1972).

\textsuperscript{10} Furthermore, the revocation hearing must afford the parolee written notice of the allegations, disclosure of the adverse evidence, opportunity to be heard, a general right to cross-examination, a "neutral and detached" hearing body and a written statement of reasons for decision. 408 U.S. at 489.
here, the indefinite deprivation of liberty,\textsuperscript{11} privacy, and loss of significant civil rights,\textsuperscript{12} there could be no doubt that they were clearly within the purview of the "liberty and property" language of the due process clause.\textsuperscript{13} The court was therefore compelled to turn to an analysis of the competing interests underlying civil commitment to discern if any of these might work to prevent the extension of the due process right to commitment procedure.

Examination of the applicable statute\textsuperscript{14} suggested two entirely distinct state interests to the court. The primary objective, the state's concern with antisocial behavior, lent itself to analogy with the criminal system not only with respect to a similar goal,

... but primarily because the resulting restriction of liberty has assumed a significant and visible role in the creation of inhibitions to the state's overzealous or mistaken application of that power.\textsuperscript{15}

The second interest derives from the state's role as parens patriae. Although the court found this objective a viscerally more persuasive rationale to counterbalance the mentally ill person's loss of liberty, upon closer scrutiny the argument lacked foundation.\textsuperscript{16} This was chiefly because the legislation itself undercut this apparent justification by drawing no distinction between statutory standards allowing institutionalization where the individual poses a threat to society, and where the danger is to the individual himself.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{11} 21 D.C. CODE ANN. § 545(b), supra note 2, allows the court to order hospitalization for an indeterminate period.
\item \textsuperscript{12} The court's opinion observes that:
\begin{itemize}
\item [While the commitment stands on the record, the party may face state constitutional and statutory restrictions on his voting rights; restrictions on his right to serve on a federal jury; restrictions on his ability to obtain a driver's license; and limitations on his access to a gun license. 482 F.2d at 651-52 (footnotes omitted).]
\end{itemize}
\end{itemize}

\begin{itemize}
\item See, OMO CONST. art. v, § 6 and N. CAR. STAT., ch. 163, § 56 (1972) (voting right); 28 U.S.C. § 1865(b) (1970) (disqualification for jury service); VA. CODE § 46.1-360 (1950) (automobile operator license); and 22 D.C. CODE §§ 3207, 3210(3)(a) (1967) (gun license).
\item The court made no distinction between the due process clauses of the Fifth and Fourteenth Amendments. The Fifth Amendment applies to the District of Columbia.
\item 21 D.C. CODE ANN. § 545 (1973) set out in note 2.
\item 482 F.2d at 650.
\item In this context it might be noted that:
\begin{itemize}
\item Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficial. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
\end{itemize}
\item 21 D.C. CODE ANN. § 545 (1973), set out at note 2, is in accord with all those states which provide for alternative statutory grounds for hospitalization in as much as none have procedures that differ according to the reason for commitment. See Note,
In analyzing the standard of proof itself, the court observed that the preponderance of the evidence standard is usually applied to litigation where the stakes are often economic, while a more stringent standard is frequently imposed where societal interests are pitted against restrictions on the individual's liberty. Close examination of the beyond a reasonable doubt standard revealed to the court several characteristics favoring its use in involuntary civil commitment proceedings. In the application of criminal law, Winship had acknowledged that a society treasuring the value of personal freedom has a significant interest in assuring the accuracy of the grounds for its deprivation. The rationale behind this acknowledgment, society's need to promote confidence in the workings of its legal system, is equally applicable to civil commitment. Furthermore, just as Winship had noted with respect to juvenile proceedings, the court found that imposition of a greater standard of proof is unlikely to produce any discernible effect on the commitment procedure itself since it is already similar to a criminal trial. Nor can it work to increase any trauma already suffered by the alleged mentally ill individual as a result of the general adversary character of the proceeding. Also relevant to an analysis of the standard of proof here is the fact that the very nature of the evidence offered in commitment proceedings can often be characterized as less than sufficiently accurate. The more rigorous, "beyond a reasonable doubt standard" is, of course, particularly suited to mitigate this danger by increasing the degree to which the jury must be convinced of factual assertions.

The court's opinion embraced Morrissey as offering both a proper framework of due process analysis, and as a gauge against which the strength of the state interest involved in civil commitment proceedings could be meas-

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20. 397 U.S. at 363-64.
21. Id. at 365-66.
22. 21 D.C. CODE ANN. § 543 (1973) mandates that the alleged mentally ill person is to be represented by counsel whether or not he so desires, and 21 D.C. CODE ANN. § 544 (1973) gives him the right to demand a jury trial.
23. Some medical experts are of the opinion that merely being subjected to a hearing is a traumatic experience that may aggravate the condition of certain mental illnesses. See, e.g., Bowman, Presidential Address, 103 AM. J. Psychiatry 1, at 12 (1946).
sured. In distinguishing the commitment situation from that in parole revocation, the court observed a proportionate reduction in the magnitude of the state interest underlying the instant case. A parolee has already been found beyond a reasonable doubt to have committed specific anti-social acts. The state then has an "overwhelming" interest in being able to re-imprison without the burden of a new adversary criminal trial if, in fact, parole has been violated. The alleged mentally ill person on the other hand, confronts a judicial determination of his status for the first time. Thus the state does not face the burden of a new adversary trial, or any repetition of effort for that matter.

Running throughout the court's opinion is a recognition of the realities of involuntary hospitalization. For example, the court acknowledges that only when institutionalization actually offers some form of therapy can the state's role as *parens patriae* begin to have any meaning. Later, the court goes even further by questioning whether the therapy rationale can ever really alter the essentially punitive nature of any forced deprivation of liberty. In its analysis the court fails to find any . . . individual interest which distinguishes civil commitment from incarceration sufficiently to justify assuming a greater risk of wrongful deprivation in the latter. This reinforces the court's earlier determination that, as in the criminal system, the dominant objective in civil commitment is apparently the protection of society rather than a primary concern with the well-being of the mentally ill individual. Regardless of the civil characterization of commitment procedure, a successful prosecution can accomplish the same substantive result, a deprivation of liberty, as a criminal trial can. But the criminal defendant is tried within a legal scheme which affords him the most stringent standard of proof as well as a determinate statutory sentence. He also has the benefit of knowing what types of conduct may lead to imprisonment. The committed civil patient, however, may be indeterminately confined and for conduct which he may never have realized as statutorily proscribed. Given the similarity of interests at stake, the court found it quite difficult to reconcile that on one hand legislatures and courts have continually in-

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26. 482 F.2d 659.
27. The court's opinion quotes the observations of a commentator in the criminal field: Measures which subject individuals to the substantial and involuntary deprivation of their liberty are essentially punitive in character, and this reality is not altered by the facts that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. CRIM. L.C. & P.S. 226, 230 (1959). Id. at 667.
28. 482 F.2d 667.
serted procedural safeguards into the criminal system, while leaving the protections afforded the civilly committed individual at a minimum. 29 In this context the significance of the Winship and Morrissey decisions were of most value in offering support for the court's holding.

Like Winship, the underlying foundation of Morrissey rests on our society's abhorrence of error in the factfinding process when individual liberty, even that which is already limited by parole conditions, is placed in jeopardy. It therefore follows that when the maximum liberty afforded by the Constitution is being threatened through commitment, the situation of the alleged mentally ill individual stands as a much more convincing one than that of the parolee facing revocation of parole. 30 The court also could not help but conclude that the loss of liberty for the committed civil patient is at least as great as that for the juvenile delinquent. 31 Unlike the juvenile in Winship, the committed individual faces the stigma of a public hearing, an indefinite period of confinement, and the loss of substantial civil rights. In Winship, the Supreme Court found that although the consequences of being adjudged a juvenile delinquent were not the same as being adjudged a criminal, the differences were insufficient to justify a distinction in the standard of proof. 32 Since the alleged mentally ill person has at stake interests of proportional value to that of the charged juvenile, the circuit court was compelled to rule that he too must be afforded a standard of proof commensurate with the nature of these interests.

Conclusion

One commentator has observed that, in general, civil commitment, established in an era when diagnosis and treatment of the mentally ill were little understood, remains today a basically obsolete and unjust process. 33 In holding proof beyond a reasonable doubt to be the required standard for forced civil commitment, the court has done much to bring commitment procedure in line with contemporary notions of justice. Certainly with the right of liberty involved, a reasonable doubt as to either the mental illness of an individual, or the harmful consequences of it should be resolved in the individual's favor when forceful commitment is sought. An insufficiently warranted, or perhaps outright mistaken, deprivation of personal liberty can no less be excused when done through the workings of the civil commit-

29. Id. at 658.
30. Id. at 656.
31. Id. at 669.
32. 397 U.S. at 365-366.
ment scheme than when accomplished by the criminal system. Behind every deprivation of freedom, whether criminal or civil, there should exist procedural safeguards which reflect our society's traditional emphasis on the critical importance of personal liberty. To afford less than this in the involuntary commitment situation would be to carve out an unrealistic exception to judicially recognized principles of due process of law.

Kenneth Appel


The Supreme Court has often decided cases involving the jurisdictional limits of court martials over military and non-military personnel. It has also found it necessary in the past to weigh military necessity as a justification for government action that infringes upon private prerogatives. But since the Constitution has delegated power to Congress to provide for the discipline of the armed forces, the federal courts have been understandably reluctant to play an active role in setting constitutional standards on military discipline. They have been even more reluctant to do so where they would be required to examine evidence to adjudicate the constitutional issues.

Captain Howard Levy was convicted by an Army court-martial on three counts. The charges stemmed from his refusal to obey an order to establish and operate a training program for Special Forces Aidmen in dermatology and from statements made by Levy to an enlisted man attacking the war in Vietnam and the Special Forces and implying that black soldiers should refuse to fight in Vietnam. Levy was sentenced under all three counts, exhausted his appeals within the military justice system and petitioned for a writ of habeas corpus. He argued that his statements were protected speech

1. The charges were brought under the following articles of the Uniform Code of Military Justice: Article 90, 10 U.S.C. § 890(2) (1970) (willfully disobeying superior commissioned officer); Article 133, 10 U.S.C. § 933 (1970) (conduct unbecoming an officer and a gentleman); and Article 134, 10 U.S.C. § 934 (1970) (disorders and neglects to the prejudice of good order and discipline).
under the first amendment and that training Special Forces Aidmen would be a war crime and violation of his medical ethics.

Rejecting Levy's arguments, the third circuit nevertheless found two of the three articles of the Uniform Code of Military Justice under which Levy was convicted to be overbroad, vague and void on their face. However, the court decided not to apply the usual rule in reviewing criminal cases that a sentence imposed on multiple convictions will be upheld on appeal if any of the convictions are valid and would legally support the sentence imposed. The court of appeals ordered the writ to issue unless the military provided a new trial on the one valid charge, refusal to obey a lawful order.

While the substantive constitutional and legal claims of Captain Levy are of interest and importance, this note will examine Levy in light of the preceding standards for determining how closely civilian courts, on collateral review, may examine the factual record and play an active role in redressing the legal rights of men in uniform convicted by courts-martial.

The "Fully and Fairly" Test

Article 76 of the Uniform Code of Military Justice makes court-martial judgments binding upon all courts of the United States. While it is widely agreed that this precludes direct appellate review of court-martial judgments, there has been a wide divergence of judicial opinion on the scope of collateral review of these judgments.

Traditionally, the approach used in collateral attacks on court-martial judgments and state criminal convictions was that the federal courts were limited to a determination of whether the court-martial or state court had jurisdiction. As recently as 1950, the Supreme Court noted in Hiatt v.
Brown,9 "It is well settled that 'by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction.'"

The same year that Hiatt was handed down, the Supreme Court began cautiously to expand the scope of collateral review. In Whelchel v. McDonald,10 the Court stated that denial of an opportunity to present a defense such as insanity would go to a question of jurisdiction; nevertheless, the expansion was not without restriction for it was held that any error committed in evaluating the evidence was beyond the reach of civil court review. And in Gusik v. Schilder11 the Court interpreted what is today Article 76 of the U.C.M.J. as not depriving civil courts of habeas corpus jurisdiction.

Three years after Hiatt, in Burns v. Wilson,12 Chief Justice Vinson laid down the test that still remains in effect, even though there was no majority opinion.13 The Chief Justice stated that Article 76 of the U.C.M.J. meant that "when a military decision has dealt fully and fairly with an allegation raised in that [habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."14 However, Vinson also stressed the responsibility of the habeas corpus court to take into account the fairness of the prior proceedings. "The military courts, like the state courts, have the same responsibilities as do federal courts to protect a person from violation of his constitutional rights."15

Justice Minton's concurring opinion approved of the Hiatt standard as the measure of how closely a civil court could examine the proceedings of a court-martial under collateral review. Vinson argued that military law is a separate jurisprudence over which civil courts could exercise no supervisory role. At least for this proposition, it would appear that the Chief

81 (1857) (jurisdiction over the subject matter); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) and Ex parte Reed, 100 U.S. 13, 21-22 (1879) (jurisdiction over the person); Carter v. McClaughry, 183 U.S. 365, 381-82 (1902) (whether sentence was within statutory limits); Runkle v. United States, 122 U.S. 543 (1887) and Dynes v. Hoover, supra (whether court martial procedure conformed to statutes and regulations of jurisdictional nature).

9. 339 U.S. 103, 111 (1950), quoting In re Grimley, 137 U.S. 147, 150 (1890). The Hiatt Court did not seem concerned with the several fundamental errors found by the Court of Appeals which also found that the law member of the court-martial, the defense counsel and the reviewing authorities were grossly incompetent. 175 F.2d 273, 277 (5th Cir. 1949).

13. Vinson's opinion was joined in by Justices Reed, Burton and Clark. Justice Jackson concurred in the result but did not file any opinion. Black and Douglas dissented because they felt the petitioners were entitled to a judicial hearing on their claims. Frankfurters' two opinions are discussed below.
14. 346 U.S. at 142.
15. Id.
Justice had a majority behind him. Both Vinson and Minton felt that the framers of the Constitution had left to Congress the task of balancing constitutional rights against military necessity and that Congress accomplished this task by enacting the Uniform Code of Military Justice. Vinson viewed the Code as a major reform of the whole field of military justice, promising a better chance for servicemen to get a fair hearing on their constitutional claims within the military system.

Despite the broadening of the traditional areas of review from the jurisdictional issues under Hiatt to a consideration of whether the military system had dealt "fully and fairly" with the constitutional claims under Burns, the federal courts did not issue one writ of habeas corpus on other than jurisdictional grounds to a military petitioner until 1965. According to former Chief Justice Warren, this hardening of judicial attitude was not so much a result of the Burns decision as it was a recognition by the civilian judiciary that it did not have a large role in regulating the military's treatment of its own personnel.

One of the earliest decisions in 1965 that granted habeas corpus relief to a military petitioner on non-jurisdictional grounds was Application of Stapely. The district court, ostensibly uninhibited by precedent, delved into factual matters that could have been reviewed by the military authorities. The court seemed to view the restrictions in Burns not so much as inhibiting its power to examine factual issues as posing a limitation of the scope of its review to constitutional issues.

The Court of Claims seems to have taken the opposite approach. In


... [I]t is indisputable that the tradition of our country, from the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.

Warren felt that although the various opinions in Burns were "not as clear as they might be," they nonetheless stood for the proposition when read as a whole that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Id. at 188. According to Warren, the deference to military authority was also a result of the establishment of the Court of Military Appeals as a civilian "Supreme Court" of the military.

18. 246 F. Supp. 316 (D. Utah 1965). One of the main grounds of the decision was the incompetency of defense counsel in the military proceeding. This was the same grounds found unsatisfactory in Hiatt. See note 9 supra.

19. Habeas corpus is an effective form of collateral relief since it will secure a prisoner's release. However, there are other forms of collateral relief available. The scope of review is the same. See Edward F. Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 VA. L. REV. 483
*Shaw v. United States,* the court reasoned that while issues of fact might be placed beyond the scope of collateral review by *Burns*, pure issues of constitutional law were to be decided by the civilian court.

The Supreme Court set out to examine the jurisdiction of the Court of Claims to review court-martial judgments in *United States v. Augenblick* and *United States v. Juhl*, decided together in one opinion in 1969. The Supreme Court reversed on substantive grounds the decisions of the Court of Claims to grant collateral relief. Although the Court did not clear up the basic jurisdictional issue, it did make it clear that collateral relief could not be extended by civilian courts to military petitioners on statutory grounds unless the legitimate claims for relief rose to a constitutional level.

*The “Fully and Fairly” Test Applied in Levy*

In holding two articles of the U.C.M.J. too vague to withstand constitutional attack, the *Levy* court did not have to violate the literal requirements laid down in *Burns*. Whether or not the military authorities dealt fully and fairly with the constitutional issue, the third circuit did not grant the writ simply to re-evaluate the evidence. However, the decision does indicate a willingness on the part of the court to exercise an active role in fashioning standards for military justice. This can be seen by the court's exercise of its discretion to grant the writ despite the fact that it found one of the three convictions to be valid and legally sufficient to support the sentence.

The rule usually applied to review of criminal convictions in federal courts is that where a single sentence is imposed upon convictions on several charges, "that . . . sentence will be upheld on appeal if any one of the convictions is valid, and the sentence imposed is within the statutorily authorized maximum for the valid conviction, despite the fact that convictions on the other charges may not be valid." The *Levy* court relied upon the Supreme Court decision in *Benton v. Maryland* when it reasoned that this rule is discretionary with the reviewing court. However, *Benton* was decided by the Supreme Court on a direct appeal from the Maryland courts. If discretion is to be exercised on appeal, it is difficult to understand why the court sitting on collateral review should exercise it rather than

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20. *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966) (action in Court of Claims for back pay) and *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968) (suit for writ of mandamus to require the Secretary of Defense to remove dishonorable discharge from department records).
22. 478 F.2d 772, 778 (3d Cir. 1973).
the military authorities who are the only authorities empowered by statute
to review the case on direct appeal.

To issue the writ, the Levy court had to find that the joinder of the un-
constitutional charges with the valid charge of refusing to obey an order
prejudiced a fair trial on the valid charge. In doing so, the court analyzed
the defense strategy and the likelihood that military judges would be preju-
diced by Levy's political views which came out in the court-martial as a result
of the joinder of the invalid charges.24 In deciding it had jurisdiction, the
court reasoned that it was unnecessary to evaluate the evidence since the
attack on two of the Articles of the Code was not dependent on evidentiary
or factual construction, and that the decision to review the case was thus well
within the approach of the Court of Claims outlined in Shaw. The extent
to which the court went into the factual record belies this claim.

The majority in Levy also stated that the two articles declared by the
court to be void on their face rarely stand alone as a basis for prosecution,
and that the "general sentence rule would virtually insulate these articles
from constitutional scrutiny."25 Not only does the majority fail to indicate
the basis of its presumption that the articles in question rarely stand alone,
but it seems to be much more interested in examining the articles than in
simply vindicating the rights of the habeas corpus petitioner in question.

The Levy case represents a situation somewhere between a collateral
attack such as in Shaw where the civilian court examined only purely non-
factual issues of constitutional law and a case such as Burns where the
lower courts issued the writ to reexamine issues of fact that were necessary
to decide the constitutional issue, but which had already been ruled on by
the military authorities. If the Supreme Court reviews the case, it should
clarify the standards laid down in Burns. It should also examine the under-
lying premises of the Burns decision, especially since the scope of collateral
review in examining state criminal convictions has been greatly expanded
since Burns was decided.

The "Fully and Fairly" Test Re-examined

Two important developments in Supreme Court case law have occurred
since 1953 that might make the test laid down in Burns out of date.

24. The Levy majority acknowledged that Levy revealed his political views in the
cross-examination of Colonel Fancy, when his attorneys tried to show an illegal motive
behind Fancy's order to Levy. However, Levy's attorneys had asked for a severance
which was denied. The Court refused to speculate how the defense might have been
conducted had the severance been granted. 478 F.2d at 798-99.
25. Id. at 779 n.4.
The first lies in the expansion of the power and obligation of federal courts to look into factual matters on habeas corpus review of state criminal convictions heralded by Fay v. Noia\textsuperscript{26} and Townsend v. Sain.\textsuperscript{27} The second lies in the closer scrutiny given military jurisdiction in O'Callahan v. Parker.\textsuperscript{28}

In Townsend v. Sain, the Court stated, "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues."\textsuperscript{29} The Court recognized that the writ of habeas corpus was an opportunity to redress detention in violation of the Constitution which presupposes an opportunity to be heard, to argue and present evidence. The Court held that even where state courts have held full and fair factual hearings, the district courts have discretion to conduct their own factual hearings and find the facts for themselves. Considerations of comity certainly play as great a role in reviewing state court judgments as judgments of a military court-martial. It is, therefore, hard to understand why federal courts should be forced to don blinders when examining court-martial judgments on collateral attack, as the law-fact approach of the Court of Claims would seem to require.

In O'Callahan v. Parker, the Supreme Court held that in order for a military tribunal to have jurisdiction over an offense, it must be service-related, even if it is committed by a serviceman. Determining exactly what offenses are service-related involves an examination of the needs of the military in punishing the particular offense. Although the Court has often enunciated "... the basic principles of comity that must prevail between civilian courts and the military justice system. ...",\textsuperscript{30} the holding tends to undercut the rationale of restricting federal courts to pure issues of law on collateral review, since the basis of that rationale has been that military tribunals and not federal courts should weigh the needs of military discipline.\textsuperscript{31}

In light of all that has happened since Burns, the views expressed by Justice Frankfurter in two separate opinions filed in that case take on added significance:\textsuperscript{32}

The right to invoke habeas corpus to secure freedom is not to be confined by any \textit{a priori} or technical notions of ‘jurisdiction’. ... And so, if imprisonment is the result of a denial of due process, it may be challenged no matter under what authority of Gov-

\begin{itemize}
  \item \textsuperscript{26} 372 U.S. 391 (1963).
  \item \textsuperscript{27} 372 U.S. 293 (1963).
  \item \textsuperscript{28} 395 U.S. 258 (1969).
  \item \textsuperscript{29} 372 U.S. at 312.
  \item \textsuperscript{30} Parisi v. Davidson, 405 U.S. 34, 46 (1972).
  \item \textsuperscript{31} See Warren, supra note 17.
  \item \textsuperscript{32} 346 U.S. at 148-49 (citation omitted).
\end{itemize}
ernment it was brought about. Congress itself in the exercise of its war power 'is subject to applicable constitutional limitations.'

Frankfurter analyzed the implied restrictions in \textit{Burns} in light of previous decisions\textsuperscript{33} to go beyond consideration of technical jurisdiction when collaterally reviewing federal criminal convictions. "If a denial of due process deprives a civil body of 'jurisdiction', is not a military body equally without 'jurisdiction' when it makes such a denial, whatever the requirements of due process in the particular circumstances may be?"\textsuperscript{34}

All of this does little to calm the fears of the military that discipline will be undermined if a recruit can make a federal case out of any attempt by the military to discipline him. However, Frankfurter offered a solution when he suggested that different standards will necessarily have to apply in a military context in order to take the needs of the military into consideration:\textsuperscript{35}

But there is no table of weights and measures for ascertaining what constitutes due process. Indeed, it was common ground, in the majority and dissenting opinions below, that due process . . . is not 'the same in a military setting as it is in a civil setting.'

The federal courts will have to develop new standards to apply to constitutional questions in a military situation. The scope of constitutional rights is necessarily more limited in the military where clear danger is ever present. But this does not mean that servicemen need be denied the opportunity to make the best case they can, addressing themselves to facts and law, once they appeal to the federal courts.

\textbf{Conclusion}

The third circuit did not violate any of the literal terms of the \textit{Burns} test in remanding Levy's case for a new trial on the one valid charge against him. Even though the majority opinion claimed that it did not have to go beyond pure issues of constitutional law in reviewing the case, the \textit{Levy} court did have to probe deeply into factual matters in order to determine whether the joinder of invalid charges prejudiced the right of Captain Levy to a fair trial on the valid charge. This goes beyond the approach of the Court of Claims to leave all questions of fact for the military. Moreover, the opinion indicates much more of a willingness to play an active role in protecting the constitutional rights of servicemen than what is indicated in the \textit{Burns} decision.

\textsuperscript{33} Johnson v. Zerbst, 304 U.S. 458 (1938) (failure of federal court to provide counsel held to be jurisdictional error).
\textsuperscript{34} 346 U.S. at 848.
\textsuperscript{35} \textit{Id.} at 149.
Should the Supreme Court review the case, it should clarify the standards outlined in the *Burns* opinion to free federal courts from any inhibition expressed in *Burns* against developing the facts fully when necessary to decide the constitutional issue, especially where the facts were not developed in the military proceedings. Constitutional rights cannot be adjudicated on the basis of whether a petitioner is lucky enough to have his case turn on purely legal issues without any factual disputes. The preservation of military discipline lies not in any artificial test of what courts may or may not look at when examining a military case. It lies in the exercise of restraint by federal courts in applying constitutional rights to a military situation.

Robert H. Bear


In 1932, the Supreme Court declared in *Powell v. Alabama* that the defendant in a criminal prosecution "requires the guiding hand of counsel at every step of the proceedings against him." Since that time, the Court has sustained the sixth amendment guarantee of the right to counsel at steps in the prosecution which present the same dangers that would confront an uncounseled defendant at trial. The question of whether a pre-trial photographic identification poses this threat to the defendant was answered by the Court in *United States v. Ash*. Respondent Ash and a co-defendant were indicted for robbery. During a two-year period between indictment and trial, the Government did not ar-


1. 287 U.S. 45 (1932).
2. *Id.* at 69.
3. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defence." U.S. CONST. amend. VI.
5. 413 U.S. 300 (1973).
range a lineup to confirm Ash's identity. Instead, less than 24 hours before trial, an FBI agent, accompanied by the prosecutor, showed five color photographs to four eye witnesses, three of whom identified Ash. At trial, only one of these three made a "positive" identification. Both the fact that three witnesses had previously identified respondent from the color photographs and the photographs themselves were admitted into evidence. The Court of Appeals for the District of Columbia, sitting *en banc*, held 5-4 that Ash's constitutional right to counsel had been violated by the uncounseled display of photographs.  

The Supreme Court, in an opinion by Justice Blackmun, emphasized that Ash was not physically present when identified from the photographs and thus was not subjected to a "trial-like confrontation" with the prosecution. The majority held that "the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender."  

In a dissenting opinion, Justice Brennan maintained that inherent in a pre-trial identification by photograph are dangers which threaten the defendant's right to a fair trial on the issue of identity. Brennan concluded, therefore, that the sixth amendment does grant to the defendant the right of having his counsel present at this step in the prosecution. How this sharp division could arise, in light of past decisions of the Court on the right to counsel and particularly in light of *United States v. Wade*, in which the Court held that a defendant has the right to counsel at a pre-trial lineup, is the subject of this Note.

**The Evolution of the "Critical Stage"**

The real significance of *Powell v. Alabama* has emerged only recently. In *Hamilton v. Alabama* the Supreme Court, for the first time, characterized an encounter between a defendant and the Government as a "critical stage" of the prosecution. The issue in this case was whether the arraignment of an uncounseled defendant violated the sixth amendment guarantee of the right to counsel. Noting that in Alabama a defendant is required to raise defenses and enter pleadings at the time of arraignment, the Court

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7. 413 U.S. at 321.
8. Id. at 344 (Brennan, J., dissenting).
10. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court reaffirmed *Powell* in holding that the right to counsel could not be limited by a state statute which required appointment of counsel for indigent defendants in capital cases only.
stated that arraignment is a "critical stage in a criminal proceeding. What happens there may affect the whole trial." Thus, the Court held that the sixth amendment guarantees the right to counsel in this situation, for it is only the presence of his counsel that enables the accused to make informed and prudent choices as to the defenses he will raise, and the pleadings he will enter.

A more recent decision of the Court, *Coleman v. Alabama*, held that the right to counsel arises at a preliminary hearing. The determination that the hearing was a "critical stage," was based on an analysis of "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." The Court concluded that the presence of counsel at the preliminary hearing is essential to protect the accused from a prosecution which in some or all respects lacks foundation, and to discover the full case against the accused, so that thorough trial preparation can be made.

In holding that the right to counsel arises at a police interrogation of a suspect in custody, the Court in *Miranda v. Arizona* found it unnecessary to determine whether such a situation was a "critical stage" of the prosecution. The right to counsel is guaranteed because, in the Court's view, the absence of counsel at a custodial interrogation undermines the defendant's fifth amendment privilege against self-incrimination by making it possible for the police to elicit a pre-trial confession and reduce the defendant's trial to a mere formality.

At the outset of its opinion in *United States v. Wade*, the Court stated that compulsory participation in a lineup does not violate a defendant's

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12. *Id.* at 54.
13. *Id.* at 55. The Court has also held that a preliminary hearing at which the defendant is merely given an opportunity to plead, though under the law of the state there is no requirement that he do so, is a "critical stage" of the prosecution. *White v. Maryland*, 373 U.S. 59 (1963).
15. *Id.* at 9, quoting *United States v. Wade*, 388 U.S. at 227.
16. 399 U.S. at 9.
18. *Id.* at 466.
19. *Escobedo v. Illinois*, 378 U.S. 478, 487 (1964), quoting *In re Groban*, 352 U.S. 330, 344 (1957) (Black, J., dissenting). Prior to *Escobedo and Miranda*, the Court held that incriminating statements made by a defendant who was not yet in custody, but who had been indicted, should have been excluded from evidence at trial since it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, had arranged a meeting between the defendant and an accomplice turned informant. *Massiah v. United States*, 377 U.S. 201 (1964). Here also, the Court did not rely on the "critical stage" analysis, but primarily upon the attempt by police to elicit an incriminating statement directly from the defendant.
fifth amendment privilege against self-incrimination.\textsuperscript{20} The Court turned its attention instead to the danger that, when an uncounseled defendant is compelled to participate in a lineup, his “most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined,"\textsuperscript{21} will be irretrievably lost. The Court discussed at length what it regarded as the high potential for prejudice to the defendant which is inherent in a pre-trial lineup and the difficulty of demonstrating the prejudicial character of a lineup to the judge and jury at trial.\textsuperscript{22} It acknowledged that cross-examination at trial of the witnesses who attended the lineup can be utilized by the defense to challenge the credibility of the identification or uncover sources of prejudice, but added that “the first line of defense must be the prevention of unfairness . . . at the lineup itself.”\textsuperscript{23} The Court reasoned that, since there is significant potential for prejudice in a pre-trial lineup which may be impossible for the defense to reconstruct at trial, and since the presence of counsel would tend to minimize such prejudice and thereby enhance the defendant's right to a “meaningful confrontation at trial,” a lineup is a “critical stage” of the prosecution at which the right to counsel is no less warranted that it is at the trial itself.\textsuperscript{24}

In \textit{Gilbert v. California},\textsuperscript{25} which was decided on the same day as \textit{Wade}, the Court gave effect to its characterization of a lineup as a “critical stage.” It held that the admission into evidence of in-court identifications of an accused without a prior determination that they were independent of identifications made at an uncounseled and therefore illegal lineup, was constitutional error.\textsuperscript{26} In a third case decided that day, \textit{Stovall v. Denno},\textsuperscript{27} the

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\textsuperscript{20} 388 U.S. at 221. Four justices dissented from this part of the majority opinion, believing that a compulsory lineup does violate a defendant's fifth amendment privilege.
\textsuperscript{21} \textit{Id.} at 223-24.
\textsuperscript{22} The high risk that a lineup will be prejudicial to a defendant is attributable to such factors as the possibility of mistaken identification, a witness' unwillingness to admit mistake or his inability even to realize it, and the suggestiveness which is inherent in the context of a lineup and which may be heightened due to the manner in which a particular suspect is presented. Reconstructability at trial is essential if the judge and jury are to weigh the credibility of the identification. But neither the witnesses nor the defendant himself are apt to be alert for, or trained in the detection of, conditions which made the lineup prejudicial to the defendant. Cross-examination of them at trial by counsel who was not himself at the lineup will thus be an inadequate means of reconstruction. 388 U.S. at 228-30.
\textsuperscript{23} \textit{Id.} at 225.
\textsuperscript{24} \textit{Id.} at 236-37, quoting \textit{Powell v. Alabama}, 287 U.S. at 57.
\textsuperscript{25} 388 U.S. 263 (1967).
\textsuperscript{26} \textit{Id.} at 272. \textit{Kirby v. Illinois}, 406 U.S. 682 (1972), limited the right to counsel to pre-trial lineups which occur after indictment. The issues discussed in \textit{Kirby} did not arise in the instant case since Ash was already under indictment at the time the identification was conducted.
\textsuperscript{27} 388 U.S. 293 (1967).
\end{flushright}
Court acknowledged that an established, alternative ground of attacking a pre-trial identification is that the circumstances under which it was made were so prejudicial to the defendant that he was denied due process of law in violation of the fourteenth amendment.\(^\text{28}\)

The Court reaffirmed this principle specifically with respect to photographic identification in *Simmons v. United States*,\(^\text{29}\) in which it was held that a conviction based on an eyewitness identification at trial following a pre-trial identification by photograph will be set aside only if the pre-trial identification procedure was so prejudicial to the defendant that it made likely a misidentification, which the defense would be powerless to undo.\(^\text{30}\)

The Court defended the use of photographs for identification purposes; however, this defense was made with specific reference to “initial identification,” not with reference to identification of a defendant in custody and under indictment. Moreover, the right to counsel was not discussed at all since the defendant, who was still at large at the time of the photographic identification, did not assert that he had a right to counsel at that time, but rather that he had been denied due process of law by virtue of the circumstances under which the identification was made.\(^\text{31}\) Thus, the facts and the issue in *Simmons* are clearly distinguishable from those in *Ash* and *Wade*.\(^\text{32}\)

**The Approach in the Circuit Courts**

Only two years before *Wade*, the Court of Appeals for the District of Columbia held that a defendant was not denied his constitutional right to counsel by virtue of his being compelled to participate, without counsel, in a lineup held shortly after the crime had been committed.\(^\text{33}\) The court stressed that trial testimony based on what transpired at the lineup was evidence “only of identification,” and was not primary evidence of guilt.\(^\text{34}\)

Under *Wade*, this distinction clearly can no longer be made when the defendant has been identified from a lineup. With respect to photographic identification on the other hand, the distinction between mere evidence of identification and primary evidence of guilt persists. The courts have believed it to be sound policy to make available evidence of a witness’ ability

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\(^{28}\) *Id.* at 302, relying on *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966).

\(^{29}\) 390 U.S. 377 (1968).

\(^{30}\) *Id.* at 384.

\(^{31}\) *Id.* at 383.

\(^{32}\) Indeed, the *Simmons* opinion cited *People v. Evans*, 39 Cal. App. 2d 242, 246 P.2d 636 (1952). The issues in that case, as stated by the California court, were “the insufficiency of the evidence so far as the element of identification is concerned and prejudicial errors alleged to have occurred during the course of the trial.” 246 P.2d at 637.

\(^{33}\) *Williams v. United States*, 345 F.2d 733, 734 (D.C. Cir. 1965).

\(^{34}\) *Id.* at 734.
or inability to make a pre-trial photographic identification of the defendant, so that the jury may better judge the credibility of in-court testimony. Whether the defendant has been denied his right "to be confronted with the witnesses against him" by virtue of the admission of evidence of the pre-trial identification is a question of much current controversy, but one which is not within the scope of this Note. However, the question of whether the constitutional rule requiring the presence of counsel at a lineup is also controlling of the admissibility of a photographic identification, is the central issue of Ash.

The circuit courts of appeals, with the exception of the District of Columbia, are all but unanimous in the position that Wade does not apply to photographic identifications which occur after arrest. The Tenth Circuit assumed this stance in 1968. The court stated that pre-trial identification by photograph is simply a part of the Government's trial preparation, and stressed that the accused is not confronted by the prosecution when such an identification technique is employed.

In the following year, the Second Circuit concluded that to hold that a defendant is guaranteed the right to counsel at a stage of the prosecution which was conducted in his absence "would press the Sixth Amendment beyond any previous boundary," and cited the Tenth Circuit's similar view. The court also cited the defense of photographic identification in Simmons, though it noted that in Simmons the right to counsel was not involved since the photographs were shown to the witnesses before the defendant had been taken into custody.

More recently, the Third Circuit Court of Appeals, sitting en banc,
overruled United States v. Zeiler,\textsuperscript{43} an earlier panel decision of that court, which had held Wade applicable to pre-trial photographic identification. It was stated in Zeiler that the considerations which warrant the presence of counsel at a lineup are equally applicable to a photographic identification.\textsuperscript{44} In overruling Zeiler,\textsuperscript{45} the court relied on what is construed in Wade as an “unabated emphasis” of the sixth amendment’s confrontation clause,\textsuperscript{46} and declared, “while the constitutional underpinnings [of Wade] relate to the broader base right of confrontations at trial, the actual mischief sought to be avoided was the physical confrontation of an uncounseled defendant with his alleged victim and other witnesses.”\textsuperscript{47} The treatment of this issue in the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits is consistent with that in the three summarized here.\textsuperscript{48} The majority view in the state courts also rejects application of Wade to pre-trial photographic identification.\textsuperscript{49}

In Ash it itself, the Court of Appeals for the District of Columbia disputed what it viewed as the limitation which the other circuits placed upon the sixth amendment guarantee of the right to counsel. It contended that this right arises whenever there is a risk that the actions or words of other persons may result in prejudice to the defendant: that the right is not limited to situations where the defendant is physically present. That prejudice may result in one instance from manipulation of the defendant’s body, and in another instance from manipulation only of his photograph, has no bearing on the right to counsel.\textsuperscript{50} The court emphasized that there is a most significant distinction between a pre-trial photographic identification of the defendant and the other meetings which the prosecutor has with the government witnesses in preparing for trial. The prosecutor cannot introduce testimony on his direct examination of a witness, of statements made to him by that witness at an earlier meeting. However, as the court had pointed out in a prior decision, the prosecutor may on direct examination introduce evidence of the witness’ prior photographic identification of the defendant.\textsuperscript{51} Moreover, assuming that the identification was not prejudi-

\textsuperscript{43} 427 F.2d 1305 (3d Cir. 1970).
\textsuperscript{44} Id. at 1307.
\textsuperscript{45} United States ex rel. Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972).
\textsuperscript{46} See note 36 supra.
\textsuperscript{47} 461 F.2d at 741.
\textsuperscript{49} See cases listed in 93 S. Ct. at 2569-70 n.2; 461 F.2d at 99 notes 8 & 10; 461 F.2d at 111-12 notes 20-29.
\textsuperscript{50} 461 F.2d at 101.
\textsuperscript{51} United States v. Kirby, 427 F.2d 610, 612 n.2 (D.C. Cir. 1970).
cial to the defendant under the due process standard discussed in Simmons, and that the witness is available for cross-examination as to his knowledge of the procedure at the identification, his pre-trial identification by photograph is deemed to have greater probative value than his in-court identification of the defendant, since the latter is subject to the suggestiveness created by the circumstances which necessarily accompany a trial. In light of its independent standing as evidence and the reliability which has been ascribed to it, to say that a pre-trial photographic identification is “less than a critical stage of the prosecution is to blink reality.”

The Qualification of United States v. Wade

In its Ash opinion, the Supreme Court reviewed the brief history of the sixth amendment guarantee of the right to counsel, and concluded that the historical test for deciding claims of that right calls for a determination of whether, in the context in which the claim was made, the defendant required the aid of counsel in coping with legal procedure or in facing the prosecutor. The Court observed that Wade is a prime example of the application of the historical test. At a lineup the defendant is compelled to face the prosecutor or a representative of him and is thereby thrust into a “trial-like confrontation” at which the presence of counsel is required to compensate for the superior knowledge and experience of the authorities.

The dangers of mistaken identification, suggestivity, and lack of reconstructability mentioned in Wade, and relied upon in United States v. Zeiler to apply Wade to photographic identification, are not a sufficient basis for requiring the presence of counsel. In support of this assertion, the Court attached great significance to the manner in which the Wade decision distinguished a lineup from other identification techniques such as fingerprinting or taking blood samples. This distinction was drawn, said the Court, not in terms of the need for counsel to protect the defendant’s rights at the time such techniques are employed, for the Wade opinion had already concluded that a lineup constituted a “trial-like confrontation” and therefore the presence of counsel. Rather, the Wade Court drew this distinction in terms of reconstructability at trial, and only in response to the government’s argument that if the right to counsel arises at a lineup it arises also at other steps in the prosecution’s evidence gathering. The Ash majority contended

53. 461 F.2d at 101.
54. 413 U.S. at 314.
55. Id. at 314.
56. Id.
57. Id. at 314-16. In reference to the less than “critical” character of an identifi-
that the clear implication of this reasoning is that the presence of counsel at the
time of an identification by fingerprints or blood sample is not required as a
matter of right under the sixth amendment but is required, if at all, only be-
cause the identification procedure in question may be difficult to reconstruct at
trial. Reconstructability then, is not a test of whether the defendant has a
right to the presence of counsel, but only of whether the presence of counsel is
necessary in view of the fact that cross-examination at trial may, in the case
of certain identification techniques, be inadequate to check any misuse the
prosecution may make of them. It is a test of whether the presence of
counsel is required to maintain equality in the adversary process.

The ultimate construction placed upon "Wade," primarily by virtue of the
distinction drawn between a lineup identification and an identification made
from evidence which can be displayed in the absence of the defendant, was
that the "Wade" Court tacitly acknowledged that the physical presence of the
defendant within the context in which the identification is made is, under
the historical test, determinate of whether the right to counsel
arises.

In light of the Court's analysis of "Wade," its holding in "Ash" was quite fore-
seeable. Ash was not present when the witnesses were shown the photo-
graphs. The identification did not constitute a "trial-like adversary con-
frontation" during which the accused might have been "misled by his lack of
familiarity with the law or overpowered by his professional adversary," and
thus, the right to counsel did not arise.

Knowledge of the techniques of science and technology is sufficiently avail-
able, and the variables in techniques few enough, that the accused has the op-
opportunity for a meaningful confrontation of the Government's case at trial
through the ordinary processes of cross-examination of the Government's ex-
pert witnesses and the presentation of the evidence of his own experts. The
denial of a right to have his counsel present at such analyses does not there-
fore violate the Sixth Amendment; they are not critical stages since there is
minimal risk that his counsel's absence at such stages might derogate from his
right to a fair trial." 388 U.S. at 227-28.

But see 388 U.S. at 236-37, where the "Wade" opinion stated:

Since it appears that there is grave potential for prejudice . . . in the pre-
trial lineup, which may not be capable of reconstruction at trial, and since
presence of counsel itself can often avert prejudice and assure a meaningful
confrontation at trial, there can be little doubt that for Wade the post-
indictment lineup was a critical stage of the prosecution . . . . (footnote
omitted; emphasis added).

58. 413 U.S. at 316.
59. Id. at 317.
60. Id. at 316. The Court also mentioned the consistent use of the word "confron-
tations" in Wade as additional evidence that the decision was intended to apply only
to an identification of the defendant made in his presence. Id. at 315-16 n.9.
61. Id. at 317. The Court believed that the alternative rationale for requiring the
presence of counsel, protection of the adversary process, failed here also since equality
There was a strong dissenting opinion by Justice Brennan who observed that, notwithstanding the dangers inherent in a lineup identification as set out in Wade, the Court has recognized that an identification made at a lineup is normally more accurate than one made from a display of photographs. A misidentification by photograph is equally prejudicial to the defendant as misidentification at a lineup, in that a witness is more apt to retain in his memory the image of a photograph than the image of the person actually seen when the crime took place. In another respect, a photographic identification is potentially more prejudicial to the defendant since, unlike a lineup, the defendant is not present and cannot himself bring even the slightest bit of evidence of prejudicial conditions to the attention of his counsel.

The dissent stated that the test which historically has been applied to claims of the right to counsel is whether, at the stage of the prosecution in question, the presence of counsel is necessary "to protect the fairness of the trial itself." It disputed the Court's conclusion that Wade summarily dismissed identification from such evidence as fingerprints or blood samples as less than a "critical stage" of the prosecution because of the physical absence of the defendant. Rather, the reasoning in Wade was that the sixth amendment does not require counsel "since there is minimal risk that his counsel's absence at such stages might derogate from [the defendant's] right to a fair trial."

The issue of reconstructability was not relegated to the role of a secondary justification for judicial intervention to protect the adversary process. It was discussed in Wade because it is descriptive of the threat that a lineup identification poses to the defendant's right to a fair trial. The distinction drawn between an identification made at a lineup and an identification of access to the photographs from which Ash was identified enabled defense counsel to conduct a similar proceeding in an attempt to discredit the results attained by the government.

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62. 413 U.S. at 332-33 (Brennan, J., dissenting), quoting Simmons v. United States, 390 U.S. at 386 n.6.
63. 413 U.S. at 334-35 (Brennan, J., dissenting), quoting 390 U.S. at 383-84.
64. Id. at 336.
65. Id. at 339, quoting Schneckloth v. Bustamonte, 412 U.S. 218, 238-39 (1973). In this case the Court held that the presence of counsel is not required for there to be an effective waiver of fourth amendment rights, but that it is required for an effective waiver of the fifth amendment privilege against self-incrimination. The Court based its greater concern for the fifth amendment privilege on the need "to protect the fairness of the trial itself." 412 U.S. at 238-39.
66. The dissent also addressed the Court's reference to the repetition of the word "confrontations" in Wade, supra note 60, explaining that use of that word was not significant since Wade involved a lineup which was, of course, a "confrontation." 413 U.S. at 341 n.19.
made from evidence such as fingerprints, was based on the need to protect this right, though of course, in discussing this need in reference to a lineup, it was necessary also to discuss the extent to which such a procedure is reconstructable at trial.

For the dissent, the essence of *Wade* is that it provided for the presence of a trained observer in the person of the defendant's counsel, who, having witnessed the lineup, would then be able effectively to demonstrate any unfairness that occurred at the lineup, and thus preserve the defendant's fundamental right to a fair trial, on the issue of identity.68

**Conclusion**

Among the cases relied on by the Court was *Hamilton v. Alabama*, in which, as has already been alluded to in this Note, it was stated that "arraignment is a critical stage in a criminal proceeding. What happens there may affect the whole trial." One may fairly ask whether *Ash* represents a strained interpretation of *Hamilton* and the cases which followed, including *Wade*. But what is most distressing about *Ash* is that the Court did not forthrightly discuss the issue as it was framed in the earlier cases. Under *Ash*, the disposition of future claims of the right to counsel at a pre-trial identification will not turn a determination of how a certain identification technique or procedure may threaten the defendant's right to a fair trial, but on a determination merely of whether the defendant's physical presence is required for the technique to be utilized.69 This statement may itself be a strained interpretation of *Ash*, but the plausibility of such a future interpretation is clear.

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68. 413 U.S. at 344.

69. It is in recognition of the realities of modern criminal law enforcement that the sixth amendment guarantee has been construed in the cases preceding *Ash* as applying to "critical stages" of the prosecution. United States v. Wade, 388 U.S. at 224.