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Criminal Law: Private Rights and Public Interests in the Balance

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NOTE

CRIMINAL LAW: PRIVATE RIGHTS AND PUBLIC INTERESTS IN THE BALANCE

INTRODUCTION

The primary goal in every criminal proceeding is a just outcome. In pursuing this objective, however, courts have come to realize that criminal justice is reducible to cross-purposes. On one hand is the uneasy recognition that in the pursuit of convictions law enforcement officials may sanction conduct that, although effective in combating crime, infringes upon private rights protected by the Constitution. The criminal trial, and the criminal law in general, then, serve as the defendant's medium for challenging governmental policies and behavior. But the real impetus behind the development of the criminal law is the protection of society. While considerations of fairness may suggest a particular outcome, this result may not be justified if it means exposing the public to substantially greater harm or depriving it of commonly held rights. Therefore, though it may be difficult to see any justification in principle for limiting the reach of prophylactic rules in criminal cases, compelling societal interests may override the individual's interest in being granted additional protection from arbitrary governmental action.[1]

The courts traditionally have labored to administer criminal law so as to preserve a proper balance between individual rights and social welfare.[2] As time has passed and public attitudes have changed, new lines have been drawn, old ones re-enlisted, and existing ones refined.[3] While resort to a synthesizing process may leave open the question whether the long-standing commitment to

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1. But social welfare is bound up with improving the fairness of criminal proceedings. "More then one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime . . . ." Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring). *See generally* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Veron, *Due Process and Substantive Accountability: Thoughts Toward a Model of Just Decisionmaking*, 38 LA. L. REV. 919 (1978); *see also* Knight, *On the Meaning of Justice*, in NOMOS IV: JUSTICE 3 (Friedrich & Chapman eds. 1963).

2. Two explicit objectives of the Constitution are to "insure domestic tranquility . . . And [to] secure the blessings of Liberty . . . ." U.S. CONST. Preamble; *see* Silver, *The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police and Riot*, in THE POLICE 1 (D. Bordna ed. 1967).

3. "To a large extent the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion." F. FRANKFURTER, LAW AND POLITICS 197 (1939).

fairness has been honored,[4] this eclectic mechanism is the heart of the criminal law, for the kinds of standards and rules adopted will determine whether on the margin claims of unconstitutionality will be successful in criminal proceedings. Against a backdrop of Supreme Court decisions, this Note will examine the Fourth Circuit's efforts to relieve this tension and to reconcile conflicting interests by judicially created remedies in five broad areas of criminal law: confessions, extrajudicial identifications, the conflict between fair trial concerns and a free press, effective representation of counsel, and prisoner rights.[5] The emphasis on Fourth Circuit decisions is not intended as a self-limiting choice, but merely as a heuristic device for exploring the problems of and the solutions proposed by the courts. The discussion will center on three critical functions of the court: defining proper police policy; regulating the courtroom, its environs, and its officers; and overseeing prison conditions. A recurring theme concerns the ability of the court to provide some guidance for lower echelon officials where thorough-going control is impossible or imprudent. The central idea, however, is to follow the swing of judicial thought through these phases of the criminal process as the courts pass from one decade to another. With the Warren Court came the so-called "due process revolution" during which some steadfast rules were fashioned to effectuate the specific promises of the amendments to the criminally accused. But after a dramatic shift in judicial perception of the conflicting interests, the courts infused the decision-making process with the more practical considerations of public policy. This Note proposes that in the formulation of these new guidelines, the balance between individual freedom and public welfare generally has swung in favor of more effective law enforcement.

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4. *See* Professor Packer's discussion of his two models of the criminal process, the "due process" model and the "crime control" model, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149 (1968). *See also* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF L. REV. 929 (1965).

5. These topics are arranged chronologically as they might arise in a criminal proceeding, moving from pretrial stages to post-conviction relief. But set against this order is the courts' traditional preoccupation with regulating trial procedures; it was only much later that the court placed equal emphasis on the peripheral phases of the criminal process.

II. Confessions and Identification Testimony: The Exclusionary Rules

In the 1960's, the Warren Court, sensitive to the relative disadvantage suffered by the criminal defendant, proposed elaborate procedural requirements for the deprivation of liberty upon criminal conviction.[6] While in the past the Court had routinely defined standards for criminal trials, these were never meant solely for extrajudicial conduct. Wielding the fifth amendment privilege against self-incrimination and the fifth and fourteenth amendments due process guarantees, the Court fashioned strict rules to govern the admissibility of confessions and identification testimony. Evidentiary rulings and the exclusion of evidence then became the constitutional context for admonishing law enforcement personnel to honor the accused's fundamental rights and a means for conditioning police behavior to conform with prevailing notions of fairness and individual dignity.

This solicitude for the accused at a time when crime rates were rising dramatically[7] touched off a sharp law-and-order backlash. The prospect of freeing the "guilty" because of mistakes made by the police[8] raised the fears of a crime-conscious public. With this

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6. *See* M. Zarr, The Bill of Rights and the Police 36 (1970). *See also* Spano v. New York, 360 U.S. 315, 320-21 (1959) ("In the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves."); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private citizen—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.").

7. The figures released by the FBI in their annual report, *Uniform Crime Report*, revealed a steady and alarming increase in the national crime index. The validity and reliability of these figures, however, have been questioned by experts in criminal law enforcement. *E.g.*, Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L.Q. 436 (1964). *See also* Bennett, *A Cool Look at "The Crime Crisis"*, Harper's 123, 123-25 (April 1964). The purpose of these articles was not to downplay the exigency of the situation but to place it in the proper perspective. *See* the statement of then Attorney General Ramsey Clark, N.Y. Times, May 19, 1967, at 23, col. 1.

8. The classic statement was made by Judge, later Justice, Cardozo in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926): "The criminal is to go free because the constable has blundered."

These fears were not unfounded, or reactionary. For cases in which a criminal was allowed to go free because of the exclusion of evidence, see Coolidge v. New Hampshire, 403 U.S. 443 (1971); Davis v. Mississippi, 394 U.S. 721 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); Mancusi v. DeForte, 392 U.S. 364 (1968); Berger v. New York, 388 U.S. 41 (1967).

rising demand for public order came an increasing intolerance of criminality and violence and a permissiveness toward the occasional injustices of police policy. The heightened public consciousness yielded a new consensus on the needs of law enforcement and the quality of criminal justice. The courts gradually eroded the protections contrived in earlier decisions until only thin procedural barriers remained. The Fourth Circuit's policy toward the admissibility of confessions and extrajudicial identification testimony is symptomatic of this trend and underscores the development of a new equilibrium between the interests of the accused, the state, and the public. These decisions suggest that the court has settled, at least tentatively, on a higher threshold for excluding trustworthy evidence, but, more important, that the court has reached the outer limit to the extent of the protection for the accused.

Fifth Amendment and Self-Incrimination: The Legacy of Miranda

Traditionally, the fifth amendment privilege against self-incrimination[9] prohibited the compulsion of testimony: "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own free will'."[10] While this right was given broad application,[11] it served its principal function in criminal proceedings for-

See generally Wright, *Must the Criminal Go Free if the Constable Blunders,* 50 TEX. L. REV. 736, 744-45 (1972).

9. "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The amendment was made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964), but had the attempt at incorporation failed, the prohibition against coerced confessions, recognized in all States, would have rendered essentially the same results.

10. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)). "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

11. *See, e.g.,* Mathis v. United States, 391 U.S. 1 (1968) (tax investigations); *In re* Gault, 387 U.S. 1 (1967) (juvenile proceedings); Griffin v. California, 380 U.S. 609 (1965) (tacit admissions); Malloy v. Hogan, 378 U.S. 1 (1964) (statutory investigations); Watkins v. United States, 354 U.S. 178 (1957) (congressional investigations); McCarthy v. Arndstein, 266 U.S. 34 (1924) (civil proceedings); Counselman v. Hitchcock, 142 U.S. 547 (1892) (grand jury proceedings). *But see* Spinney v. United States, 385 F.2d 908, 910 (1st Cir. 1967), *cert. denied,* 390 U.S. 921 (1968) (Internal Revenue Service inquiries), and United States v. Agy, 374 F.2d 94, 95 (6th Cir. 1967) (investigation by agents of the Alcohol and Tobacco Tax Division of the IRS), wherein *Miranda* warnings were not required. *See generally* L. LEVY,

bidding the use of coerced confessions at trial.[12]

Almost immediately, however, this constitutional principle encountered contumacy within law enforcement agencies. The interrogation of suspects was an important part of almost every criminal investigation, because there is something inherently reliable about statements made by an individual in custody. In most instances the accused's confession would be the strongest evidence of guilt possible.[13] The courts realized early that to freely admit this testimony would encourage police to use whatever means were available to extract a confession; but using testimony given under compulsion is repugnant to the fundamental characteristic of our system of criminal law. As Justice Frankfurter once stressed, "Ours is the accusatorial as opposed to the inquisitorial system . . . . [S]ociety carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation."[14] Therefore, the courts conditioned the admission of pretrial confessions upon proof of voluntariness, thereby integrating with trial procedure the promise underlying the right against self-incrimination by requiring the government to show

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ORIGINS OF THE FIFTH AMENDMENT (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Note, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station*, 5 STAN. L. REV. 457 (1953).

12. The constitutional basis for the exclusion of confessions, emanating from the fifth amendment privilege against self-incrimination, was devloped in Bram v. United States, 168 U.S. 532, 542 (1897). "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any of them against himself." United States v. Burr, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692e).

13. Also, often it was the suspect's responses to police questioning that led to his immediate release.

14. Watts v. Indiana, 338 U.S. 49, 54 (1949). It is "far pleasanter to sit comfortable in the shade rubbing red pepper in a poor devil's eyes than to go about in the sun hunting up evidence." 1 J. STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 442 n.1 (1883). Although this satirical account of police methods of interrogation is unfair, tactics more pernicious than casting red pepper have been used frequently in the past. *See* IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); Booth, *Confessions, and Methods Employed in Procuring Them*, 4 S. CAL. L. REV. 83 (1930). For more recent discussion of police policy, see White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965).

Judicially coerced confessions also can be a problem. *See* Warden, *Miranda—Some History, Some Observations and Some Questions*, 20 VAND. L. REV. 47 (1966).

more than the normal justification for introducing inculpatory statements of the accused.[15] This voluntariness exception to the general disapproval of interrogation reflected the courts' accommodation of the competing interests juxtaposed by police questioning.

At some stage of the proceeding, the defendant was entitled to a hearing to challenge the voluntariness of a confession.[16] If the state failed to prove voluntariness by a preponderance of the evidence, the confession was excluded. On appeal, any conviction supported by an involuntary confession, irrespective of its truth, would be overturned automatically, even though without the confession there was enough independent evidence to convict the defendant.[17] The courts' inquiry was limited to an ad hoc determination of whether the defendant's confession was voluntary, and therefore reliable, considering all the circumstances—including the use of physical force or threats, psychological abuse, and the peculiar characteristics or deficiencies of the individual.[18] Though no one factor controlled the decision, this standard could be met if the prosecution

15. Whether the exclusionary rule deters police misconduct is still debated. According to two observers, several variables determine its effectiveness: whether the requirements of the rule are succinct and detailed and drafted in a manner responsive to both the practical needs of law enforcement and individual rights; whether the requirements are expressed in a manner understandable by the front line officer and are effectively communicated to him; and whether the desire to convict is sufficiently great to induce compliance with the requirements of the law. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 62 MICH. L. REV. 987, 1003 (1965). *See also* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974). Some empirical studies of the fourth amendment exclusionary rule suggest that the rule does not affect police behavior. *E.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 245-48 (1973). *But see* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 224-25, 230-31, 250 (1976); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681, 697-717, 725-27 (1974); and *Critique*, 69 NW. U.L. REV. 740 (1974), for some damning criticism of these studies. An interesting debate on the merits of the exclusionary rule between Professor Yale Kamisar and United States Court of Appeals Judge Malcolm Wilkey appears at 62 JUDICATURE 67, 215, 337, 351 (1978-1979).

16. Jackson v. Denno, 378 U.S. 368 (1964).

17. *Id.* at 376; Rogers v. Richmond, 365 U.S. 534, 545 (1961); Stroble v. California, 343 U.S. 181, 190 (1952).

18. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Peck v. Pate, 367 U.S. 433, 441-42 (1961); Payne v. Arkansas, 356 U.S. 560, 567 (1958). *See also* T. REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT (1959); Kamisar, *What is an "Involuntary" Confession*, 17 RUTGERS L. REV. 728 (1963); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); *Developments in the Law—Confessions*, 79 HARV. L. REV. 938 (1966).

could prove that when the defendant confessed, he spoke free from the compulson of coercive police tactics.[19]

While it may seem difficult to prove the voluntariness of the defendant's confession at the same time he is recanting his statement, generally confessions were excluded only when police conduct was especially egregious or when the accused suffered from severe disabilities.[20] Consequently, the rule did not affect much of the stationhouse policy of custodial questioning; its sole function was to ensure that only the accused's voluntary statements were admitted at trial.

It was not until *Miranda v. Arizona*,[21] 175 years after the adoption of the fifth amendment, that the privilege against self-incrimination was applied to proceedings in the police station as well as in the courtroom, such that even statements admissible under the traditional totality of the circumstances test would be excluded.[22] This extension of an individual's right to resist questioning "in any criminal case" was accomplished largely by refining the "focusing" concept of *Escobedo*[23] to one dependent on custodial interrogation.[24] Once in custody "or otherwise deprived of his freedom of action in any significant way,"[25] the suspect must be informed of his fifth amendment right to remain silent and his *Gideon* right to appointed counsel, before any questioning could take place.[26] After

19. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973).

20. *E.g.*, Rochin v. California, 342 U.S. 165, 173-74 (1952) (stomach pumped for morphine); *see* cases cited in note 18 *supra*.

21. 384 U.S. 436 (1966).

22. *Id.* at 457, 463; *see* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 65, 77-83 (1966). *See generally* Symposium, *Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966).

23. 378 U.S. at 490-91.

24. 384 U.S. at 477-79.

25. *Id.* at 444 (footnote omitted).

26. "In order to combat the pressures of the in-custody interrogation process and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. "[A] warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id.* at 469. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

The *Miranda* warnings were designed to meet what had been a very serious problem. For documented cases of egregious police practices, see *id.* at 445-58, 481; IV NATIONAL COMMIS-

these warnings have been read, questioning can commence only if the suspect indicates that he does not intend to exercise his rights.[27] Absent these warnings and a "voluntary, knowing and intelligent" waiver, or upon any indication that the accused intends to exercise his rights, custodial questioning must terminate; any statement obtained after this point is inadmissible per se.[28] Whether the Court expected custodial interrogation to cease is uncertain.[29] Nevertheless, it is evident that at a minimum the Court envisaged a more thorough inquiry into the circumstances of every confession.[30]

The Court's motivation in drawing new lines to govern the admissibility of confessions derived from three related goals. The

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SION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); Booth, *Confessions, and Methods Employed in Procuring Them,* 4 S. CAL. L. REV. 83 (1930).

The promulgation of the warnings was premised upon the belief that with this information even an indigent suspect could act intelligently, but whether the warnings provide a suspect with enough information to understand his rights is questionable. For example, the manner in which the warnings are read may affect the significance that the accused attaches to them. For a discussion of the impact of *Miranda* on police behavior and the accused's comprehension of his rights, see Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation As Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply,* 1968 DUKE L.J. 425; Seeburger and Wettick, *Miranda in Pittsburgh—A Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

27. 384 U.S. at 444-45.

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id.

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained.

Id. at 475. *See also* Carnley v. Cochran, 369 U.S. 506, 516 (1962).

28. 384 U.S. at 477-78. "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." *Id.* at 476. "[N]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 477.

29. *Id.* at 479-81.

30. *Id.* at 443-44, 475, 490.

chief purpose of the caution was to dissipate as much as possible the "inherently coercive" atmosphere of custodial interrogation. The Court believed that the accused's fifth amendment right to remain silent was seriously threatened by commonly used techniques of interrogation.[31] Through ecological control of the environment and by manipulating the manner and personality of the interrogator, the desired immediacy of contact was established, and then, even an innocent suspect, physically isolated and confronted with contradictory assertions, might change his beliefs.[32] Once a confession was elicited, the trial was largely a formality, unless the accused could shed sufficient doubt upon its voluntariness.

The Court balanced this fifth amendment right to remain silent against the police's need for special privileges of interrogation, and concluded that custodial interrogation could not continue unrestricted in a system of criminal law that recognizes the right against self-incrimination.[33] To safeguard this right, the Court attempted to convert the confession process into something resembling the adversary system.[34] The Court presumed that, once notified of his rights, the accused would refuse to answer any questions until an attorney was appointed him.[35] This was the critical premise of the decision, because to be effective the privilege against self-incrimination must be asserted at a specific time; if the accused answers questions voluntarily, then he has waived this constitutional right, at least as to those statements already made. The *Miranda* warnings, then, were intended merely to tell the defendant when to assert the privilege and what it entails.

A second goal underlying *Miranda* was the Court's desire to deter police from violating constitutional principles. The very idea of a caution seems to reflect an uneasy recognition of the fact that the roles of interrogator and suspect are openly antagonistic.[36] The

31. See *id.* at 448-55 for a discussion of the more subtle psychological tactics of contemporary law enforcement. *See also* Larson, *Psychology in Criminal Investigation*, in THE POLICE AND THE CRIME PROBLEM 260 (T. Sellin ed. 1971); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1521, 1542 (1967).

32. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 81 (1968).

33. 384 U.S. at 457-58, 460; *see* Weisbury, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 153 (C. Sowle ed. 1962).

34. *See generally* Swisher, *The Supreme Court and "The Moment of Truth"*, 54 AM. POL. SCI. REV. 879 (1960).

35. *See* 384 U.S. at 476.

36. The real significance of the caution is that it is, so to speak, a declaration of

warnings served as a reminder to the policeman that he is duty-bound to protect the rights of the suspect.

Finally, through the standardization of procedures, the Court hoped to relieve trial courts of the necessity of adjudicating in each case whether coercive influences, physical or psychological, were present.[37] To this end, *Miranda* can be viewed as an experiment in regulating trial procedure. The decision's true value, then, would be in its ability to explain to the courts and to law enforcement officers exactly what can be done.

The Court's attempt to accomplish these goals, however, was cut short. Although doctrinally speaking the decision was terminal, a number of nearly impossible factual questions survived *Miranda:* what is "custodial interrogation"?; to what crimes do the warnings attach when the fifth amendment applies to all?; and what actions

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> war. By it the police announce that they are no longer representing themselves to the man they are questioning as the neutral inquirer whom the good citizen ought to assist; they are the prosecution and are without right, legal or moral, to further help from the accused.

P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 37 (1958). Therefore, to expect policemen to administer the warnings in a sympathetic manner so as to assure the accused's full comprehension and appreciation of the subject may be unreasonable. *See* Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protestors,* 77 YALE L.J. 300, 309-10 (1967). *See also* S. GILLERS, GETTING JUSTICE, THE RIGHTS OF THE PEOPLE (1971); N. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT (1971).

37. *See* 26 VAND. L. REV. 1069, 1074 (1973). But an ad hoc approach was still prevalent in lower courts after *Miranda. E.g.,* Narro v. United States, 370 F.2d 329 (5th Cir. 1966) (per curiam), *cert. denied,* 387 U.S. 946 (1967).

> [T]he cases in which it is clear that the warnings have been given must be considered on their own fruits in order to determine the question of the waiver. The courts must do this on an *ad hoc* basis, since no *per se* rule has thus far been adopted dealing with this problem.

Id. at 329-30.

The vagaries of the totality of the circumstances approach are illustrated in Smallwood v. Warden of Md. Penitentiary, 367 F.2d 945 (4th Cir. 1966), *cert. denied,* 386 U.S. 1022 (1967), and Shorey v. Warden of Md. Penitentiary, 401 F.2d 474 (4th Cir.), *cert. denied,* 393 U.S. 915 (1968). In *Smallwood,* the court reversed a conviction supported by a confession obtained from an uneducated farm laborer after he was interrogated for four hours one afternoon, six hours the next afternoon, and until 4 or 5 A.M. that night. 367 F.2d at 948-49. *See also* Watts v. Indiana, 338 U.S. 49 (1949) (questioned in relays). In *Shorey,* however, the defendant's confession withstood the court's scrutiny when, even though he was questioned for six hours in an 11-hour period, the defendant was allowed an hour each to eat breakfast and lunch. 401 F.2d at 479-80. *See also* Stein v. New York, 346 U.S. 156 (1953) (12 hours of questioning over a 32-hour period interrupted by sleeping and eating). The admissibility of the confession, then, depended upon the color given the circumstances of the questioning. *See also* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test,* 65 MICH. L. REV. 59, 101 (1966).

by the accused constitute a waiver of his right to remain silent? It was upon these fronts that the steady erosion of *Miranda* began in the Fourth Circuit. Reckoning that a strict exclusionary rule unduly hampers law enforcement and often unnecessarily excludes relevant, trustworthy evidence, and following clear signals from the Supreme Court,[38] the Fourth Circuit disturbed the equilibrium effected by *Miranda* between the opposing interests of the accused and law enforcement. These decisions indicate that the court is moving away from an easy rule to one in which all the factors encompassed by the old totality of the circumstances test will be examined. The guilt or the innocence of the suspect becomes secondary to the resolution of evidentiary issues,[39] while the courts retain the same degree of discretion in determining these issues as they had with the traditional voluntariness standard.

Custodial Interrogation

Police questioning was conducted in one of two locations, the field or the stationhouse.[40] Street questioning could be as useful a tool as stationhouse interrogation; however, it was usually more general and less formal, more of a preliminary to the stationhouse. In *Miranda,* the Court acknowledged these two levels of criminal investigation by distinguishing between the extremes of "general-

38. In terms of its decisions on the merits, the Court, in the years since Warren Burger assumed the role of Chief Justice, has handed down eleven decisions concerning the scope and application of *Miranda.* In ten of these cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence. In the remaining case, the Court avoided a direct ruling on the *Miranda* issue, holding the evidence inadmissible on other grounds. In effect, then, the Court has not held a single item of evidence inadmissible on the authority of *Miranda.*

Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 100-01 (footnotes omitted); *see* Whitbread, *Trends in Constitutional Law: A Forecast,* in CONSTITUTIONAL LAW DESKBOOK 9-1 (National College of District Attorneys ed. 1977).

39. The defendant stands little chance of winning a "swearing contest" in court with a law enforcement officer.

The very existence of a waiver is something of an anomaly. The incidence of waiver has provided law enforcement officers with the means to circumvent the restriction imposed by *Miranda.* Once the waiver has been obtained, the police have a variety of techniques and considerable time to extract a confession.

40. Stationhouse questioning includes that conducted in a squad car since the important attributes of the stationhouse, isolation in unfamiliar surroundings and a hostile interrogation, are present.

on-the-scene questioning"[41] and "custodial interrogation." But while it was the Court's disapproval of the intimidating atmosphere of stationhouse interrogation that prompted the *Miranda* warnings,[42] the Court's definition of "custodial interrogation" encompasses street or field confrontations between the police and an individual whenever the individual's freedom of action is curtailed significantly.[43] Custodial questioning, in the sense that the individual is removed from familiar surroundings and isolated in an environment constructed by the police, becomes of secondary importance to the wide diversity of less structured confrontations in the field.[44] Therefore, what began as an accommodation of "the traditional function of police officers in investigating crime"[45] cast substantial doubt on the constitutionality of methods of interrogation in the field.[46]

A difficult question, then, remained: under what circumstances did police questioning outside the stationhouse constitute "custodial questioning" subject to the *Miranda* rule?[47] Obviously, the stationhouse environment described so painstakingly in *Miranda*[48] alone did not trigger the warnings; instead, they were conditioned upon the compulsive influence that seems to attach automatically to the uniformed officer.[49] Whether the individual is approached

41. 384 U.S. at 477-78. "In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 478 (footnote omitted). *Miranda* also would not apply when an individual walks into the police station and confesses to a crime, or calls the police and confesses. *Id.* "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." *Id., see* United States v. Kilbourne, 559 F.2d 1263, 1264 (4th Cir. 1977), *cert. denied*, 434 U.S. 873 (1978).

42. 384 U.S. at 448-55, 457, 461, 465.

43. *Id.* at 477.

44. *See* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 100-06 (1968).

45. 384 U.S. at 477. *See also* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

46. *See* Terry v. Ohio, 392 U.S. 1 (1968).

47. *See* Graham, *What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59 (1966); Kamisar, *supra* note 37, at 60 n.8, 66 & n.43; Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation*, 25 S.C. L. REV. 699 (1974). *See generally* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.8 (1975) (adapting *Miranda* to field questioning when attorney's presence impractical); *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 945-51 (1966).

48. 384 U.S. at 449-55.

49. In one of its very few official comments on *Miranda*, the Warren Court, in a majority opinion written by Justice Stewart, emphasized that "a necessary element of compulsory

first in his residence,[50] in a correctional facility where he is serving time for another crime,[51] or in a hospital bed,[52] the questioning conducted by a police officer may move from the permissive zone of general investigation to the regulated area of custodial interrogation. In fact, any instance of general police investigation may take on a compulsive character, thus becoming the functional, and therefore legal, equivalent of stationhouse interrogation. But even an interrogation conducted by a police officer in the stationhouse is not automatically subject to the *Miranda* rule;[53] despite an officer's failure to read the warnings before questioning a suspect, the suspect's answers will be admissible as long as "he chooses to speak in the unfettered exercise of his own will."[54]

A solution to this problem, one consistent with the intent of the majority,[55] would be to allow questioning to go unrestricted until the investigation focuses on a particular individual. At this point the individual's actions and statements take on new legal significance.[56] In *Oregon v. Mathiason*,[57] however, the Court rejected this

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self-incrimination is some kind of compulsion." Hoffa v. United States, 385 U.S. 293, 304 (1966). Justice Stewart further noted that there were sharply differing views as to the ultimate reach of the fifth amendment right against compulsory self-incrimination, only some of which were aired in *Miranda*. *Id.* at 303. Chief Justice Warren dissented from the Court's decision, though for reasons other than *Miranda* principles. *Id.* at 320.

Furthermore, the determination that the accused was in custody is predicated upon the circumstances, not upon the subjective impressions of the accused. Logically, though, the same coercive pressures are exerted on one who believes unreasonably that he is in custody as on one who in fact is in custody. *See* LaFave, *supra* note 44, at 105; notes 132-41 & accompanying text *infra*.

50. Orozco v. Texas, 394 U.S. 324 (1969).

51. Mathis v. United States, 391 U.S. 1 (1968); *accord*, United States v. Cassell, 452 F.2d 533, 540 (7th Cir. 1971).

52. Mincey v. Arizona, 437 U.S. 385 (1978).

53. *E.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam).

54. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

55. *See* notes 27-28 *supra* & accompanying text.

56. [I]n contrast to the criminal law presumption that a man is innocent until proven guilty, the policeman tends to maintain an administrative presumption of regularity, in effect, a presumption of guilt. When he makes an arrest and decides to book a subject, the officer feels that the suspect has committed the crime as charged. He believes that as a specialist in crime, he has the ability to distinguish between guilt and innocence.

J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 197 (1966). *See also* A. TRAIN, COURTS AND CRIMINALS 15 (1921) ("People as a rule don't go rushing around charging each other with being crooks unless they have some reason for it. Thus at the very beginning the law flies in the face of probabilities when it tells us that a man accused of a crime must be presumed to be innocent.").

rule and refused to single out stationhouse questioning for special scrutiny.[58] In *Mathiason,* the defendant appeared voluntarily at the stationhouse, but only after the officer had left word for the defendant to contact him. Mathiason's confession was admitted even though the officer informed Mathiason that he was a suspect and falsely accused him of leaving his fingerprints at the scene of the crime. Whatever impact this accusation had on the defendant was mitigated, the Court concluded, by the investigating officer's opening remark that the defendant was not under arrest and, thus, implicitly, was free to leave at any time.[59]

As is evident in *Mathiason,* the principal consideration in determining the scope of "custodial interrogation" is whether the accused in fact is free to leave, not the accused's familiarity with his surroundings, nor whether the accused realizes he may leave. In refusing to require *Miranda* warnings in all stationhouse interrogations, but instead delving into the circumstances of each confrontation, the Court has emphasized factual coercion, thus avoiding use

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Earlier, in Beckwith v. United States, 425 U.S. 341 (1976), the Court rejected an interpretation of *Miranda* calling for warnings before the beginning of non-custodial questioning when the police investigation narrowed to a single person. *Id.* at 347; *accord,* United States v. Caiello, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied,* 397 U.S. 1039 (1970). Justice Brennan, in a dissenting opinion, argued that warnings should be required in any surroundings where the compulsion to respond is as great as or comparable to that in *Miranda.* 425 U.S. at 349-50. *But see* United States v. Fitzgerald, 545 F.2d 578 (7th Cir. 1976), *rev'g* United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) (quoted by Justice Brennan).

57. 429 U.S. 492 (1977) (per curiam).

58. *Id.* at 495.

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Id.; accord, United States v. Kilbourne, 559 F.2d 1263, 1264 (4th Cir. 1977), *cert. denied,* 434 U.S. 873 (1978); United States v. White, 493 F.2d 3, 5 (5th Cir.), *cert. denied,* 419 U.S. 901 (1974) (mere fact that in custody when confessed does not vitiate voluntariness); United States v. Moriarty, 375 F.2d 901, 904 (7th Cir.), *cert. denied,* 388 U.S. 911 (1967) (fact that in custody not determinative).

59. 429 U.S. at 495. In his dissent, Justice Marshall notes the individual's subjective impression of his predicament and the reasonably close parallel between the circumstances of this case and those of *Miranda. Id.* at 497-98 & 498 n.1. "Today's decision means . . . that the Fifth Amendment privilege does not provide full protection against mischiefs equivalent to, but different from, custodial interrogation." *Id.* at 499.

of the *Miranda* concept of legal coercion.[60]

The Fourth Circuit Court of Appeals has dealt with this issue in much the same fashion. From its very first study of the *Miranda* "custodial" issue, the court has treated investigative questioning and interrogation differently, permitting the former to continue without regulation.[61] During the formative stages in the development of this rule, however, the court never clearly distinguished these two elements of police investigation. In *United States v. Harris*,[62] reversing the trial court, the Fourth Circuit held that although the agents had no intention of allowing Harris to leave, their questions remained within the scope of permissive on-the-scene questioning, and, therefore, the agents' failure to advise Harris of his rights was not fatal.[63] Purporting to adhere to an objective standard for determining "custody," the court indicated that there was no "potentiality for compulsion" when the confrontation was so brief and when the agents exercised so little control over Harris, even though they were confident they had the right man.[64]

The Fourth Circuit, then, clearly rejects two practicable indicia of "custodial" questioning. First, the court states, the officer's decision to arrest does not trigger the *Miranda* warnings even though, whether the suspect realizes it or not, he is not free to leave and his freedom of action is therefore curtailed significantly. Given the low visibility of field investigation and the discretion vested in the arresting officer,[65] to require the investigating officer to warn the suspect of his rights when the focus of the search narrows is consistent with *Miranda*. Nor is it custodial interrogation, says the court, when the suspect is asked to report to the stationhouse or to

60. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 396-402 (1978) (free will overcome by persistent questioning although indicated that he did not want to speak).

61. *E.g.*, United States v. Harris, 528 F.2d 914 (4th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976); United States v. Edwards, 444 F.2d 122 (4th Cir. 1971); United States v. Gibson, 392 F.2d 373 (4th Cir. 1968); *see* United States v. Chase, 414 F.2d 780 (9th Cir.), *cert. denied*, 396 U.S. 920 (1969); Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969).

62. 528 F.2d 914 (4th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976).

63. *Id.* at 915.

64. *Id; accord*, United States v. Curtis, 568 F.2d 643, 646 (9th Cir. 1978) (although approached the defendant with information that he was involved, statement admissible without warnings). *See also* Hoffa v. United States, 385 U.S. 293, 310 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.").

65. *See* notes 43 & 56 *supra* & accompanying text.

the courthouse, provided he comes voluntarily.[66]

Further efforts to define custodial questioning through the use of general guidelines have failed when these guidelines collided later with the totality of the circumstances standard. For example, in *United States v. Gibson,*[67] the court admitted into evidence statements made by the defendant during police questioning conducted on a sidewalk outside a bar.[68] The officer neglected to read the *Miranda* warnings, despite his suspicions when he asked Gibson to accompany him outside. The court stated in dicta, however, that " '[c]ustodial interrogation' certainly includes all stationhouse or police-car questioning initiated by the police, for there the 'potentiality for compulsion' is obvious."[69] But in *Clay v. Riddle,*[70] over the strong dissent of Judge Butzner, who recalled the language used in *Gibson,* the Fourth Circuit affirmed the trial court's decision to admit incriminating statements obtained without *Miranda* warnings during an interrogation of the suspect in the police car en route to the stationhouse.[71]

More importantly, though, in determining whether the suspect was in custody at the time of questioning, the court refused to consider the suspect's apprehensions, or the layman's perspective. Whether in the stationhouse or on the street, if the suspect believes, reasonably or not, that he is under arrest or is not free to go, the same compulsive pressures come to bear as would had the officer formally arrested him first.[72] The tendency has been to carve out types of questioning, such as roadside investigations, as specific exceptions to the *Miranda* doctrine. While this eliminates the need to inquire into this area deeply, an objective sought by the *Miranda* majority,[73] this trend may repudiate the spirit underlying the call for warnings.

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66. *E.g.,* United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977), *cert. denied,* 434 U.S. 873 (1978) (stationhouse); United States v. Weston, 417 F.2d 181 (4th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970) (courthouse).

In several of these cases, the court acknowledged that the officers had focused exclusively on the defendant, but the warnings still did not attach. *E.g., Harris,* 528 F.2d at 915.

67. 392 F.2d 373 (4th Cir. 1968).

68. *Id.* at 376.

69. *Id.*

70. 541 F.2d 456 (4th Cir. 1976).

71. *Id.* at 458-59.

72. *See* note 49 *supra* & accompanying text.

73. *See* note 37 & accompanying text *supra.*

While the Supreme Court left open the question whether much of the interrogation conducted outside of the stationhouse was subject to the strictures of *Miranda*, the Fourth Circuit has interpreted the on-the-scene exception so as to swallow the "significant deprivation" element of the concept "custodial interrogation." Consequently, the application of *Miranda* is limited principally to the confines of the stationhouse.

The Nature of the Crime

In determining whether the suspect was in custody at the time of his questioning and therefore entitled to warnings, the Fourth Circuit intimated in earlier cases such as *Gibson*[74] and *Harris*[75] that some types of investigation were presumptively within the on-the-scene exception to *Miranda*.[76] In these situations, the court states, the coercive influences worrying the Supreme Court are present so rarely that warnings are unnecessary; the right to due process is sufficient to protect the accused from arbitrary or unlawful state action.[77]

This rationale has been given clearer expression recently in *Clay v. Riddle*,[78] in which an inculpatory statement made by a suspect in custody on charges of drunken driving and in response to questions asked by the arresting officer was admissible despite the officer's failure to administer the *Miranda* warnings.[79] The court held that a timely reading of the suspect's rights is not a prerequisite to the admission of statements made to an investigating officer by individuals charged with traffic offenses,[80] although it refused to simi-

74. *See* notes 67-69 & accompanying text *supra*.

75. *See* notes 62-64 & accompanying text *supra*.

76. For the most part, these cases involve roadside questioning of an occupant of a car or a street confrontation. *But see* United States v. Jordan, 557 F.2d 1081, 1083 (5th Cir. 1977) (questions about sawed-off shotgun during general license check constituted custodial interrogation).

77. Irrespective of whether the holding in *Miranda* or a suspect's fifth amendment right against self-incrimination is implicated, the procedure must comport with due process. *See* Schneckloth v. Bustamonte, 412 U.S. at 225-27.

78. 541 F.2d 456 (4th Cir. 1976).

79. *Id.* at 457-58; *see* State v. Gabrielson, 192 N.W.2d 792, 796 (Iowa 1971) (*Miranda* inapplicable to simple felonies); State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826, 828 (1969) (same).

80. 541 F.2d at 458. *But see* United States v. LeQuire, 424 F.2d 341, 343-44 (5th Cir. 1970); United States v. Chadwick, 415 F.2d 167, 173 (10th Cir. 1969); Lowe v. United States, 407 F.2d 1391, 1394 (9th Cir. 1969); Allen v. United States, 390 F.2d 476, 478-79 (D.C. Cir. 1968).

larly except all misdemeanors.[81]

The court relied once again on the *Miranda* exception of "[g]eneral on-the-scene questioning as to facts surrounding a crime."[82] To support this proposition that constitutional protections afforded in serious crimes are inapposite to traffic offenses, the court suggested that the nature of the crime, rather than the method of the interrogation, may determine the necessity for warnings.[83] Arguably, this result may free scarce judicial resources by rejecting for lessor offenses constitutional procedures mandatory for more serious crimes, but, as Judge Butzner intimated in his dissent to *Clay*,[84] the danger in recognizing classes of crimes to which the warnings do not apply is that situations calling for *Miranda*-like protections may pass unnoticed. In *Clay*, the defendant was convicted of a felony and sentenced to one year imprisonment, in part upon statements made by him while handcuffed and in custody, and in response to inquiries by the arresting officer.[85]

Miranda states very clearly that the necessity for the warnings is predicated upon the extent to which the individual's freedom is curtailed and the degree of the officer's involvement in eliciting the statement.[86] The on-the-scene exception to the *Miranda* rule accommodates the officer's need to investigate crime without cumbersome restrictions and suggests that the Court meant to allow creativity in police investigations, but the scope of this exception was narrowed substantially at its creation when the *Miranda* Court extended protection to those confrontations between the police and a suspect before the formal process of arrest and detention was begun

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81. 541 F.2d at 457; *see* 384 U.S. at 444, 477-78. The distinction between custodial interrogation and on-the-scene investigation was adopted by the Fourth Circuit in United States v. Gibson, 392 F.2d 373 (4th Cir. 1968). *See* notes 67-69 & accompanying text *supra*.

82. For similar developments in the sixth amendment right to appointed counsel, see pp. 716-18 *infra*.

83. *See* cases cited in note 80 *supra*.

84. 541 F.2d at 459-60.

85. *See* the discussion in United States v. Schultz, 442 F. Supp. 176 (D. Md. 1977).

86. 384 U.S. at 444.

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Id. (footnote omitted).

but after the individual was detained. These decisions by the Fourth Circuit, however, have expanded the scope of permissive investigatory questioning, while continuing to define custodial interrogation and the need for warnings strictly.

The Waiver

Assuming that *Miranda* is applicable and the warnings have been given, questioning of a suspect may begin only if he waives his right to remain silent and to appointed counsel.[87] The interrogating officer then may question the accused freely, and any statements made by the accused can be used against him at trial, provided the waiver was made "voluntarily, knowingly and intelligently."[88] This moment , when the concern over the voluntariness of the waiver appears, marks the entry into the second level of the *Miranda* doctrine. More so than in the issues raised at the first level, the practicability of *Miranda* as an independent fifth amendment doctrine will be decided on this point. This is true—even though in many cases this stage of the analysis is never reached—because whether *Miranda* accomplishes more than the older doctrines of fundamental fairness and due process will be determined by the resolution of this question. If a confession is extracted by physical intimidation of the suspect, then due process principles can be relied on to protect the integrity of the trial and to vindicate private constitutional rights. But within a system of warnings and waiver, the cognitive element of "free and rational choice"[89] is explored; that an understanding of the process was conveyed to the accused is ensured. Only with the *Miranda* condition that information be communicated automatically does requiring an "intelligent" waiver make sense.[90]

Voluntariness of a Waiver

In *Miranda,* the Court did not specify what form a waiver must

87. *Id.* at 444, 479.

88. *Id.* at 444.

89. *Id.* at 465; *see* Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963).

90. The ability to waive one's fifth amendment right presents something of a paradox: a waiver is effective only if it is intelligent, but, arguably, to ever waive such an important constitutional right while in police custody is not intelligent.

take to be effective, but it did state in general terms the fundamental rules: the waiver must be voluntary, knowing, and intelligent;[91] "[a]n express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement could constitute a waiver . . .;"[92] a valid waiver may not be presumed from the defendant's silence;[93] if the defendant asserts his right to remain silent or to seek the assistance of counsel, questioning must stop immediately;[94] and, finally, the burden of demonstrating a valid waiver rests upon the prosecution.[95]

Implicit in these guidelines is the convergence of two familiar concepts of constitutional law, voluntariness and waiver. Traditionally, "voluntariness," when used to describe confessions, was simply a shorthand expression for several factors which, when present, suggested that the accused's statements were the product of free and rational judgment.[96] Likewise, the effective waiver of a constitutional right was predicated upon deliberate choice, which could be demonstrated from the circumstances.[97] The same facts that would sustain a voluntary confession, then, are critical to a waiver. The new voluntariness test merely substitutes the conclusion that

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91. *Id.* at 444-45, 475.

92. *Id.* at 475.

93. *Id.* As was stated in Carnley v. Cochran, 369 U.S. 506 (1962), "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.* at 516, *quoted in Miranda,* 384 U.S. at 475.

94. 384 U.S. at 473-74. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* (footnotes omitted).

95. *Id.* at 475 (citing *Escobedo,* 378 U.S. at 490 & n.14; Johnson v. Zerbst, 304 U.S. 458 (1938)). "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*

96. *See* Schneckloth v. Bustamonte, 412 U.S. at 223-26.

97. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (courts should "indulge every reasonable presumption against waiver"); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937) (courts should "not presume acquiescence in the loss of fundamental rights").

the waiver, and therefore the confession, was voluntary.[98] But by tracking this standard with the more traditional inquiry, the subjective question of the accused's state of mind at the time of his interrogation is passed over. This subjective element could be the key to an effective waiver. Instead, the courts have limited the scope of their analysis to those interests guaranteed by the Constitution that preserve the right to a fair trial, and, consequently, the application of the new voluntariness concept represents nothing more than the legal conclusion that in procuring the confession the police did not offend widely held notions of fairness.

This tendency to separate the cognitive element from a "voluntary" waiver is evident in the courts' recognition of an implied waiver and in the development of liberal standards regulating the resumption of questioning. Chief Justice Warren stated in his majority opinion in *Miranda,* "[a] valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained."[99] Even evidence of an express waiver by the accused of his right to remain silent does not dispose of the voluntariness issue, but is just one of the circumstances to be examined by the court before admitting the confession.[100] While it did not consider custodial questioning unconstitutional per se, the Court did presuppose that a waiver would not be found readily.[101]

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98. *See, e.g.,* Boulden v. Holman, 394 U.S. 478, 480-81 (1969); Davis v. North Carolina, 384 U.S. 737, 740-42 (1966); Coney v. Wyrick, 532 F.2d 94, 99-101 (8th Cir. 1976); United States v. Harden, 480 F.2d 649, 650-51 (8th Cir. 1973); Makarewicz v. Scafati, 438 F.2d 474, 478 (1st Cir.), *cert. denied,* 402 U.S. 980 (1971); United States *ex rel.* Liss v. Mancusi, 427 F.2d 225, 229-30 (2d Cir. 1970); Moser v. United States, 381 F.2d 363, 364 (9th Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968); Morales v. Rodriquez, 373 F.2d 15, 16 (10th Cir. 1967).

99. 384 U.S. at 475. Nor is it permissible "to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n.37 (citations omitted); *see* Doyle v. Ohio, 426 U.S. 610 (1976) (unfair to use defendant's silence after *Miranda* warnings to rebut his exculpatory testimony at trial). *See generally* Clossey, *Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-incrimination,* 52 CORNELL L.Q. 335 (1967); Hilles, *Tacit Criminal Admissions,* 112 U. PA. L. REV. 210 (1963).

100. 384 U.S. at 475-76.

101. *Id.* at 475. The prosecution must prove voluntariness by a preponderance of the evidence, Lego v. Twomey, 404 U.S. 477 (1972), and this determination must be made independently by the judge. Jackson v. Denno, 378 U.S. 368, 380, 395 (1964); *accord,* Sims v. Georgia, 385 U.S. 538, 543-44 (1967); Mullins v. United States, 382 F.2d 258, 261-62 (4th Cir. 1967).

Interpretations of this standard in recent cases, however, suggest that only an unequivocal assertion of his rights will insulate the accused from the socio-psychological pressures of interrogation. In *North Carolina v. Butler*,[102] the Supreme Court confirmed the constitutionality of a practice adopted earlier by the Fourth Circuit: that of finding a valid waiver in situations where the suspect did not expressly refuse constitutional protection. The Court stated, "[T]he defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may . . . support a conclusion that a defendant has waived his rights. . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."[103]

The Fourth Circuit has refused to interpret the silence of the accused as an invocation of fifth amendment rights and has implied an effective waiver from the totality of the circumstances. In *Taylor v. Riddle*,[104] the court held that, irrespective of the length of time between a reading of the warnings and the questioning, the accused's silence is not an election of his right to remain silent such that further questioning is precluded; mere silence is not the constitutional equivalent of an express refusal to answer questions.[105]

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102. 47 U.S.L.W. 4454 (U.S. April 24, 1979) (No. 78-354).

103. *Id.* at 4455 (footnote omitted). *But see* Commonwealth v. Bussey, 48 U.S.L.W. 2222 (Pa. Sup. Ct. Aug. 27, 1979) (rejecting *Butler*); *cf.* Barker v. Wingo, 407 U.S. 514 (1972) (rejecting rule that failure to demand right to speedy trial constitutes a waiver).

In a dissent joined by Justices Marshall and Stevens, Justice Brennan argues that because *Miranda* requires any ambiguity arising from custodial questioning to be resolved in the accused's favor, only a explicit waiver will satisfy fifth amendment standards. 47 U.S.L.W. at 4456; *see* United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976) (suggesting that it is officer's duty to stop questioning long enough to have accused clarify ambiguous answers).

104. 563 F.2d 133 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978).

105. *Id.* at 136 (citing Michigan v. Mosley, 423 U.S. 96, 101-03 (1975); Blackmon v. Blackledge, 541 F.2d 1070, 1072 (4th Cir. 1976)).

But the *Miranda* Court stated, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at an time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (footnote omitted). "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475. Therefore, *Miranda* clearly states that mere silence is insufficient to establish a valid waiver.

The court of appeals emphasized the defendant's voluntary responses to the officer's questions. 563 F.2d at 136-37. The above quotation from *Miranda*, however, indicates that a valid waiver may not be implied from these admissions.

The circuit court further concluded that Taylor's statement, "you've done asked me a question I can't answer," was not an exercise of the right to terminate the questioning but

Therefore, the interrogation need not have ceased at this point; Taylor's voluntary responses to the questions constituted a valid waiver of his fifth amendment right.

In *Taylor*, the court relied upon an earlier case, *Blackmon v. Blackledge*,[106] to support its conclusion that the defendant "did not indicate a desire to exercise his right to remain silent."[107] *Blackmon* states that even without the defendant's signature on a printed waiver form[108] or an express oral waiver, the circumstances of the questioning and the defendant's personal characteristics and behavior may be sufficient to sustain a valid waiver, provided the defendant understood his rights.[109] The Fourth Circuit applied *Blackmon* again in *United States v. Wyatt*.[110] To determine the validity of the alleged waiver, the court examined the totality of the circumstances, including "the defendant's intelligence, the affirmative statement that the accused understands his rights, and the voluntariness of the confession."[111] The court concluded that the defendant's silence upon the reading of the *Miranda* warnings alone did not vitiate what was otherwise a voluntary waiver.[112]

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an indication of ignorance. *Id.* at 137; *accord,* United States v. Riggs, 537 F.2d at 1222 ("I have no information to furnish the FBI with regard to the money."). If the defendant had requested counsel, the result would have been different; then, no waiver could have been implied. *Blackmon,* 541 F.2d at 1073; *accord,* United States v. Clark, 499 F.2d 802 (4th Cir. 1974) (earlier assertion of right to remain silent and to receive counsel barred any further questioning).

106. 541 F.2d 1070 (4th Cir. 1976).

107. 563 F.2d at 136.

108. *See* United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968) (express waiver unnecessary; effective waiver even though the defendant never stated that he understood his rights). *But see Blackmon,* 541 F.2d at 1072 (requiring actual understanding).

109. 541 F.2d at 1072-73. The court cited United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968), as controlling on this issue. In *Hayes,* a waiver was implied from the defendant's understanding of the warnings, as evidenced by his request for counsel after thirty minutes of questioning and by his alert state and normal intelligence. *Id.* at 378.

110. 561 F.2d 1388 (4th Cir. 1977).

111. *Id.* at 1391 (citing United States v. Thompson, 417 F.2d 196 (4th Cir. 1969), *cert. denied,* 396 U.S. 1047 (1970)). In *Thompson,* the defendant refused to sign a printed waiver form but voluntarily responded to questions, the answers to which were used against him at trial. 417 F.2d at 197. In holding that the waiver was valid, the court emphasized the defendant's "intelligence, his affirmative statement that he understood the explanation of his rights, and the voluntariness of his confession . . . ." *Id.* (citing United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968)); *see* note 113 *infra.*

112. 561 F.2d at 1390-91.

> Here, there is every indication that Wyatt knowingly and intelligently waived

This reasoning precludes an ambiguous expression by the accused, which might reasonably be construed as an invocation of fifth amendment rights, from barring further questioning or from affecting the admissibility of an ensuing statement.[113] Therefore, in the Fourth Circuit, anything less than an express, unequivocal assertion of the right to remain silent will not guarantee that further questioning will be foreclosed. The danger in applying the theory of an implied waiver lies in the possibility that the courts will determine voluntariness not from the circumstances of the interrogation but from strong circumstantial evidence gathered from other sources which suggests that the accused is guilty.[114]

More distressing than the recognition of implied waivers, though, is the tenor of the emerging standards on the resumption of questioning. A corollary to the accused's right to remain silent is his right to terminate questioning at any time, even though he may have answered some questions voluntarily.[115] Conversely, the accused may waive his fifth amendment privilege at any time and respond to questioning.[116] Assuming that the accused indicates that he is now willing to waive his rights and respond to questions, the interrogating officer may renew the questioning cut short earlier by the accused's exercise of his right to remain silent.

> his Fifth Amendment rights. Knowing that he did not have to respond, Wyatt was not coerced or threatened in any way and voluntarily answered the officer's questions. Nor were the statements obtained after any demand by Wyatt to talk to an attorney prior to further questioning.

Id. at 1391 (footnotes omitted).

113. Other circuits also have adopted an implied waiver doctrine. *E.g.*, United States v. James, 528 F.2d 999 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); United States v. Marchildon, 519 F.2d 337 (8th Cir. 1975); United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); United States v. Moreno-Lopez, 466 F.2d 1205 (9th Cir. 1972); Mitchell v. United States, 434 F.2d 483 (D.C. Cir. 1970); Bond v. United States, 397 F.2d 162 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969).

114. *See, e.g.*, Taylor v. Riddle, 563 F.2d at 137.

115. *Miranda*, 384 U.S. at 475-76.

116. *Id.* at 473-74. It is conceivable that this nuance of the *Miranda* doctrine may encourage police to harass a suspect until he waives his rights and agrees to speak. In the absence of other evidence, that a statement was obtained after the assertion of one's rights suggests that improper influences were at work. *Id.* at 476. Also, repeated questioning is one of the methods criticized by Chief Justice Warren in his majority opinion. *Id.* at 473-76.

This procedure, though, also works to the accused's benefit. By immediately asserting his right to remain silent, he gains valuable time to assess his predicament. If he decides to cooperate and submit to questioning, he may waive his fifth amendment right. If the accused then decides that his choice was unwise, he may terminate the interrogation by reasserting his rights.

In 1975, in *Michigan v. Mosley*,[117] the Court began the development of standards for the resumption of questioning after the accused has asserted his right to remain silent. While in custody for one crime, Mosley was questioned about a separate offense and made an incriminating statement.[118] The Court held that although the right to question Mosley about the first offense was cut off by the exercise of his fifth amendment privilege, this circumstance did not preclude questions pertaining to a separate offense, and therefore, the confession was admissible.[119] To reach this conclusion, the Court merely drew upon the converse of the suspect's *Miranda* and fifth amendment rights to stop further interrogation automatically by invoking his right to remain silent, even though he may have answered some questions voluntarily. If this right is asserted as soon as the accused is taken into custody, then, conversely, *Miranda* does not prohibit the police from encouraging the suspect to waive his rights, although after lengthy detention the government's burden of proof may increase substantially.[120]

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117. 423 U.S. 96 (1975).

118. *Id.* at 98.

119. *Id.* at 104-06. The Court focused on several factors including the brevity of the initial questioning, the significant time period between the two sessions, the defendant's voluntary response to questions about the holdup-murder, and the different subject matter of the second questioning. *Id.* at 106. *But see* United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966). In *Slaughter*, the court of appeals held that incriminating statements made in response to questions posed by the police and pertaining to a crime other than that for which the defendant was in custody were inadmissible when the defendant earlier had requested counsel and had expressed his desire to stop the interrogation. *Id.* at 840-41. The detention of the defendant was not based solely on police suspicion of his complicity in the original offense, but also reflected police opinion that he was involved in the second offense. *Id.* at 841. A close analogy may be drawn to the circumstances in *Michigan v. Mosley*. *See* 423 U.S. at 118-20 (Brennan, J., dissenting).

Justice Brennan, joined by Justice Marshall, dissented in *Mosley*, arguing that this holding was contrary to *Miranda*. While *Miranda* does not forbid outright a resumption of questioning, it does require the formulation of adequate safeguards, which, Justice Brennan opined, the Court in *Mosley* failed to effect. *Id.* at 114-16.

California, for one, has rejected *Mosley* as a matter of state constitutional law because of the concern over the coercion inherent in continuing custody and renewed questioning. People v. Pettingill, 21 Cal. 3d 231, ___, 578 P.2d 108, 117-18, 145 Cal. Rptr. 861, 870-71 (1978).

120. The Court has indicated in Brewer v. Williams, 430 U.S. 387 (1977), however, that when the accused's right to counsel is implicated, a stricter standard may apply, although reaching sixth amendment principles in a confession case may require tortuous reasoning. *See* Kamisar, *Brewer v. Williams, Massiah and Miranda: What is Interrogation? When Does it Matter?*, 67 GEO. L.J. 1 (1978). In *Brewer*, while in transit from one town to another, the defendant confessed in response to subtle questioning by one of the officers. Before leaving town, the officers had promised one of William's attorneys that Williams would not be ques-

In the Fourth Circuit, however, *Mosley* has sponsored the evolvement of a more liberal policy towards resumed questioning. In the earlier cases, the court was reluctant to endorse a practice that came so close to crossing the lines drawn by *Miranda*. In *United States v. Slaughter*,[121] the Fourth Circuit reversed the trial court's decision that a statement obtained during prolonged questioning and after a recitation of the suspect's rights was admissible even though early in the interrogation the suspect had requested counsel but was given no opportunity to secure an attorney.[122] Several years later, in *United States v. Clark*,[123] the court held that evidence of a confession was insufficient by itself to establish a valid waiver.[124] Clark was subjected to a second round of questioning about the same offense discussed earlier approximately four hours after the first interrogation had ended and after Clark had requested counsel.[125] The court concluded that once the suspect exercises his rights, the government must sustain the heavy burden of proving that the admission was voluntary and not the product of overbearing influences.[126]

After *Mosley* was announced, however, the court set aside earlier misgivings and opened up interrogative procedures to repeated questioning. In *United States v. Grant*,[127] the Fourth Circuit held that the defendant's confession made during a later identification check was admissible, although Grant had cut off questioning earlier by requesting counsel.[128] The court noted that the defendant had expressly waived his earlier request for counsel, thus removing

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tioned during the trip. 430 U.S. at 404-05. The Court held 5-4 that once it was apparent from the defendant's statements and from other circumstances that he intended to secure counsel, his earlier request for counsel barred further questioning even though Williams answered the questions voluntarily; "[i]t is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Id.* at 404.

121. 366 F.2d 833 (4th Cir. 1966) (per curiam).

122. *Id.* at 840.

123. 499 F.2d 802 (4th Cir. 1974).

124. *Id.* at 808; *see Miranda*, 384 U.S. at 473-75.

125. 499 F.2d at 807.

126. *Id.* at 808.

127. 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977).

128. *Id.* at 946-48. *Contra*, Strickland v. Garrison, No. 76-1683 (4th Cir. June 22, 1976) (conviction based in part upon confession obtained in violation of *Miranda* right to counsel set aside); Proctor v. United States, 404 F.2d 819, 821-22 (D.C. Cir. 1968).

the bar to further questioning.[129] Among the circumstances emphasized by the court were the spontaneity of the defendant's admission and the officer's good faith in conducting the standardized inquiry into the suspect's identification.[130]

Grant reflects the general tendency to interpret the intervening circumstances between the defendant's exercise of his rights and an incriminating statement so as to allow resumed questioning. What began in *Mosley* as an expedient concession to law enforcement, to permit repeated questioning of an arrestee suspected of several unsolved crimes, is now gradually eviscerating the central premises of *Miranda.*[131] By condoning prolonged interrogation, the court has encouraged police to disregard the accused's desire to remain silent, thus robbing his decision not to talk of its finality.

Knowing and Intelligent Waiver

With the emerging judicial support of implied waivers and repeated questioning, the only protection remaining for the accused, on which even in *Miranda* the Court hedged, is a clear understanding of his rights. The warnings were designed originally to combat

129. 549 F.2d at 948; *see* Michigan v. Mosley, 423 U.S. at 104 ("A review of the circumstances leading to Mosley's confession reveals that his 'right to cut off questioning' was fully respected . . . ."); United States v. Slaughter, 366 F.2d 833, 840 (4th Cir. 1966) ("The right to counsel, like most other constitutional rights, may be waived."). *Miranda* states unequivocally that once the accused requests counsel, the questioning must be stopped until counsel is provided. 384 U.S. at 474. Whether this right may be waived intelligently and voluntarily before counsel is present was not decided, but the Court intimated that such a waiver would be invalid unless substantiated by compelling evidence. *Id.* at 474 n.44, 475. Other circuits considering this question have honored a waiver of an earlier request for counsel. *See, e.g.*, United States *ex rel.* Hines v. LaVallee, 521 F.2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); United States v. Dority, 487 F.2d 846, 848 (6th Cir. 1973); United States v. LaMonica, 472 F.2d 580, 581 (9th Cir. 1972); United States v. Fellabaum, 408 F.2d 220, 224-25 (7th Cir.), *cert. denied*, 396 U.S. 818 (1969). *But see* Brewer v. Williams, 430 U.S. 387, 398 (1977) (the right to assistance of counsel "is indispensable to the fair administration of our adversary system of criminal justice"); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974) ("Evidence that an accused has previously asserted his right to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary.").

130. 549 F.2d at 947-48. On this ground, the court distinguished United States v. Clark, 499 F.2d 802 (4th Cir. 1974), and United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966), in which investigating officers initiated the questioning. 549 F.2d at 947.

131. *See* George, *U.S. Supreme Court, 1973-74 Term, Criminal Law Decisions*, in TWELFTH ANNUAL DEFENDING THE CRIMINAL CASES 87-114 (Practicing Law Institute 1974); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394-95 (1968).

the suspect's lack of knowledge and information. By this prelude to interrogation, the Court presumed that the suspect could better comprehend his predicament and the legal limits to police action.[132] This warning seemed only fair when the accused is led into a seemingly antagonistic environment created by the police in which he is cut off from familiar reinforcing agents and then forced into a dialogue about which he may know very little.

The Supreme Court and the Fourth Circuit, however, have refused to broach the subjective question of the defendant's state of mind at the time of his confession, even though this cognitive element is tied closely to the *Miranda* standard of a voluntary, knowing, and intelligent waiver. Whether the accused is able to understand his rights is contingent upon the amount of information conveyed by the warnings and his relative intelligence, while his actual comprehension of his rights is a function of the significance he attaches to the warnings. Arguably, then, a voluntary, knowing, and intelligent waiver could never be made after a bureaucratic reading of the warnings or by one who did not understand the scope and effect of his constitutional rights.

On numerous occasions the "totality of the circumstances" standard has been used to determine the validity of a waiver, entailing in part some measure of the defendant's ability to comprehend the

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132. *Miranda*, 384 U.S. at 469-70, 472, 473. "[I]f the parties who act contrary to their interest had a proper knowledge of that interest, they would act well. What is necessary, then, is the knowledge." Mill, *An Essay on Government*, in THE ENGLISH PHILOSPHERS FROM BACON TO MILL 885 (1939).

The results of studies of confrontations between police and criminal suspects suggest that the warnings do not impart this knowledge. Faculty Note, *supra* note 36, at 309-10; Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1521, 1562, 1568 (1967). *Contra*, McGuire & Papageorgis, *Effectiveness of Forewarning in Developing Resistance to Persuasion*, 26 PUB. OPINION Q. 24 (1962). Nor do the warnings seem to affect significantly the decision to talk. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1 (1970). *See also* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation As Revealed by Pre and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425; Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967).

Furthermore, the influence that the warnings can have may be defused by the manner in which they are delivered. A spiritless or confusing reading will minimize the attention given, and the understanding of, the warnings by the suspect. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1521, 1562, 1568 (1967). *See also* Kuh, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 233 (1966) (may be absurd to expect the officer to give effective warning).

warnings and to exercise rational judgment.[133] In *Miranda*, however, the Court noted only that a waiver must be made "voluntarily, knowingly and intelligently" and that the need for warnings was not determined by the accused's intelligence.

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on the information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation . . . .[134]

Other than to emphasize the importance of an informed suspect, the Court did not specify whether a suspect's intelligence bears on the determination of a valid waiver, and if so, to what extent evidence of low intelligence could vitiate an otherwise valid waiver.

The Fourth Circuit in addressing this key issue has denied any significance to the defendant's allegation that for various reasons he misunderstood the situation and, therefore, could not validly waive constitutional protection. In *United States v. Hall*,[135] the defendant objected to the admission of incriminating statements on the ground that his ignorance of the severity of punishment for the crime precluded an intelligent and voluntary waiver.[136] Rejecting the defendant's arguments, the court stated, "*Miranda* . . . reflects the Supreme Court's concern that an accused might, to his detriment, forfeit rights afforded him by the Constitution simply because he was not aware that he possessed such rights. We do not find in that decision any intimation that knowledge of the punishment for the crime with which he was charged is a prerequisite to a

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133. *See* notes 96-116 & accompanying text *supra*.

134. 384 U.S. at 468-69 (footnote omitted). Despite this broad statement, the Court did expect an inquiry into the circumstances of the waiver to determine whether it was made intelligently. *Id.* at 444, 475. Presumably, this assessment would be predicated upon the same circumstances that the Court criticized as requiring mere conjecture. *See* the totality of circumstances approach adopted by the Fourth Circuit on the issue of effective waivers in United States v. Wyatt, 561 F.2d 1388, 1390-91 (4th Cir. 1977), and Blackmon v. Blackledge, 541 F.2d 1070, 1073 (4th Cir. 1976).

135. 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918 (1968).

136. *Id.* at 845.

valid waiver of constitutional rights . . . ."[137]

Similarly, in *Harris v. Riddle,*[138] the court held that the defendant's misapprehension of the law, which prompted his admission, did not vitiate his waiver of fifth amendment rights.[139] Even though the arresting or interrogating officer realizes the mistake being made by the suspect and has the knowledge to correct it, the court surmised, the officer need not inform his suspect; the officers' duty to "inform" is limited to substantial compliance with *Miranda.*[140] Therefore, an "intelligent" waiver means no more than that the defendant spoke after an officer told him that he could remain silent, have an attorney appointed, and that anything he said could be used against him.[141]

Confessions: Admissibility Enhanced

While it did not intend to bar all custodial interrogation, with *Miranda* the Court meant to create a stricter standard for the admission of confessions, to establish what was believed to be a more equitable balance between law enforcement and individual rights, and to help local courts regulate pretrial procedure. Constitutional principles, the Court surmised, dictated that every person in imminent jeopardy of a criminal charge know of his right to remain silent and to have counsel appointed, and to know when to exercise these rights. These warnings also reminded the police of their duty to honor the rights of every individual. But at a time when public consciousness of crime was heightened, and when disenchantment with the strict exclusionary rule was growing, *Miranda* was criticized as an ill-advised attempt to promote the rights of criminals at the expense of effective law enforcement. From this climate of

137. *Id.* In response to the defendant's contention that the substitution of the word "understandingly" for "intelligently" in the court's charge to the jury violated his rights, the court stated that "the test is not whether Hall made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all . . . ." *Id.* at 846.

138. 551 F.2d 936 (4th Cir. 1977), *cert. denied,* 434 U.S. 849 (1978).

139. *Id.* at 938, 939. *But see* California v. Stewart, 384 U.S. at 457; Townsend v. Sain, 372 U.S. 293, 307-10 (1963). The fact that the defendant was seventeen years old with a dull-normal range of intelligence and had third grade language skills did not affect the validity of the waiver. 551 F.2d at 937.

140. 551 F.2d at 938-39.

141. *See id.* at 939. "It is wholly irrelevant that the decision to talk turns out to be wise or foolish, or that the decision is the result of poor cerebration or misinformation as to the law and/or the facts." *Id.*

controversy came a new judicial perception of the proper equilibrium between law and order and private rights. The broad principles of *Miranda* were soon supplanted by a more flexible and subjective totality of the circumstances standard reminiscent of conventional due process inquiries. The immediate result of this change was to facilitate the use of confessions; but to the extent that the oftimes competing objectives of criminal law can be better served by generally enhancing the admissibility of confessions, this new consensus is sound.

Due Process Clauses of the Fifth and Fourteenth Amendments: Pretrial Identification

Show-up and Lineup

In 1967, one year after its novel revision of the law affecting confessions and police interrogation, the Supreme Court applied due process criteria to pretrial identification procedures, thereby departing from the traditional rule that the manner of extrajudicial identification affects only the weight, and not the admissibility, of identification testimony.[142] In *Stovall v. Denno*,[143] the Court

142. Stovall v. Denno, 388 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). In *Wade*, the Court concluded that pretrial identification marked a critical stage in the prosecution of the accused, and, therefore, in the absence of counsel, a pretrial confrontation between the accused and the identifying witness violated the accused's sixth amendment right to counsel. 388 U.S. at 236-37 (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)). Also, an in-court identification may be excluded if tainted by an improper pretrial confrontation procedure. *Id.* at 241 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)). In *Gilbert*, the Court held that prior to the admission of in-court identification testimony, an inquiry must be made into whether it is predicated upon an unlawful pretrial confrontation; an in-court reference to an improper pretrial procedure is inadmissible per se. 388 U.S. at 272, 273-74 (citing United States v. Wade, 388 U.S. 218 (1967); Wong Sun v. United States, 371 U.S. 471, 488 (1963)). For later development of these principles, see Moore v. Illinois, 434 U.S. 220 (1977); Kirby v. Illinois, 406 U.S. 682 (1972). In the future the per se exclusionary rule of *Wade* and *Gilbert* may be replaced by the more flexible and comprehensive totality of the circumstances approach. 434 U.S. at 233 (Rehnquist, J., concurring). *But see* United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 405 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975).

For an illustration of the use of and the protection afforded by the totality of the circumstances standard, see Clewis v. Texas, 386 U.S. 707, 708, 711-12 (1967) (custodial confession was involuntary and therefore inadmissible). The federal harmless error rule of Chapman v. California, 386 U.S. 18 (1967), may yield the same result. *See* 434 U.S. at 232. Also, the due process totality of the circumstances standard governs in those situations when resort to the sixth amendment is barred. 434 U.S. at 230; Manson v. Brathwaite, 432 U.S. 99, 113-14 (1977); United States v. Ash, 413 U.S. 300, 320 (1973); Neil v. Biggers, 409 U.S. 188, 196

concluded that pretrial confrontation procedures must comport with the due process standards of the fifth and fourteenth amendments.[144]

In *Stovall,* the Court faced a problem similar to that resolved in *Miranda* by adopting a strict exclusionary rule: how to sharpen the distinction between constitutionally guarded pretrial rights and the range of permissive police investigation. Traditionally, structured pretrial confrontations between a suspect and a witness were a useful means of narrowing an investigation and corroborating police suspicions, while identification testimony was extremely valuable, if not critical, at trial.[145] These confrontations, however, were often arranged with little regard for their inherent suggestiveness. In lineups the suspect often was placed with others of contrasting features or clothing; he might be dressed in clothes similar to those described by the witness, while the others wear less distinctive clothes. This danger of misidentification was even more pronounced in show-ups, in which a witness was given a secret, private view of only the suspect at a place or time set by the police. The witness knows that the police have not arranged this show-up or lineup to deceive him. He must presume that in the case of a

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(1972); Simmons v. United States, 390 U.S. 377, 383 (1968); Stovall v. Denno, 388 U.S. at 302. For the development of the limitations on the exercise of sixth amendment rights, see United States v. Ash, 413 U.S. at 317-21; Kirby v. Illinois, 406 U.S. at 690; Powell v. Alabama, 287 U.S. at 57.

143. 388 U.S. 293 (1967).

144. *Id.* at 301-02 (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)). Procedural due process rights attach whenever government action condemns a person to "suffer grievous loss of *any kind,*" Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (emphasis supplied), or whenever it offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." Malinski v. New York, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., concurring); *see* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973). As the Court has stated in the past,

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

McNabb v. United States, 318 U.S. 332, 343 (1943). Underlying the operation of the due process clause is the rule that a conviction obtained in violation of the accused's fundamental rights cannot stand. *See, e.g., id.;* Brown v. Mississippi, 297 U.S. 278 (1936); Weeks v. United States, 232 U.S. 383 (1914).

145. *See* McGowan, *Constitutional Interpretation and Criminal Identification,* 12 WM. & MARY L. REV. 235 (1970).

lineup, the suspect has been included. This presumption is even stronger, as is the suggestiveness of the procedure, when a show-up is conducted.

Mindful of these vagaries of pretrial identification,[146] the Court adopted a due process and sixth amendment standard, limiting the use of these procedures to circumstances when the apparent necessity of a pretrial confrontation outweighs the potential prejudice to the accused.[147] A confrontation procedure "unnecessarily suggestive

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146. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall,* 388 U.S. at 302 (footnote omitted).

> But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial . . . . The identification of strangers is proverbially untrustworthy . . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

United States v. Wade, 388 U.S. at 228. Another commentator has remarked that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more errors than all other factors combined." P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965). Also, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before trial." Williams & Hammelmann, *Identification Parades—I,* 1963 CRIM. L. REV. 479, 482; *see* United States v. Wilson, 435 F.2d 403, 404-05 (D.C. Cir. 1970) (inherent suggestiveness of even prompt show-up). *See also* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 160.1, 160.2 (1975) (frowns on use of show-up or display of single photograph).

147. The necessity for an immediate identification may justify the use of a show-up. In *Stovall,* the accused was escorted handcuffed and in the company of several policemen to the victim's hospital room for identification. In admitting this testimony, the Court noted that the victim was the only one who could identify the assailant and that the victim was in critical condition. 388 U.S. at 302; *accord,* United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 403-04 (7th Cir.), *cert. denied,* 421 U.S. 1016 (1975); Smith v. Coiner, 473 F.2d 877, 880-81 (4th Cir.), *cert. denied,* 414 U.S. 1115 (1973) (emphasizing the lack of any compelling reason for using a show-up instead of a lineup); McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969) (identification testimony of show-up conducted four hours after crime inadmissible); *cf.* United States v. Collins, 416 F.2d 696, 701 (4th Cir. 1969) (Winter, J., dissenting), *cert. denied,* 396 U.S. 1025 (1970) (no justification for using photographic arrays when lineup or show-up conceivable).

Since *Stovall,* suggestive confrontation procedures have been justified on other grounds. *See* note 145 *supra.* A prompt confrontation while the witnesses' or victim's recollection is vivid may be sufficiently reliable to outweigh the suggestiveness of the procedure. *E.g.,* United States v. Hines, 455 F.2d 1317, 1327-29 (D.C. Cir.), *cert. denied,* 406 U.S. 975 (1972); United States v. Perry, 449 F.2d 1026, 1032-33, 1037-38 (D.C. Cir. 1971); Bates v. United

and conducive to irreparable mistaken identification" offends this standard, the Court observed, and, therefore, the identification testimony must be excluded, even though it may be relevant.[148] In *Stovall,* then, the Court established an equilibrium between the competing interests of the accused in securing a fair trial, of the police in conducting comprehensive investigations, and of the courts in admitting all evidence pertinent to a case. But, overall, this balance reflected more the Court's attentiveness to the adequacy of the procedural protection offered the accused.[149]

A few years later, in *Simmons v. United States*[150] the Court con-

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States, 405 F.2d 1104, 1106 (D.C. Cir. 1968) (opinion of Judge, now Chief Justice, Burger). And even though the confrontation is not prompt, the reliability of the identification may be established by other factors. *E.g.,* Neil v. Biggers, 409 U.S. 188, 194-95 (1972) (confrontation seven months after crime); United States v. MacDougall, 422 F.2d 353, 354 (2d Cir.) (per curiam), *cert. denied,* 398 U.S. 912 (1970) (confrontation three months after crime, testimony admissible); Long v. United States, 424 F.2d 799, 803-05 (D.C. Cir. 1969) (spontaneous identification in stationhouse cures the defects of pretrial confrontation); United States v. Levi, 405 F.2d 380, 383 (4th Cir. 1968) (confrontation occurred four months after crime, reliability of identification testimony was matter for jury consideration with proper instructions); United States v. Quarles, 387 F.2d 551, 555 (4th Cir. 1967), *cert. denied,* 391 U.S. 922 (1968) (confrontation six days after crime, testimony admissible).

148. 388 U.S. at 301-02. Congress was quick to censor the *Wade* trilogy standards. *See* 18 U.S.C.A. § 3502 (West 1969). "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States." *Id.* "The use of eyewitness testimony in the trial of criminal cases is an essential prosecutorial tool. The recent case of *United States v. Wade* . . . struck a harmful blow at the nation-wide effort to control crime . . . . It is incredible that a victim is not permitted to identify his assailant in court . . . . Nothing in the constitution warrants [this rule]." S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2139; *see* United States v. Levi, 405 F.2d 380, 382 (4th Cir. 1968). *But see* United States v. Zeiler, 427 F.2d 1305, 1307-08 (3d Cir. 1970).

The constitutionality of this provision is subject to dispute. *See, e.g.,* United States v. King, 321 F. Supp. 614, 617 (W.D. Tex. 1970).

149. *See* Gilbert v. California, 388 U.S. at 273; *cf.* Linkletter v. Walker, 381 U.S. 618, 632, 636-37 (1965) (no retroactive application for *Mapp*); Mapp v. Ohio, 367 U.S. 643, 658-60 (1961) (relevant evidence obtained in violation of individual's fourteenth amendment right to privacy will be excluded).

The suggestion that *Stovall* established a strict exclusionary rule is belied by the fact that in only one case has the Supreme Court held pretrial identification testimony inadmissible. Foster v. California, 394 U.S. 440 (1969). In *Foster,* the witness made a "positive" identification of the defendant only after two separate lineups and one show-up, in each of which the defendant, by his dress or physical characteristics, was easily distinguishable. *Id.* at 441-42. In several cases, the Court has reversed the lower court determination that due process was violated. *E.g.,* Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

150. 390 U.S. 377 (1968).

tinued the development of due process safeguards for pretrial identification testimony begun in *Stovall.* Passing upon the common police practice of exhibiting photographs to witnesses, the Court commented, "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[151] The reasoning in *Simmons* closely tracked that used in *Stovall.* Photographic displays, like lineups, could be manipulated in such a way that the witness' choice was a foregone conclusion. The opportunity to view this suspect later at trial merely reinforced the witness' opinion that he had selected the correct photograph. This very persuasive identification testimony rarely could be rebutted by cross-examination, leaving the jury to ponder the unshaken credibility of the witness. Therefore, identification testimony based even in part upon a suggestive photographic display was subject to exclusion by the court.

Simmons then marks more clearly the due process foundation laid in the earlier cases. *Stovall, Wade,* and *Gilbert* to a great extent rested upon the importance of counsel in the pretrial stages of a criminal proceeding, something about which the Supreme Court of this period was especially adamant.[152] These cases, including *Simmons,* underscore the Court's concern over the propriety of extrajudicial identification procedures.[153] But in *Simmons* the Court relaxed the emerging standard to allow for consideration of circumstances, other than the relative necessity of the procedure, that

151. *Id.* at 384. "The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . ." Neil v. Biggers, 409 U.S. at 199; *accord,* United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972); Kimbrough v. Cox, 444 F.2d 8, 10 (4th Cir. 1971); United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971); Mason v. United States, 414 F.2d 1176, 1182 (D.C. Cir. 1969).

152. *See* F. GRAHAM, THE DUE PROCESS REVOLUTION (1970).

153. The *Simmons* standard, "impermissibly suggestive," is analogous to the *Stovall* "unnecessarily suggestive" standard. 390 U.S. at 384; *see, e.g.,* United States v. Scott, 518 F.2d 261 (6th Cir. 1975). A closer comparison, though, may be drawn between *Simmons* and United States v. Wade, 388 U.S. 218, 240-41 (1967), in which in-court identifications that did not have an origin independent of the pretrial identification were excluded. *Cf.* United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969), *cert. denied,* 387 U.S. 1013 (1970) (in-court identification not tainted by prior suggestive confrontation because witness was not positive of identification until saw defendant in the courtroom). *See also* notes 30-37 *supra* & accompanying text.

bear on the trustworthiness of the in-court identification and justify its use. Relative necessity, though still a factor,[154] occupied a less pivotal position in the *Simmons* analysis, since the reliability of the in-court identification has an origin independent of the impermissibly suggestive extrajudicial procedure.[155]

Following *Simmons,* a more flexible standard was adopted, one even more closely aligned with traditional due process analysis and more sympathetic toward law enforcement interests.[156] Even so, the nucleus of this new rule, circumstantial reliability, was introduced in *Simmons.* In 1972, in *Neil v. Biggers,*[157] the Court surmised that the primary evil to be avoided was the "very substantial likelihood of irreparable misidentification."[158] Consequently, the relative reliability of the identification, not the suggestive character of the iden-

154. "The justification for this method of procedure was hardly less compelling than that which we found to justify the 'one-man lineup' in Stovall v. Denno . . . ." 390 U.S. at 385. The principal factors considered in *Simmons* were the seriousness of the crime, the necessity of quick action because the offenders were still at large, the need to determine immediately if the officers were on the right track, and the fact that the preliminary investigation led the officers to the defendant. *Id.* at 384-85.

155. Under *Simmons,* evidence that the display was suggestive and unnecessary will not compel exclusion of the testimony when the court can identify an independent basis for an in-court identification. *Id.* at 385. This standard, unlike that of *Stovall,* calls for an inquiry into the factual basis for the witness' identification. Special emphasis is assigned to the witness' opportunity to observe the crime. *Id.*

156. The flexibility and breadth inherent in the "due process" concept allows the courts considerable latitude in formulating standards. Traditionally, under due process analysis the particular circumstances dictated the need and nature of the procedural safeguards invoked. "Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, . . . fall short of such denial." Betts v. Brady, 316 U.S. 455, 462 (1942) (footnotes omitted); *see* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Morrissey v. Brewer, 408 U.S. at 481; Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

157. 409 U.S. 228 (1972).

158. *Id.* at 198 (citing Simmons v. United States, 390 U.S. at 384). In *Biggers,* the confrontation procedure was both suggestive and unnecessary. *Id.* at 198-99. Arguably, then, *Simmons* is inapposite. The *Simmons* standard is applicable to cases in which an in-court identification is challenged on the ground that improper pretrial identification procedures preclude a rational, objective judgment in court. 390 U.S. at 384; *see* Coleman v. Alabama, 399 U.S. 1, 5-6 (1970). *Stovall* and *Foster* stand for the proposition that an unnecessarily suggestive procedure itself violates due process. *See* notes 146-52 *supra* & accompanying text. *See also* Manson v. Brathwaite, 432 U.S. 98, 120-24 (1977) (Marshall, J., dissenting); United States v. Collins, 416 F.2d 696, 701 (4th Cir. 1969) (Winter, J., dissenting), *cert. denied,* 396 U.S. 1025 (1970). To some extent, then, the distinction between *Stovall* and *Simmons* was eliminated by *Biggers* when the *Simmons* standard was used to determine the admissibility of pretrial identification testimony. 409 U.S. at 198.

tification procedure,[159] would be the principal consideration. By way of explanation, the Court identified several factors that alone, or in combination, could substantiate the trustworthiness of the identification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[160] A pretrial identification may spring from a variety of sources. Assuming that the state introduces some evidence to corroborate an identification, the fact that the procedure used may have been unnecessary or suggestive will not affect the admissibility of the identification testimony.[161]

Thus, in *Biggers* the Court moved a step further from *Simmons* by adopting a "harmless error" approach to suggestive pretrial procedures. *Simmons* permitted the use of testimony predicated upon unnecessary, suggestive pretrial identification procedures when an independent cause for an in-court identification could be estab-

159. "We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199; *accord,* Coleman v. Alabama, 399 U.S. 1, 3-6 (1970); United States v. Skeens, 494 F.2d 1050, 1051-52 (D.C. Cir. 1974); Stanley v. Cox, 486 F.2d 48, 51 (4th Cir. 1973), *cert. denied,* 416 U.S. 958 (1974); Mock v. Rose, 472 F.2d 619, 621 (6th Cir. 1972), *cert. denied,* 411 U.S. 971 (1973); United States v. Wilson, 435 F.2d 403, 404-05 (D.C. Cir. 1970); Russell v. United States, 408 F.2d 1280, 1284 (D.C. Cir.), *cert. denied,* 395 U.S. 928 (1969). *See generally* 73 COLUM. L. REV. 1168 (1973).

160. 409 U.S. at 199, 200; *accord,* Israel v. Odom, 521 F.2d 1370, 1375 (7th Cir. 1975); Stroud v. Hall, 511 F.2d 1100, 1101 (1st Cir. 1975); Virgin Islands v. Navarro, 513 F.2d 11, 17-18 (3d Cir.), *cert. denied,* 422 U.S. 1045 (1975); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 402-04 (7th Cir.), *cert. denied,* 421 U.S. 1016 (1975); Souza v. Howard, 488 F.2d 462, 464-65 (1st Cir. 1973), *cert. denied,* 417 U.S. 933 (1974); United States v. Kaylor, 491 F.2d 1127, 1131-32 (2d Cir. 1973), *vacated on other grounds sub nom.* United States v. Hopkins, 418 U.S. 909 (1974); Lewis v. United States, 417 F.2d 755, 759-60 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1058 (1970). *Contra,* Smith v. Coiner, 473 F.2d 877, 881 (4th Cir.), *cert. denied,* 414 U.S. 1115 (1973).

In *Biggers,* the witness identified the defendant at a confrontation seven months after the crime was committed. 409 U.S. at 194-95. The Court dismissed the importance of the time lapse, emphasizing the victim's prolonged exposure to her assailant and her vivid recollection of his features. *Id.* at 200-01.

161. The application of this standard is illustrative of the Court's reluctance to impose a stringent exclusionary rule. In *Bigger,* the Court reversed the decisions of the district court and the court of appeals, both of which had concluded that, under the totality of the circumstances, the probability of misidentification was evident. *Id.; see* Biggers v. Neil, 448 F.2d 91, 95 (6th Cir. 1971). *See also* 409 U.S. at 202-04 (Brennan, J., dissenting). Despite the lower courts' findings, the Court concluded that the identification was reliable. *Id.* at 200-01.

lished. After *Biggers*, the focus is almost solely on the witness' basis for identifying the accused, not on the nature and degree of protection afforded the accused at the pretrial identification. Provided that the witness had a reasonable basis for incriminating the accused, then a suggestive pretrial procedure will not taint the identification.

Biggers further emasculated the *Stovall* standard by eliminating the principal impediment to the use of suggestive extrajudicial identification procedures.[162] When the admissibility of pretrial identification testimony was contingent upon proof of the relative necessity of the procedure, the use of these methods was restricted to those exceptional circumstances when the exigency of their use overcame judicial distrust of their inherent suggestiveness.[163] Initially, then, the focus was on the propriety of the procedure, and the evidentiary standard was strict. Now the paramount consideration is whether the witness' identification is sufficiently reliable to satisfy fifth and fourteenth amendment due process.[164] This type of

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162. Language in *Biggers* indicates that it is applicable only to pre-*Stovall* cases. "Such a rule [excluding evidence of unnecessarily suggestive confrontations] would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno* . . . when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury." 409 U.S. at 199; *accord,* Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1972); Smith v. Coiner, 473 F.2d 877, 880-81 (4th Cir.), *cert. denied,* 414 U.S. 1115 (1973); Workman v. Cardwell, 471 F.2d 909, 910 (6th Cir.), *cert. denied,* 412 U.S. 932 (1973).

To the extent that *Biggers* reflects a substantive change in the Court's attitude towards pretrial identification procedures, the decision is inconsistent with other cases decided since *Stovall* that declare unnecessarily suggestive confrontations violative of due process. *E.g.,* Kirby v. Illinois, 406 U.S. 682, 691 (1972) ("The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification."); Foster v. California, 394 U.S. 440, 442 n.2 (1969) ("But it is the teaching of *Wade, Gilbert,* and *Stovall* . . . that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.").

Some courts have adhered to a construction of *Biggers* consistent with the standard announced in *Stovall. E.g.,* United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 402-05 (7th Cir. 1975) (opinion of Judge, now Justice, Stevens).

163. *See* notes 146-52 *supra* & accompanying text.

164. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Despite intimations that "unnecessarily suggestive" pretrial identification procedures would meet the same fate as "inherently coercive" custodial interrogations, the Court has concluded that the present standards afford sufficient protection against the possibility of misidentification. Reliability may play substantially the same role in future interrogation cases. Brewer v. Williams, 430 U.S. 387, 420-29 (1977) (Burger, C.J., dissenting) (suggestion that absent question of volun-

inquiry entails an examination of all the circumstances that support the witness' identification. Undoubtedly, the elimination of many of the restrictions on the use of these procedures will encourage their use.

That *Biggers* expressed the Court's ambivalent disposition towards extrajudicial identification procedures became evident in *Manson v. Brathwaite*[165] and *Moore v. Illinois*.[166] In *Manson*, reversing a lower court decision excluding pretrial identification testimony,[167] the Court reiterated the significance of reliability in determining the admissibility of identification testimony.[168] The Court, however, once again slightly modified the standard; the reliability of the identification, as reflected in circumstances independent of the identification procedure, must be weighed against "the corrupting effect of the suggestive identification itself."[169] Conceivably, the procedure may be so suggestive as to preclude, as a matter of law, an objective identification despite corroborative evidence of the witness' positive identification.[170]

In *Moore*, the Court reversed the decisions of the Illinois state courts to admit evidence of a pretrial confrontation conducted

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tariness, reliability should be the key to the exclusion of confessions, analogy to pretrial identification cases).

The *Biggers* approach is decidedly more sympathetic to law and order interests. *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Hartman & Goldberg, *The Death of the Warren Court, The Doctrine of Suggestive Identification*, 32 N.L.A.D.A. BRIEFCASE 78 (1974); Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protections*, 26 STAN. L. REV. 1097 (1974).

165. 432 U.S. 98 (1977); *see* 73 COLUM L. REV. 1168, 1181 (1973).

166. 434 U.S. 220 (1977).

167. Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975).

168. 432 U.S. at 114.

169. *Id.*

170. In *Manson*, the identifying witness was shown one photograph, that of the defendant. *Id.* at 101. The danger of misidentification increases "if the police display to the witness only the picture of a single individual who generally resembles the person he saw . . . ." Simmons v. United States, 390 U.S. 377, 383 (1968); *accord*, United States v. Kimbrough, 528 F.2d 1242, 1244-45 (7th Cir. 1976); Israel v. Odom, 521 F.2d 1370, 1373-74 (7th Cir. 1975); Brathwaite v. Manson, 527 F.2d 363, 366-68 (2d Cir. 1975); United States *ex rel.* Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); United States v. Workman, 470 F.2d 151, 153 (4th Cir. 1972); United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971); Anthony v. United States, 433 F.2d 952, 953 n.5 (9th Cir. 1970). *Contra*, Nassar v. Vinzant, 519 F.2d 798, 801 (1st Cir.), *cert. denied*, 423 U.S. 898 (1975); United States v. Anderson, 484 F.2d 746, 747 (10th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974); United States *ex rel.* Frasier v. Henderson, 464 F.2d 260, 264-65 (2d Cir. 1972).

without furnishing Moore with counsel.[171] The victim identified Moore in the courtroom during a preliminary hearing to determine whether he should be bound over to the grand jury and to set bail. Addressing the admissibility of testimony of this identification, the Court reaffirmed the holdings of *Wade, Gilbert,* and *Kirby* that in the absence of counsel, evidence of a pretrial corporeal identification may not be admitted, even though an independent basis for the identification is established.[172]

Brathwaite and *Biggers* underscore the extreme flexibility of the totality of the circumstances standard, tempered only by the overriding importance of sixth amendment values as reiterated in *Moore*. These modifications in the judge-made rules governing identification have made more frequent use of these procedures possible, despite earlier indications of judicial displeasure. These uses of identification testimony, then, reveal another area of criminal procedure in which the balance is shifting in favor of law enforcement interests.

Pretrial Identification in the Fourth Circuit

This transition is even more evident in Fourth Circuit decisions. This court has adhered unerringly to a circumstance-oriented test of the suggestiveness of identification procedures, which permits admission of identification testimony when its reliability alone can be demonstrated. An identification procedure may be so suggestive that any testimony will be tained, but this showing of reliability has not proven to be a difficult burden when the witness had any opportunity to view the offender; then, the foundation for this testimony can be laid routinely.

In *Faison v. Zahradnick*,[173] habeas corpus relief was denied a state prisoner who contended that the admission of identification testimony violated constitutional standards.[174] At a pretrial showup conducted in the stationhouse four hours after the commission of the crime, a witness, who was forced to accompany the offenders in

171. 434 U.S. at 224, 232.

172. *Id.* at 231-32; *see* notes 146-52 *supra* & accompanying text. *But see* United States v. Ash, 413 U.S. 300, 317, 318 n.10 (1973) (no sixth amendment right to counsel at photographic display, since not "trial-like adversary confrontation").

173. 563 F.2d 1135 (4th Cir. 1977) (per curiam).

174. *Id.* at 1136-37.

their escape, identified the petitioner as one of the robbers.[175] The petitioner objected on the grounds that during the commission of the crime, the witness did not have an opportunity to observe the petitioner's features and that the show-up was so suggestive as to violate his fourteenth amendment right to due process.[176]

In a per curiam opinion, the court rejected the petitioner's argument, holding that the identification and the procedure satisfied constitutional criteria.[177] In so deciding, the court emphasized that a "pre-trial showup identification . . . was not subject to any *per se* rule of invalidity but that its validity was to be determined on the basis of its reliability as established by the 'totality of the circumstances.'"[178] Examining the witness' opportunity to observe the accused and the circumstances of the confrontation, the court concluded that the witness' prolonged exposure to the offenders and the promptness of the show-up were sufficiently probative of the identification's reliability to counter the petitioner's constitutional claim.[179]

In *United States v. Stevenson*,[180] the court applied a similar presumption of validity to reject the defendant's contention that an in-court identification was tainted by a pretrial display of photographs. The court upheld the district court's refusal to conduct a *Simmons* hearing to determine whether photographic displays arranged by the police for the benefit of the identifying witnesses

175. *Id.*

176. *Id.* at 1137. The petitioner also argued that the witness' inability to re-identify the petitioner in a lineup arranged several months later confirmed the unreliability of the initial identification. The court rejected this contention while noting the significant changes in the petitioner's physical appearance between these two occasions. *Id.*

177. *Id.*

178. *Id.* (citing Manson v. Brathwaite, 432 U.S. 98 (1977); Stanley v. Cox, 486 F.2d 48, 50-51 (4th Cir. 1973), *cert. denied*, 416 U.S. 958 (1974)); *accord*, United States v. Scott, 518 F.2d 261, 266 (6th Cir. 1975); United States v. Kaylor, 491 F.2d 1127, 1131-32 (2d Cir. 1973), *vacated*, 418 U.S. 909 (1974); Doss v. United States, 431 F.2d 601, 603 (9th Cir. 1970); Hampton v. Oklahoma, 368 F.2d 9, 10 (10th Cir. 1966); *see* note 159 *supra*.

179. 563 F.2d at 1137. The witness was careful to observe the accused's features and had ample time during the crime and the escape to view the accused. *Id.; accord*, United States v. Revels, 575 F.2d 74, 75-76 (4th Cir. 1978); McNeary v. Stone, 482 F.2d 804, 806 (9th Cir.), *cert. denied*, 414 U.S. 1071 (1973). Also, the prompt confrontation negates any presumption of suggestiveness. 563 F.2d at 1137; *accord*, United States v. Wilcox, 507 F.2d 364, 366 n.2 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); Mock v. Rose, 472 F.2d 619, 621 (6th Cir. 1972), *cert. denied*, 411 U.S. 971 (1973); United States v. Washington, 447 F.2d 308, 312 (D.C. Cir. 1970); United States v. Wilson, 435 F.2d 403, 404-05 (D.C. Cir. 1970); United States v. Quarles, 387 F.2d 551, 555 (4th Cir. 1967), *cert. denied*, 391 U.S. 922 (1968).

180. 554 F.2d 123 (4th Cir. 1977) (per curiam).

were impermissibly suggestive.[181] The defendant argued that, as a matter of law, before a witness could make an in-court identification, the prosecution must demonstrate that the photographic displays were not impermissibly suggestive.[182] Relying principally on *United States v. Cranson,*[183] the court rejected this argument and concluded that the defendant adduced insufficient evidence to warrant the interruption of the trial to conduct an evidentiary hearing and that proof of an independent source for an in-court identification cures any defects arising from pretrial confrontations.[184]

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181. *Id.* at 126.

182. *Id.* at 125.

183. 453 F.2d 123 (4th Cir. 1971), *cert. denied,* 406 U.S. 909 (1972).

184. 554 F.2d at 126. "[M]otions seeking an evidentiary hearing on such pre-trial procedures, especially if made at trial would require a claim rising above the level of mere hope and including some reasonable assertion of possible taint in the preliminary identification procedures." 453 F.2d at 126-27 (citing United States v. Allison, 414 F.2d 407, 410 (9th Cir.), *cert. denied,* 396 U.S. 968 (1969)); *accord,* Simmons v. United States, 390 U.S. 377, 384 (1968); Stovall v. Denno, 388 U.S. 293, 301-02 (1967); United States v. Lawrence, 499 F.2d 962, 963 (4th Cir. 1974); United States v. Hall, 437 F.2d 248, 249 (3d Cir.), *cert. denied,* 402 U.S. 976 (1971); United States v. Marson, 408 F.2d 644, 650 (4th Cir. 1968), *cert. denied,* 393 U.S. 1056 (1969); *cf.* Guam v. Cruz, 415 F.2d 336, 338 (9th Cir. 1969) (burden on the defendant to show that counsel not present at pretrial identification). *But see* United States v. Holiday, 482 F.2d 729, 733-34 (D.C. Cir. 1973) (presumption that counsel not present).

The district court conducted a hearing earlier to investigate the defendant's claim of impropriety in the FBI's administration of two separate photographic displays. 554 F.2d at 125. On appeal, the defendant raised the same issue regarding additional displays conducted by the Baltimore City police. *Id.* Under *Cranson,* to compel an evidentiary hearing, the defendant at the very least must submit a statement asserting that a pretrial photographic identification was conducted and that "possible taint in the preliminary identification procedures" existed. 453 F.2d at 127. The fact that the defendant's motion was made during the trial rather than before affects the court's disposition of the request. 554 F.2d at 126; *accord,* Nardone v. United States, 308 U.S. 338, 341-42 (1939); Guam v. Cruz, 415 F.2d 336, 338 (9th Cir. 1969).

The burden of proving an independent source for an in-court identification, of course, is on the prosecution. *E.g.,* United States v. Dailey, 524 F.2d 911, 916 (8th Cir. 1975); United States *ex rel.* Harris v. Illinois, 457 F.2d 191, 195 (7th Cir.), *cert. denied,* 409 U.S. 860 (1972); Mason v. United States, 414 F.2d 1176, 1182 (D.C. Cir. 1969). Once an independent source is established, defects arising from pretrial procedures are cured. *E.g.,* United States v. Wade, 388 U.S. 218, 241 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Cranson, 453 F.2d 123, 128 (4th Cir. 1971), *cert. denied,* 406 U.S. 909 (1972); United States v. Cunningham, 423 F.2d 1269, 1272-73 (4th Cir. 1970); Vance v. North Carolina, 432 F.2d 984, 987-88 (4th Cir. 1970); United States v. Butler, 405 F.2d 395, 396 (4th Cir. 1968), *cert. denied,* 396 U.S. 853 (1969). *Contra,* United States *ex rel.* Cannon v. Smith, 527 F.2d 702, 705 (2d Cir. 1975).

Arguably, the burden as to all these elements should rest upon the prosecution. The burden of proof "is upon the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged." United States v. Levi, 405 F.2d 380,

Pretrial Identification Reconsidered

In *Stovall v. Denno,* the Supreme Court adopted a strict evidentiary standard to govern the admission of identification testimony. This standard was designed not only to combat the hazards of misidentification stemming from the use of suggestive and unnecessary identification procedures, but also to allow use of these procedures when necessary. The Court realized that in some exigent circumstances a pretrial confrontation, with proper precautions, may be permissible. Then the public interest in eliminating crime overrides whatever substantial interest the suspect may have in excluding all testimony derived from suggestive pretrial identification procedures. The Court in *Stovall,* however, proscribed the routine use of these procedures because of the inherent probability of convicting an innocent person.

Since *Stovall,* the Supreme Court and the Fourth Circuit have relaxed these requirements to permit identification testimony even when it is derived from an unnecessary and suggestive procedure, provided the prosecution could demonstrate the reliability of the identification. Decisions in the Fourth Circuit indicate that very little else other than the slightest opportunity to view the offender and a positive pretrial, and perhaps in-court, identification is necessary to meet this "totality of the circumstances" standard. The emphasis no longer is on the pretrial procedure, which may have been unnecessarily suggestive, but on circumstances extraneous to this confrontation that tend to support the reliability of the testimony. A searching inquiry into the nature of the procedure, then, need not be conducted because the admissibility of the identification testimony is predicated upon its reliability, which in turn depends upon these outside circumstances.

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383 (4th Cir. 1968) (citing Jones v. United States, 361 F.2d 537, 542 (D.C. Cir. 1966)).

The defendant's burden of proof on the *Simmons* issue increases as the trial progresses and as the interest in securing a speedy administration of justice is implicated. Since the accused was not present at either of the photographic displays in *Stevenson,* it is anomolous that he would be expected to have sufficient information to raise a *Simmons* issue as to one array and not the other unless the burden was greater for the second. This result appears especially harsh when no evidence was presented demonstrating that the defendant was even aware of the additional displays until the witnesses' testimony at trial. *See* 554 F.2d at 125-26.

Custodial Interrogation and Pretrial Identification Procedures: The Passing of the Exclusionary Rule

In the late 1950's and the early 1960's, the Supreme Court began what was to become a due process revolution in criminal procedure to bring law enforcement under the close supervision of the courts and to dictate police policy. Challenging the routine use of such conventional investigative tools as custodial interrogation and pretrial identification procedures, the Court imposed strict standards to govern the admissibility at trial of evidence obtained through methods used exclusively during the early pretrial phases of the criminal justice system. In tackling the abuses of these instruments of law enforcement, the Court labored to sharpen the distinction between those rights conditioning the trial process and those that relate only to permissive criminal investigation.

These efforts, however, have been thwarted by an abrupt and dynamic change in public consciousness of crime and in judicial perception of the constitutional mandate. Guided by a reappraisal of the accused's need for additional protection and by a sharp break in legal doctrine, the courts have modified the equilibrium between the interests of law and order and private rights. As is apparent in Fourth Circuit decisions regarding confessions and pretrial identification testimony, evidence will not be excluded at trial merely because law enforcement officials did not adhere strictly to judicial guidelines during pretrial investigations of crime. The court will intervene to exclude relevant evidence only when the very integrity of the truth-finding process is in jeopardy.

III. Balancing Fair Trial and Free Press Interests: The Gordian Knot

Traditionally, society has relegated to private enterprise the task of collecting and disseminating information of public interest. The importance of this role received constitutional expression in the first amendment, which proclaims the media's right to publish freely.[185] But since media coverage of the courtroom first began,

185. U.S. Const. amend. I. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court noted:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries.

this jealously guarded privilege has been juxtaposed with the accused's constitutional right to a fair trial.[186] Especially in dramatic jury trials, the sensationalism fomented by press coverage and the prejudices fostered by biased reporting threatened to subvert the truth-finding function of the court. With the development of modern mass communication systems, the tension between the two has heightened, and the compatibility in the courtroom of the media's exercise of first amendment rights and the sixth amendment right of the defendant has been seriously questioned. Predictably, courts have been called upon to decide the ineluctable issue: when in the name of the accused's right to a fair trial can the media's access to and the publication of information about a pending trial be limited.

The problem has proven intractable.[187] Irrespective of whether

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> The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. at 350.

186. > Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury.

Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (citation omitted). *See generally* Rendleman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127 (1973); Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1 (1971); Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51 (1972); Note, *Ungagging the Press: Expedited Relief From Prior Restraints on News Coverage of Criminal Proceedings*, 65 GEO. L.J. 81 (1976); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608 (1975) (proposing a framework within which the confrontation between free press and fair trial principles may be resolved).

187. As the Court of Appeals for the Tenth Circuit stated:

> The problem presented is incapable of a satisfactory solution. Media of publicity have the right to report what happens in open court. An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has the right to demand and expect "fair trials designed to end in just judgments." These rights must be accommodated in the best possible manner.

Mares v. United States, 383 F.2d 805, 808 (10th Cir. 1967) (footnote omitted) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). *See generally Report of the Committee on the Opera-*

the court agrees or refuses to restrict media coverage, it must justify the intrusion upon a well-established constitutional right, for every incursion by the press into the courtroom raises the spector of prejudicial reporting. Regretfully, the court's task must be accomplished with only the barest guidance. The Constitution does not identify any priority that must be enforced, and the utility of judicial decisions as practicable guidelines is diminished by the limited scope of the case-by-case approach of the courts. Yet, building upon a due process foundation laid by the Supreme Court, the Fourth Circuit has concluded that the courts are charged with the responsibility to take affirmative steps towards ensuring the objectivity of the trial.[188] This decision is representative of the court's transition from a time when trial judges felt impotent to curb publicity of a pending trial to the contemporary attitude that in special circumstances the failure to impose restrictions constitutes reversible error.[189] While adhering generally to the proposition that what takes place in the courtroom is public property and may be published freely, the more recent decisions place a greater emphasis on the trial's fairness.[190] Consequently, the courts have confirmed that direct but limited restraints are constitutionally permissible. These same cases, however, all reaffirm the early philosophy that first amendment freedoms are fundamental to our conception of liberty, which points up the problem confronting the courts.

The Constitutional Confrontation: The First and Sixth Amendments in Brief Review

Historically, the extent of protection afforded the press by the first amendment was limited by the narrow reading given the first amendment. In a 1907 decision, *Patterson v. Colorado,*[191] the ma-

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tion of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1969) [hereinafter cited as *Free Press-Fair Trial*]; Barist, *The First Amendment and Regulation of Prejudicial Publicity—An Analysis,* 36 FORDHAM L. REV. 425 (1968); Powell, *The Right to a Fair Trial,* 51 A.B.A.J. 534 (1965).

188. Sigma Delta Chi v. Martin, 556 F.2d 706 (4th Cir. 1977).

189. *See generally* Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond,* 29 STAN. L. REV. 393 (1977).

190. The Supreme Court in *Sheppard v. Maxwell* stated, "Due process requires that the accused receive a fair trial by an impartial jury free from outside influences." 384 U.S. at 362.

191. 205 U.S. 454 (1907).

jority commented that the free speech and press guarantees prohibited only prior restraints upon publications, but left undecided the issue whether first amendment protection against state action was extended through fourteenth amendment due process.[192] Therefore, objections to a Colorado court's punishment for contempt of a political cartoonist whose work allegedly impugned the integrity of the court during a pending case did not raise a constitutional issue. Thus, the authority of the courts to punish for contempt when press publications tended to impede judicial functions was confirmed.

Even as late as 1931, the Supreme Court had yet to speak with unanimity on the extent of press freedoms. Notably, though, in *Near v. Minnesota,*[193] the Court, by a five-to-four margin, held unconstitutional a state statute that forbade the publication of scandalous or defamatory statements.[194] The dissent in *Near* now echoed hollowly what the majority in *Patterson* had concluded—that the Court had erroneously read into the first amendment a protection against punishment after publication when at common law this liberty meant "simply the absence of restraint upon publication *in advance* as distinguished from liability for libelous or improper matter so published."[195]

A growing disapproval of any limitation on the media was evident in *Bridges v. California,*[196] in which the Court set forth the condition precedent for the use of the contempt power to reprimand publishers attacking court decisions. Absent a showing that words used in the editorial created a "clear and present danger" of bringing about substantive evil,[197] the courts' use of the contempt power to silence its critics was improper. The Supreme Court then added that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be

192. *Id.* at 462. Justice Harlan demonstrated solitary foresight by proclaiming in dissent that the right of free speech and free press was not subject to deprivation without due process of law and was not limited only to those instances when prior restraints were ordered. *Id.* at 463-65; *see* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1970); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 238 U.S. 697 (1931).

193. 283 U.S. 697 (1931).

194. *Id.* at 722-23.

195. *Id.* at 735 (emphasis supplied).

196. 314 U.S. 252 (1941).

197. *Id.* at 262 (citing Schenck v. United States, 249 U.S. 47 (1919)).

punished."[198]

The new vitality given press freedoms by *Bridges* was reinforced by the principle recognized in *Craig v. Harney*,[199] that what transpires in the courtroom is public property and therefore as a general rule cannot be shielded from disclosure.[200] Emanating from the commitment to an informed public and to the free dissemination of news of public importance, this principle, at the very least, dictated a thorough consideration of the substantial danger to the public interest posed by any limitation upon the media's access to judicial proceedings.[201] But the decision in *Craig v. Harney* is important also because of the Court's open acknowledgement of its allegiance to the *Bridges* "clear and present danger" standard as the constitutional measure for resolving free press/contempt cases. The Court reiterated that a contempt conviction must rest upon more than the determination that certain statements may marginally affect the disposition of the case or may question the com-

198. *Id.* at 263. Applying this standard, the Supreme Court reversed the contempt conviction. The contempt order arose from a publication of an article that denounced two members of a labor union who had been convicted of assaulting non-union truck drivers. The trial judge for the Superior Court of Los Angeles County objected to an editorial comment suggesting that if he granted probation to the defendants, he would be making a "serious mistake;" the judge issued the contempt order on the ground that this publication interfered with the orderly administration of justice.

199. 331 U.S. 367 (1947).

200. *See generally* Wiggins, *The Public's Right to Public Trial*, 19 F.R.D. 25 (1957); 52 MICH. L. REV. 128 (1953).

201. Subsequent cases have confirmed the Supreme Court's reluctance to sanction contempt convictions as a means to punish reporters for what the courts consider improper commentary. In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court reversed a state court judgment of contempt for a critical comment on judicial action already taken but pertaining to a case still pending. Addressing the balance between the accused's rights, the media's privilege, and the judge's responsibilities, the Court stated:

> Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

Id. at 347.

Whether an exercise of the court's contempt power is warranted can be determined only by weighing the impact of the statement against the first amendment protection of public comment on pending cases. Apparently, even though it may criticize the court and prejudice the accused, commentary short of creating a clear and present danger to the administration of justice still could be protected. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962).

petence of the court. Instead, the citation must be compelled by the court's perception of an imminent and serious threat to its impartial resolution of the case.[202]

As a whole, the contempt cases illustrate the Court's steadfast development of the limits to first amendment rights. The expansive interpretation given the media's right to publish ostensibly eliminated the contempt power as a means to control press commentary on pending trials;[203] with such an exceedingly high burden, its use could be sanctioned only in cases of the most egregious abuse of the media's privilege. But these decisions did not recognize constitutional priorities that would govern all confrontations between the courts and the press; they were meant only to vindicate the court's interest in guarding the integrity of the judicial process, and to demonstrate the extent to which the Supreme Court would permit the threat of punishment to restrain the press.

The contempt cases give the press one line of protection from infringement on its first amendment rights when the information is already in its hands. Other than to underscore the critical importance of the media's newsgathering to modern society, the reasoning of this rule, however, is not as persuasive when an accused's right to a fair trial is likely to be jeopardized by extensive press coverage. These cases, then, did not lend themselves comfortably to the analysis of the fair trial/free press issue, which requires the accommodation of two competing constitutional interests.

The issue was first joined in *Stroble v. California,*[204] in which the Court rejected the defendant's due process argument and refused to set aside the defendant's conviction absent proof of actual prejudice, even though the Court agreed that the district attorney's

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202. 331 U.S. at 377-78.

203. As courts observed in some later cases, subsequent punishments such as contempt citations do not restrict improper or unfair media commentary effectively. Whether a publication or broadcast undermines the objectivity of the factfinder, or prejudices the accused in any other way, the damage is suffered by the parties and cannot be corrected by punishing the publisher. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976) ("But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed."). A similar result was accomplished in the federal courts through statutory construction of 18 U.S.C. § 401(1) (1976), limiting the availability of the contempt power to federal judges. *See, e.g.,* Nye v. United States, 247 U.S. 402 (1918). *See also* Portman, *supra* note 189, at 433.

204. 343 U.S. 181 (1952).

release of the defendant's pretrial confession to the media was improper.[205] Justice Frankfurter, however, argued in dissent that the media in effect had conducted a "trial by Newspaper,"[206] and that inflammatory and sensational journalism should not be made a part of the concept of the "American way of the conduct of a trial.' "[207] This conflict of opinion marked the beginning of an era in which, and the ground upon which, the free press/fair trial controversy was to proliferate.

Shortly after *Stroble,* the Court signaled a shift away from the conventional approach to free press issues to a methodology that drew almost exclusively upon due process considerations.[208] In *Marshall v. United States,*[209] the Court considered whether a new trial should be granted when seven jurors read newspaper articles containing information excluded from trial, in this instance evidence of the accused's prior convictions. The Supreme Court reversed the conviction even though the jurors denied any feeling of prejudice against the petitioner as a result of reading the articles. The Court concluded that, regardless whether the information reached the jurors by news accounts or the prosecution's evidence, the resulting prejudice is "almost certain to be as great . . . [and if by the former] may indeed be greater for it is then not tempered by protective procedures."[210] To some extent, the *Marshall* decision, like Frankfurter's dissent in *Stroble,* foreshadowed the Court's proclivity to carefully scrutinize in the name of due process media accounts of pending trials.

This inclination was more apparent in *Irvin v. Dowd,*[211] decided two years after *Marshall*'s prejudice per se approach was announced. In *Irvin,* the trial was preceded by extensive press cover-

205. *Id.* at 193-94. The defendant must prove unfairness as a "demonstrable reality." *Id.* at 195. The majority affirmed the state court's conviction of an accused murderer over the defendant's objections that as a matter of law the extensive, prejudicial pretrial media coverage precluded a fair trial. The defendant contended that given the nature of the news accounts and the regional saturation by the media, a fair trial was impossible. *Id.* at 193, 195. Because of the unusually vicious and gruesome character of the crime, the media often referred to the accused as "a 'werewolf,' 'a fiend,' [and] a 'sex-mad killer.' " *Id.* at 192. The Court also mentioned the defendant's failure to move for a change of venue. *Id.* at 193-94.

206. *Id.* at 201 (Frankfurter, J., dissenting).

207. *Id.* (quoting People v. Stroble, 36 Cal. 2d 615, 621, 226 P.2d 330, 334 (1951)).

208. *See* Portman, *supra* note 189, at 399-400.

209. 360 U.S. 310 (1959) (per curiam).

210. *Id.* at 312-13.

211. 366 U.S. 717 (1961).

age, prompted to a large extent by comments of the prosecutor and police officials. The defendant's claim of prejudice was based on their remarks that the defendant had confessed to six murders. Rather than relying on *Marshall,* in which the conviction was reversed even though the jurors disclaimed prejudice, the Court scrutinized the four week *voir dire* transcript and concluded that when before hearing any testimony eight of the twelve impaneled jurors thought the petitioner was guilty, it would be difficult to suppose that each could deliberate uninfluenced by his preconception of guilt.[212] With the defendant's life at stake, the Court did not find it unduly burdensome to vacate the defendant's conviction and death sentence and remand the case for a new trial in a forum in which the trial could be held "undisturbed by so huge a wave of public passion . . . ."[213]

The transition from the *Stroble* prejudice in fact standard to a variant of the *Marshall* per se test, however, was not complete until the decisions in *Rideau v. Louisiana*[214] and *Estes v. Texas,*[215] in which the Court applied the emerging standard to an even more suggestive medium, television. In *Rideau,* the Court resolved any doubts lingering after *Marshall* and *Irvin* about the direction and the substantive content of the evolving due process standards. The defendant argued that the repeated televising of his pretrial confession obtained while he was in police custody violated his constitutional right to a fair trial.[216] The Court agreed, noting that the televised admission of guilt "in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceed-

212. *Id.* at 727. *But see* Murphy v. Florida, 421 U.S. 794 (1975) (conviction affirmed on review of voir dire transcript over a dissent by Justice Brennan, who relied upon *Irvin*). Commenting on the degree of objectivity required, the Court stated,

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23 (citations omitted). In fact, in the early development of the jury, the jurors were selected on the basis of which area citizens knew the most about the controversy and parties, those knowing more being preferred over the less knowledgeable. II F. POLLACK & W. MAITLAND, THE HISTORY OF ENGLISH LAW 621-22 (2d ed. 1909).

213. *Id.* at 728.

214. 373 U.S. 723 (1963).

215. 381 U.S. 532 (1965).

216. 373 U.S. at 724-25.

ings in a community so pervasively exposed to such a spectacle could but a hollow formality."[217]

More revealing than the Court's holding was its approach. Without reverting to an extensive *Irvin* analysis of the *voir dire* transcript, the Supreme Court held that the denial of the defendant's request for a change of venue violated his constitutional right to a fair trial.[218] The Court concluded that the publicity resulted in an atmosphere inherently prejudicial to the defendant and necessitated a change of venue to a community where a jury could be impaneled untainted by the televised "interview."[219] *Rideau* confirms that, like the newspaper articles in *Marshall,* pretrial publicity can be so prejudicial that a court may presume a denial of due process without conducting an extensive inquiry into the jurors' ability to set aside their predispositions before considering the evidence.

In *Estes,* the Court examined the propriety of televising phases of the criminal process and reached a similar result, but in this case the accent was placed more clearly on the importance of the sixth amendment guarantee of a fair trial. The media was permitted to set up television cameras in the courtroom, and the entire proceeding was televised live. Without bothering to investigate the real impact on the jury, the Court presumed that the intrusion of television into the courtroom interfered with the truth-seeking function of the court.[220] When the volume of publicity is so great

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217. *Id.* at 726. Justice Stewart, speaking for the majority, stated:

> But we do not hesitate to hold, without pausing to examine a particularized transcript of *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."

Id. at 727.

218. *Id.* at 726-27.

219. *Id.* The dissenters argued that a nexus between the publication and the alleged prejudice must be established before a challenge to the fairness of the trial can be sustained. *Id.* at 729-30.

220. 381 U.S. at 544-45. The sharp response of the Court perhaps was prompted by its anticipation of the problems posed by acceding to live coverage of court proceedings. Notably, at the 30th Annual Conference of the Chief Justices held July 30-August 2, 1978, the conference supported overwhelmingly the televising of state courtroom proceedings. The text of the resolution is reproduced below in pertinent part:

> *RESOLUTION I*
>
> TELEVISION, RADIO, PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS
>
> WHEREAS, the Conference of Chief Justices appointed a sixteen member committee in February, 1978, to study the possible amendment of Canon 3-A(7) of the Code of Judicial Conduct to permit electronic and photographic

that it "inherently prevent[s] a sober search for the truth,"[221] the Court opined, then the conviction may be reversed without a strong factual showing of prejudice; it is enough that the Court could infer reasonably from the circumstances that the trial was unfair.[222]

The line of cases culminating in *Estes* underscores the Court's willingness to reverse a conviction without mulling over the defendant's guilt or innocence when the media's exercise of its first amendment right threatens the factfinder's impartial evaluation of the evidence. Reversal, however, was an incomplete remedy. Although these cases reflect a growing sensitivity to the accused's right to a fair trial, once the courts' use of contempt power was discouraged the defendant could do little more than preserve his objections to trial publicity for appellate review. Even apart from

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coverage of the courts of our nation under guidelines that would preserve the decorum and fairness of our judicial proceedings; and

. . . .

WHEREAS, the news media, both print and electronic, serve an important role in informing the public and it is in the best interest of the public to be fully and accurately informed of the operation of judicial systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the Canon 3-A(7) of the Code of Judicial Conduct be amended by adding the following paragraph and the commentary:

> Notwithstanding the provisions of this paragraph, the (name the supervising appellate court or body in the state or federal jurisdiction) may allow television, radio and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice. If television, radio, and photographic coverage is permitted, it should be supervised by the appropriate appellate body which supervises the courts within its jurisdiction. It is necessary that there be express conditions and guidelines adopted by the supervising court or body in order to provide a specific manner and means for this type of media coverage. These guidelines should include the type and location of equipment, the discretion left to the individual trial or appellate court, and the necessity, if any, to obtain the consent of the participants. Absent special circumstances for good cause shown, no consent appears necessary in appellate courts. Special circumstances may exist in all courts for the restriction of this type of coverage in cases such as rape, custody of children, trade secrets, or where such coverage would cause a substantial increase in the threat of harm to any participant in a case.

. . . .

Adopted at the 30th Annual Meeting held in Burlington, Vermont, August 2, 1978.

221. 381 U.S. at 551.

222. *Id.* at 542, 544; *see id.* at 564 (Warren, C.J. concurring).

the waste occasioned by this policy, reversal was reserved generally for the more egregious cases of "trial by newspaper."

What was needed then was some mechanism for the trial court to curb potentially prejudicial publicity before it could taint the proceeding. This came in 1966 in *Sheppard v. Maxwell.*[223] The courts' overriding responsibility to ensure the fairness of a criminal proceeding had been reiterated on numerous occasions,[224] but without a more unequivocal approval from the Supreme Court, courts understandably were reluctant to take positive action, especially since the Supreme Court earlier had clearly discouraged the then prevalent use of the contempt power. In *Sheppard,* however, the Court eliminated any doubt that the courts should take precautions against even the possibility of prejudicial news coverage.

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts *must take* strong measures to ensure that the balance is never weighed against the accused. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[225]

When pretrial publicity creates a "reasonable likelihood" that the defendant's right to a fair trial will be affected, the Court continued, the trial court is duty-bound to prevent prejudice at its incep-

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223. 384 U.S. 333 (1966).

224. As was stated several decades ago in *In re* Murchison, 349 U.S. 133 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *possibility* of unfairness . . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice.

Id. at 136 (citation omitted) (emphasis supplied).

In an even earlier case, Tumey v. Ohio, 273 U.S. 510 (1927), the Court stated:

> [B]ut the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532 (emphasis supplied).

225. 384 U.S. at 362-63 (emphasis supplied).

tion.[226] Responding to the trial judge's plaintive admission that he lacked the authority to control the media, the Court identified several measures well within the courts' power, including such conventional remedies as granting a continuance, changing venue, or sequestering the jury; but more important the Court sanctioned direct restraints on trial participants, state officials, and newsmen.[227] With *Sheppard,* then, the focus shifted away from the appellate courts' power to ensure the integrity of the criminal process to the trial court's duty to take positive action against the threat of biased reporting.

While in *Sheppard* the Court spoke in broad terms of the obligation and power of the trial judge to regulate the content and volume of pretrial publicity, the constitutionality of a prior restraint upon press comment on a pending trial was not passed upon until 1976 in *Nebraska Press Association v. Stuart.*[228] Even though it distinguished *Sheppard,* and although it ultimately held that the restraining order was invalid, the Court did not qualify the *Sheppard* mandate; instead, it reemphasized the superiority of early precautions over appellate reversal[229] and expressly denied, in dicta, that prior restraints could never be employed constitutionally.[230] The holding was simply that in this case no need for the order was shown. Before a restraining order may issue, the Court commented, the trial court must be convinced that such an extraordinary remedy is necessary, that no less drastic alternative would accomplish the same goal, and that the order will mitigate prejudicial influences.[231] Consequently, only on rare occasions could a prior re-

226. *Id.*

227. *Id.* The Court mentioned the following restrictions that, pursuant to the judge's power over the courtroom and its environs, could be imposed to preserve the impartiality of the factfinder: limit the number of reporters allowed into the courtroom once the judge decides that their presence may disrupt the trial; regulate the conduct and movement of the newsmen in the courtroom; insulate the witnesses from the media's efforts to gather information; control the release of information by witnesses, law enforcement officers, and counsel; proscribe extrajudicial statements by trial participants or court personnel; request city and county officials to promulgate regulations governing the free dissemination by their employees of information pertaining to pending trials; and warn the media about publishing material inadmissible in the proceeding. *Id.* at 358-62.

228. 427 U.S. 539 (1976).

229. *Id.* at 555.

230. *Id.* at 569-70. But there was ominous language to the effect that a prior restraint could be justified so rarely that it was not a real alternative.

231. *Id.* at 562. For a slightly different standard, see *id.* at 571 (Powell, J., concurring).

straint be justified; if reversal were saved for the most egregious cases, then the use of restraining orders would enjoy no greater favor. This standard was bottomed on the long-standing disfavor of prior restraints emphasized by the Court in *Nebraska Press.*[232] The principal thrust of the decision, then, was to emphasize the last-resort status of prior restraints; when no other device would curtail prejudicial publicity, the trial court could restrict press coverage of the trial, but only to the limited extent necessary to preserve the fairness of the proceeding.[233]

The reach of this due process/balancing license to restrict media access to judicial proceedings is illustrated by *Gannett Company, Inc. v. DePasquale,*[234] in which the Supreme Court agreed with the New York state courts that a pretrial hearing may be closed to the public to protect the accused's right to a fair trial.[235] In reaching this conclusion, the Court rejected the argument that the constitutional right to a public trial was more than a guarantee enforceable by the accused to prevent secret criminals trials.[236] This decision

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232. *Id.* at 559. "Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." *Id.* at 561.

233. The Court observed:

> Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied . . . . In this sense, the record now before us is illustrative rather than exceptional.

Id. at 569.

234. 47 U.S.L.W. 4902 (U.S. July 2, 1979) (No. 77-1301).

235. *Id.* at 4909. While the Court made every effort to define the issue as narrowly as possible, *id.* at 4903, 4909, this decision is almost certain to be interpreted by lower courts as carte blanche authority to close other court proceedings.

In fact, the Supreme Court has granted certiorari to review the decision of the Virginia Supreme Court to exclude press from a capital murder case. Richmond Newspapers, Inc. v. Virginia, 48 U.S.L.W. 3235 (U.S. Oct. 9, 1979) (No. 79-192).

236. *Id.* at 4906-07; *cf.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). The Supreme Court affirmed the district court's refusal to permit a private company to duplicate the White House tapes acquired by subpoena *duces tecum* in *In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C.), *aff'd sub nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), for the purpose of broadcasting and sale to the public. In reversing the Court of Appeals for the District of Columbia, which would have permitted the release of the tapes, Justice Powell commented for the majority:

> The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits,

further refines the *Sheppard*esque remedies available when the trial court suspects that pretrial publicity may jeopardize the fairness of a pending criminal trial. More important, though, it suggests that the burden of justifying drastic measures, thought to be so difficult after *Nebraska Press*, can rest easily upon an evenly balanced evaluation of the public interest in open access and the accused's right to fair trial.[237]

The Fourth Circuit: Gagging News Sources

Against this checkered background, in May 1977, in *Sigma Delta Chi v. Martin*,[238] the Fourth Circuit reviewed an order restricting trial participants from commenting outside the courtroom on the pending criminal trial. The order was issued by Judge Martin of the United States District Court for the District of South Carolina to eliminate at the outset any possibility of an outbreak of prejudicial publicity prior to or during the criminal trial of a state Senator, J. Ralph Gasque.[239] Reviewing the extent of public interest already aroused, anticipating even more inflammatory and sensational press coverage, and assessing the likelihood of carrying the constitutional burden for justifying a prior restraint on newsmen,[240] the judge opted to restrain only trial participants from divulging outside the courtroom prejudicial information not of public record.[241]

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what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public."

435 U.S. at 609 (quoting Estes v. Texas, 381 U.S. 532, 589 (1965)) (citations omitted).

237. 48 U.S.L.W. at 4921-23 (Blackmun, J., dissenting). Perhaps this is due solely to the escape from the stigma of prior restraints, but the impact of the two usually will be the same.

238. 556 F.2d 706 (4th Cir. 1977).

239. 431 F. Supp. 1182 (D.S.C. 1977).

240. *See* text accompanying note 231 *supra*.

241. For reasons appearing to the Court it is Ordered that the above captioned case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further ordered that,

(1) Extra judicial statements by trial participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving

The challenge to the order was mounted by the media who insisted that by restraining news sources the order abridged their first amendment right to publish freely.[242] The court, however, characterized its order as a restraint on trial participants, which only indirectly, if at all, affected the press. Therefore, the court noted, the applicable standard was not the existence of a "clear and present danger" but a "reasonable likelihood" that news coverage would prejudice the accused's right to a fair trial.[243] Although the order's effect on the media's ability to gather news would likely

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the courtroom and the courthouse during recesses in the trial.

(3) The names and addresses of prospective jurors are not to be released except on Order of the Court, and no photographs shall be taken and no sketch made of any juror within the environs of the Court.

(4) All witnesses are prohibited from news interviews during the trial period.

(5) The United States Marshal at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designed for their use.

(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen.

Id. at 1184-85.

Notably, section (2) of the trial judge's order comported fully with the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.5(c) (1968):

> (c) Cautioning parties, witnesses, jurors, and judicial employees; insulating witnesses.
>
> Whenever appropriate in light of the issues in the case or the notoriety of the case, the court shall instruct parties, witnesses, jurors, and employees and officers of the court not to make extrajudicial statements, relating to the case or the issues in the case, for dissemination by any means of public communication during the course of the trial. The court may also order sequestration of witnesses, prior to their appearance, when it appears likely that in the absence of sequestration they will be exposed to extrajudicial reports that may influence their testimony.

The comment accompanying this section states:

> In subsection (c), the provision that parties and witnesses may be instructed by the court not to make extrajudicial public statements during the course of the trial has been extended to cover jurors and officers and employees of the court. This extension is consistent with the guidelines laid down by the Supreme Court in the *Sheppard* case.

242. For a discussion of the media's ability to challenge restrictive orders, see Rendleman, *Free Press—Fair Trial: Review of Silence Orders,* 52 N.C. L. REV. 127 (1973); Note, *Ungagging the Press: Expedited Relief from Prior Restraints on News Coverage of Criminal Proceedings,* 65 GEO. L.J. 81 (1976).

243. 431 F. Supp. at 1188.

be the same, the court avoided the odium of prior restraint by exercising its plenary power over court personnel and trial participants.

On appeal, the Fourth Circuit affirmed the district court's reasoning but modified the order slightly to minimize its impact on the media's privilege to gather and publish informtion about this important trial. The court of appeals redefined the "environs" of the district court to include only the confines of the courthouse, not the adjacent sidewalks.[244] This modest editing, however, was not intended to impair the thrust of the district court's decision that the court may close off some important news sources to the press upon a showing of less than a "clear and present danger." The Fourth Circuit tacitly confirmed the trial court's interpretation of *Sheppard,* while acknowledging that the publication of information obtained by the press during public proceedings could not be prohibited except in rare circumstances and that the attempt to assure the accused a fair trial through a prior restraint order only rarely could satisfy the tripartite standard of *Nebraska Press.*[245]

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244. 556 F.2d at 708.

245. *Id.* This distinction between restraints upon trial participants and spectators has not received unwavering support. The Tenth Circuit Court of Appeals and the California Court of Appeals for the Second District concur with the Fourth Circuit's approach. *E.g.,* United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969) (the restraint order directed against trial participants was held valid on a "reasonable likelihood" of prejudice standard); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (the "reasonable likelihood" of prejudice test was the proper standard for assessing the constitutionality of an order directed against criminal trial participants).

On the other hand, the Fifth Circuit Court of Appeals and the California Court of Appeals for the Fourth District agree that the "clear and present danger" test is the proper measure for analyzing orders directed at nonparticipants. *E.g.,* United States v. C.B.S., Inc., 497 F.2d 102, 104 (5th Cir. 1974) (the appeals court reviewed an order directed against newspersons prohibiting the sketches of courtroom scenes and held the order unconstitutional upon applying an "imminent . . . threat to the administration of justice" standard); Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973) (the court of appeals applied the "clear and present danger" standard to review the constitutionality of a court order directed at newspersons prohibiting the publication of the names of prosecution witnesses and held the order unconstitutional). The Sixth Circuit Court of Appeals apparently rejected the less burdensome rule and applied the "clear and present danger" standard to invalidate an order restraining *trial* participants from communicating with the press. C.B.S., Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

Interestingly, the Seventh Circuit Court of Appeals has analyzed cases involving restrictive orders by applying both standards of review. *E.g.,* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (an order directed against trial participants held unconstitutional when analyzed by *either* the "clear and present danger" rule or the "reasonable likelihood" of prejudice test).

Restraints: A Procedural Hierarchy

The court's reasoning in *Sigma Delta Chi* reflects the dichotomous methodology created by distinguishing between the targets of a restraining order rather than concentrating only on the order's impact on the interests competing for the court's recognition. The ranking of interests, which the Supreme Court had avoided in emphasizing a due process balancing test, has occurred nonetheless on a procedural level by imposing different burdens of proof. Whether a restraining order will issue is largely dependent upon the label given the issue.

At one extreme are the restraints imposed upon trial participants. Because the Fourth Circuit has rejected the argument that the right to gather news is a corollary to the free press guarantee, an order directed solely at trial participants does not implicate first amendment concerns; therefore, the presumption against the validity of prior restraints does not attach. In addition, the applicable "reasonable likelihood of prejudice" standard contains a built-in bias favoring the accused's interests. By encouraging the court to speculate on the probable volume and prejudicial content of impending news coverage of a criminal trial, the standard counsels against restrictions only when news publications clearly would not affect the accused's right to an impartial jury.

This category of cases actually avoids the direct confrontation of first and sixth amendment rights, for the authority to restrain trial participants may spring from the court's conventional power over court personnel and the courtroom.[246] The juxtaposition of free press and fair trial interests occurs when the restraint is imposed upon the media, either to deny it access to information or to forbid publication of information already obtained. At this point the long-standing disfavor for restrictions on the press is brought to bear. A "clear and present danger" to the fairness of the trial must be shown before the media's first amendment right is counterbalanced and press publications may be restrained. The presumption against prior restraints, then, is translated into a preference for free press concerns in the trade-off between two constitutional claims.

246. For a discusson of the limited role the sixth amendment plays in gag order controversies, see Comment, *Gagging the Press in Criminal Trials,* 10 HARV. C.R.-C.L. L. REV. 608, 612 (1975).

IV. The Right to Effective Counsel

Since the 1938 Supreme Court decision, *Johnson v. Zerbst,*[247] the criminal defendant has been guaranteed legal counsel in federal court, but the real turning point in the development of the constitutional right to representation,[248] which many now take for granted, did not occur until twenty-five years later in *Gideon v. Wainwright.*[249] In *Gideon,* this right to an attorney was deemed an indispensable prerequisite to constitutional due process and therefore binding upon the states as well.[250] Well before this open acknowledgement of the universal right to counsel, the Court began to develop standards to pass upon the quality of legal representation as a necessary ingredient of the sixth amendment right. Therefore, even in the early stages of the development of the right to counsel, the Court reversed criminal convictions when the effectiveness of counsel was undermined. The requirement of effective advocacy meant that vindication of the public interest in stability, continuity, and predictability was not the only end of the criminal justice system; convictions were to be had, but only had fairly.

With the assurance of representation given in *Gideon,* though, the courts' focus shifted to the quality of this representation; the need for some standard of review became of greater concern. The Supreme Court largely relegated the task of articulating meaningful standards to the lower courts. As a result of this delegation, a patchwork of tests emerged. Although many of the differences were semantical, at least two standards were commonly used, the "farce or mockery" standard or the "reasonably competent" test. In a recent decision, the Fourth Circuit has abandoned the more permissive, traditional approach to demand higher levels of performance from legal counsel in criminal cases.[251] The adoption of the reasonably competent standard denotes a significant transition in judicial treatment of post-conviction claims of ineffective assistance of counsel. But more important to our system of criminal justice, it

247. 304 U.S. 548 (1938).

248. The sixth amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

249. 372 U.S. 335 (1963).

250. *Id.* at 344-45.

251. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978).

represents a vital step towards improving the quality of representation.

"The Assistance of Counsel for His Defense"

In *Zerbst*, and then later in *Gideon*, the Supreme Court formally acknowledged what must have been evident in our adversarial approach to criminal justice since its inception, that legal representation was fundamental to the truth-seeking process and that, therefore, every defendant must have at least the opportunity to retain counsel.[252] Those who desire but cannot afford an attorney must be furnished one. But even before the promise of legal counsel was confirmed, the accused's expectation of effective representation was enforced through the due process clause. In 1932, in *Powell v. Alabama*,[253] the Supreme Court reversed a state rape conviction of three black defendants denied, in the Court's terms, "an effective appointment of counsel." While an attorney was appointed to represent the defendants, the appointment was not made until the morning of the trial. The Court concluded that in all capital cases the poor and illiterate must be guaranteed the same access to legal counsel as that enjoyed by the more affluent and, equally important, that counsel must be furnished soon enough before the trial begins to permit preparation of a defense.[254] In effect, then, the

252. This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under the Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."

Johnson v. Zerbst, 304 U.S. at 462 (footnote omitted).

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Gideon, 372 U.S. at 344.

253. 287 U.S. 45 (1932).

254. *Id.* at 71. The Court stated:

> [W]e are of opinion [sic] that . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment. . . . [I]n a capital case, where the defendant is unable to

Court protected against the constructive denial of counsel well before all defendants could be assured legal representation.

In the decisions following immediately after *Powell*, it became apparent that the mere appointment of counsel did not satisfy all the prerequisites of due process; the appointment must come at a time and in a manner conducive to preparation for trial.[255] At the very least, the attorney must have an opportunity to consult with the defendant in advance of the start of the trial so that the defendant does not unwittingly waive defenses. At the root of this development lies two goals: to protect the integrity of a trial's outcome; and to encourage attorneys to be diligent guardians of their clients' rights. But the Court had yet to devise criteria of effectiveness encompassing the wide variety of situations from which claims of ineffective assistance of counsel might arise. Even though the appointment was timely, the representation may fall below minimum constitutional standards for any number of reasons.[256]

The crystallization of this rule as an integral part of constitutional fairness exposed a curious distinction between state and federal requirements, due in large measure to the Supreme Court's reluctance to upset the delicate balance between the dual systems of criminal justice. *Zerbst* confirmed that indigent criminal defendants possess a constitutional right to the appointment of counsel in most federal trials. However, by the 1940 decision of *Avery v. Alabama,* no federal court had read an effectiveness standard into the sixth amendment right to counsel. On the other hand, on the authority of *Powell* and *Avery,* state criminal defendants could expect a modicum of effectiveness, but could demand that counsel be appointed only in trials for capital offenses. The anomaly then existing was that federal defendants had a sixth amendment right to

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> employ counsel, and is incapable adequately of making his own defense . . ., it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Id.

255. *E.g.*, Anders v. California, 386 U.S. 738 (1967); White v. Ragen, 324 U.S. 760, 764 (1945); Avery v. Alabama, 308 U.S. 444, 446 (1940).

256. Ineffective counsel may be attributed to a number of sources. A judge may appoint an attorney so late that the defendant waives some defenses, *e.g.*, Reese v. Georgia, 350 U.S. 85 (1955), or he may appoint one attorney to represent several defendants in one trial, *e.g.*, Glasser v. United States, 315 U.S. 70 (1942). This Note is concerned more with improving the quality of counsel by encouraging legal craftsmanship.

counsel but no confirmed right to effective representation, while state defendants did possess a due process right to effective counsel but were guaranteed representation only in those limited cases involving serious state crimes.

In 1942, this shortcoming in the federal system was alleviated when in *Glasser v. United States,*[257] the Court held that federal defendants were entitled to the same effective representation accorded their state counterparts. The Court, however, while insisting that the defendant had a right to effective counsel, had yet to identify the level at which complaints of inadequate representation became colorable claims of constitutional import; the Court's analysis stopped once it determined that the accused had been denied effective counsel. Eventually filling this void was a hodgepodge of standards devised by lower federal courts. The earliest statement is attributed to the District of Columbia Court of Appeals.[258] In *Diggs v. Welch,*[259] the court concluded that "it must be shown that the proceedings were a farce and a mockery of justice"[260] or that counsel was "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it."[261] Therefore, under this standard it could not be said that the defendant was denied effective counsel unless the attorney's mistakes were so egregious that the trial judge could be admonished for not coming to the aid of the defendant and that due to his inattention the whole proceeding was tainted. An otherwise valid conviction would not be reversed unless only a pretense of representation was provided.

This "farce or mockery" standard identified a denial of effective representation with exactness, but a number of courts felt that the strict language of this standard did not express their perception of the legal and moral obligations of an attorney to his client and did

257. 315 U.S. 60 (1942).

258. The District of Columbia remains a leader in discouraging post-conviction claims of ineffective assistance of counsel. Recently in United States v. Decoster, ___ F.2d ___ (D.C. Cir. May 14, 1979) (en banc) (No. 72-1283), the court held in a plurality opinion that a defendant must show prejudice in fact to succeed on his claim of inadequate representation.

259. 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945).

260. *Id.* at 669 (footnote omitted). The court also observed that the sixth amendment guarantees only that the accused will be appointed counsel, "not . . . that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment." *Id.* at 668. Instead, the defendant must rely upon the due process right to a fair trial when challenging the competency of his counsel. *Id.* at 669.

261. *Id.* at 670.

not permit the kind of oversight thought necessary to ensure fair representation. These courts then resolved to sharpen the definition of the attorney's constitutional responsibility to the defendant.[262] To succeed in their endeavor, it was necessary for the courts to overcome the inertia of conventional practices. Traditionally, the courts had refused to intercede between attorney and client for fear that they would undercut this sensitive relationship. A liberal definition of effectiveness, besides opening up the process to countless accusations of misconduct or incompetence, might have a stultifying effect on representation. An attorney could end up treating his client as a potential adversary, and the room in which his professional opinion and experience could operate could then be severely restricted. To forestall complaints, an attorney would be forced to make every possible objection, thus prolonging the trial unnecessarily, or, worse still, to refuse appointment.[263] Furthermore, frivolous appeals and petitions for habeas relief could clog judicial channels. With a lenient standard, the concomitant burden on the courts may be too great. The search for a more practicable standard, then, was to begin and end with a balancing of the competing interests.

Rejected almost immediately were standards linked to the success of the outcome[264] and those encouraging the court to use hindsight or to second-guess counsel's trial stategy.[265] The standard ulti-

262. *See* Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959); Black v. United States, 269 F.2d 38 (9th Cir. 1959), *cert. denied,* 361 U.S. 938 (1960); Newsom v. Smyth, 261 F.2d 452 (4th Cir. 1958), *cert. denied,* 359 U.S. 969 (1959); Floyd v. United States, 260 F.2d 910 (5th Cir. 1958), *cert. denied,* 359 U.S. 947 (1959); United States v. Miller, 254 F.2d 523 (2d Cir.), *cert. denied,* 358 U.S. 868 (1958); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958); United States v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied,* 346 U.S. 865 (1953); United States v. Ragen, 166 F.2d 976 (7th Cir. 1948); Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941), *cert. denied,* 314 U.S. 617 (1941).

263. *See generally* Tague, *Federal Habeas Corpus and Ineffective Representaton of Counsel: The Supreme Court Has Work To Do,* 31 STAN. L. REV. 1, 56-67 (1978).

264. *See, e.g.,* Crimson v. United States, 510 F.2d 356 (8th Cir. 1975); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971); Tolhurst v. United States, 453 F.2d 432 (10th Cir. 1971); United States v. Baca, 451 F.2d 1112 (10th Cir. 1971), *cert. denied,* 405 U.S. 1072 (1972); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970); Duran v. United States, 413 F.2d 596 (9th Cir.), *cert. denied,* 396 U.S. 917 (1969).

265. *See, e.g.,* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. Williams, 455 F.2d 361 (9th Cir.), *cert. denied,* 409 U.S. 857 (1972); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971). *See also* Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974); Walker v. Henderson, 492 F.2d 1311 (2d Cir.), *cert. denied,* 417 U.S. 972 (1974); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Mengarelli v. United States Marshal, 476 F.2d 617

mately selected stressed the attorney's predominant role in ensuring the accused a fair trial. Despite some differences in the phraseology used by courts across the country, the new standard defined effective assistance in terms of what the average attorney might reasonably be expected to do.[266]

This choice is attributable, at least in part, to the language used by the Supreme Court in *McMann v. Richardson*.[267] Without mentioning the "farce" standard currently in use in some courts, or even addressing the debate over the demarcation between constitutionally defective representation and tolerable errors in judgment or strategy, the Court declared that a defendant is entitled to "advice . . . within the range of competence demanded of attorneys in criminal cases."[268] This offhand observation, intended more as a statement of policy, was understood by the lower courts as an au-

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(9th Cir. 1973); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Davis v. Slayton, 353 F. Supp. 571 (W.D. Va. 1973).

266. The following four circuits have adopted with some variation a "reasonable competency" standard: United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977) ("the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances") (ineffective counsel when failed to object to evidence seized by police intrusion into private home); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (expressly rejecting farce or mockery standard for "reasonably effective assistance") (defective counsel when did not explain alternative to defendant such that entered involuntary guilty plea); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) ("counsel reasonably likely to render and rendering reasonably effective assistance") (failure to explore certain defenses and present them at trial constituted ineffective counsel); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("reasonably competent assistance of an attorney acting as his diligent conscientious advocate") (remanded for reconsideration by the district court).

The First, Second, and Tenth Circuits, though, remain faithful to the traditional "force or mockery" standard. Gillihan v. Rodriquez, 551 F.2d 1182, 1187 (10th Cir. 1977), *cert. denied*, 434 U.S. 845 (1977) ("trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation") (record refuted the defendant's claim of defective counsel); United States v. Madrid Ramirez, 535 F.2d 125, 129 (1st Cir. 1976) ("representation such as to make a mockery, a sham or a farce of the trial") (rejected defendant's claim that counsel was ineffective but intimating that the more lenient "reasonably competent assistance of counsel" was under consideration; also noted that under either standard, no violation of defendant's rights); Rickenbacker v. Warden, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977) ("purported representaton by counsel was such as to make the trial a farce and a mockery of justice") (also concluding that neither standard violated).

267. 397 U.S. 759 (1970).

268. *Id.* at 771. Addressing the legal issue at hand, the Court stated, "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770 (footnote omitted).

thoritative interpretation of constitutional principles.[269] But the real inspiration behind the revision was the courts' growing concern over the quality of representation afforded defendants who relied upon court appointments for legal counsel.[270] Indifferent or unquali-

269. *E.g.*, Marzullo v. Maryland, 561 F.2d 540, 542 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) ("We, too, are persuaded that *McMann* furnishes the proper standard for determining the effectiveness of counsel."); *see* the cases listed *id.* at 542.

But there is some reason to doubt that the Court intended to create a standard to govern all claims of ineffective assistance of counsel. After indicating that the attorney's performance must fall within the presumably broad "range of competence," the Court emphasized that "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.* at 771. Judges have always exercised supervisory power over the officers of the court. If a judge demands a higher level of performance in his courtroom, then the attorneys have little basis to object, except to the extent that the judge's actions are appealable or open to collateral attack.

Moreover, at the conclusion of the decision, the Court noted that a defendant must be able to "allege and prove serious derelictions on the part of counsel," a statement more reminiscent of the strict "farce or mockery" standard.

270. Some courts, for the purpose of granting or denying post-conviction relief, distinguish between state-appointed counsel and that privately retained. *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973). Under the alternative theories that counsel acts as the defendant's agent or that private retainder absolves the state from any duty to insure the adequacy of counsel, the defendant is held to have waived any objections to his counsel's competency. *See, e.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953) (lack of skill imputed to client rather than to state). But the defendant must know that he can object to counsel during the course of the trial. *See, e.g.*, Goodson v. Peyton, 351 F.2d 905, 907 (4th Cir. 1965); Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945). Even then, however, if counsel's conduct is so improper that in effect no representation was afforded, then the accused has been denied a fair trial. Tompsett v. Ohio, *supra.*

The District Court of the Western District of Virginia in Davis v. Slayton, 353 F. Supp. 571, 574 (W.D. Va. 1973), held that the petitioner could not raise an ineffective assistance of counsel issue in a habeas corpus proceeding when the defense attorney had been retained privately. In accord, the Third Circuit Court of Appeals in United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953) (en banc), *cert. denied*, 346 U.S. 865 (1953), stated:

> When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegience is to his client whose interests are ordinarily diametrically opposed to those of the state. It necessarily follows that any lack of skill or incompetency of counsel must in these circumstances be imputed to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and as such so recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel.

Id. at 426. *See also* Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); Franklin v. Conway, 391 F. Supp. 1233 (W.D. Va. 1975). This "agency theory" is

fied counsel could blot out the essence of a substantial defense. These new standards, despite the obvious differences in phraseology,[271] reflect a change in judicial perception of an attorney's legal and moral obligations to his client.

The Quality of Representation: Marzullo v. Maryland

In *Marzullo v. Maryland,*[272] the Court of Appeals for the Fourth Circuit expressly adopted the "range of competence" standard, thus ending the circuit's ambivalence towards claims of ineffective assistance of counsel.[273] Up until this decision, the court had veri-

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criticized in Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 NW. U.L. REV. 289, 297, 298-300 (1964).

In Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), *cert. denied,* 422 U.S. 1011 (1975), the Fifth Circuit Court of Appeals relied upon the "state action theory" and held that in retained defense counsel cases, the sixth amendment standard of effectiveness demanded a finding of "actual" or "constructive" state involvement before the quality of the representation issue could be raised. *Id.* at 1337. *But see* Porter v. United States, 298 F.2d 461 (5th Cir. 1962) ("The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court appointed."). *See also* Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975). The "state action" analysis is criticized in Note, *Effective Assistance of Counsel for the Indigent Defendant,* 78 HARV. L. REV. 1434, 1437-38 (1965) (asserting that the question is not whether the state has denied the effective assistance of counsel but whether the defendant was denied a fair trial by inadequate representation).

Many courts have abandoned these distinctions. *E.g.,* Crimson v. United States, 510 F.2d 356, 357 n.2 (8th Cir. 1975) (assuming the standard to be the same). *But see* Davis v. Blomor, 344 F.2d 84, 86-89 (8th Cir. 1965) (federal review of state court conviction by habeas corpus). *See also* United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975); Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974) (heavier burden on collateral attack than on direct appeal); United States v. Marshall, 488 F.2d 1169, 1192-93 (9th Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir, 1970), *cert. denied,* 401 U.S. 1010 (1971).

In some jurisdictions, the courts distinguish between claims predicated upon a fourteenth amendment denial of fundamental fairness and a sixth amendment claim of inadequate counsel. *E.g.,* Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), *cert. denied,* 422 U.S. 1011 (1975) (when fourteenth amendment fairness is implicated, it is immaterial whether retained or appointed; when sixth amendment, state must have actual knowledge of deficient counsel and not move to correct it).

271. *See* note 262 *supra.* The Third and Seventh Circuits have developed their own standards. United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975) ("legal assistance which meets a minimum standard of professional representation") (denied effective counsel when attorney failed to seek delay in trial to investigate the conduct of the co-defendant); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("the exercise of customary skill and knowledge which normally prevails at the time and place") (remanded for evidentiary hearing on adequacy of legal service).

272. 561 F.2d 540 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978).

273. *Id.* at 770-71; *see* note 266 *supra* for decisions in other circuits adopting the same or a similar standard.

fied in one line of cases its allegiance to the "farce or mockery" standard, while in several isolated cases the court countenanced a more objective standard that seemingly demanded a higher level of performance from defense counsel. In 1965, in *Root v Cunningham,*[274] the court observed that "one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial."[275] Several years later, in *Bennett v. Maryland,*[276] the court held that defense counsel's open-court admission of his client's criminal record, although unwise, was not so flagrant an error as to make a farce of the non-jury trial.[277] Then, in *Miller v. Cox,*[278] after the Supreme Court had enunciated the "range of competence" standard in *McMann,* the Fourth Circuit concluded that under the "farce" standard the transcript did not substantiate the defendant's claim that he was denied effective assistance of counsel, even though the petitioner was one of several defendants represented by the same attorney at a single trial in which the confession of the co-defendant was introduced into evidence.[279]

Interspersed among these cases, however, were two decisions in which panels of the court endeavored to define a more practicable standard in the hope that the problems associated with describing the minimum conduct expected of an attorney would be resolved. In *Braxton v. Peyton,*[280] the court stated that "the assigned lawyer should confer with his client without undue delay and as often as necessary, advise him of his rights, ascertain what defense he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial."[281] Several years later in *Coles v. Peyton,*[282] the court experimented even further with the idea of devising explicit guidelines for defense counsel. Thinking that a more objective standard would clarify the constitutional principles, the court suggested the following duties:

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274. 344 F.2d 1 (4th Cir. 1965).

275. *Id.* at 3 (citing Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959)).

276. 425 F.2d 181 (4th Cir.), *cert. denied,* 400 U.S. 881 (1970).

277. *Id.* at 182.

278. 454 F.2d 700 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972).

279. *Id.* at 701-02.

280. 365 F.2d 563 (4th Cir. 1966).

281. *Id.* at 564 (citations omitted). *See also* AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS.

282. 389 F.2d 224 (4th Cir.), *cert. denied,* 395 U.S. 849 (1968).

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel.[283]

Applying this checklist, the court held that the attorney's failure to explain to the defendant the elements of the crime with which he was charged, to investigate alternative defenses, and to question some of the witnesses constituted ineffective assistance of counsel.[284] The panels in *Braxton* and *Coles,* then, focused upon counsel's performance of legal chores thought to be fundamental to adequate representation.

The schism in the court provoked by differing perceptions of this constitutional right was finally repaired in *Marzullo v. Maryland,*[285] in which the Fourth Circuit followed the lead of a majority of the other circuits and adopted a "reasonable competence" standard. The repudiation of the "farce or mockery" standard was complete; the court expressly disavowed *Cunningham* and incorporated into its new test the reasoning and the guidelines offered in *Coles.*[286] The critical question surviving *Marzullo* is whether the adoption of the "reasonable competence" standard will necessarily improve the defendant's chances of prevailing on an "ineffective assistance" chal-

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283. *Id.* at 226. *See also* ABA STANDARDS RELATING TO THE DEFENSE FUNCTION (App. Draft 1971).

284. *Id.* at 226-27. In *Coles,* the court also stated that by showing a lack of prejudice the prosecution could rebut the petitioner's evidence of ineffective representation. *Id.* at 226. *But see* United States v. DeCoster, __ F.2d __ (D.C. Cir. May 14, 1979) (en banc) (No. 72-1283) (defendant must show that he was prejudiced by ineffective assistance of counsel).

285. 561 F.2d 540 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978).

286. *Id.* at 543. The court also cited the standard for professional competence found in RESTATEMENT (SECOND) OF TORTS § 299A (1965):

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

561 F.2d at 544 n.9.

lenge to his conviction. The mere fact that the court thought it necessary in light of recent developments to revise the standard strongly suggests that the change at least was perceived as qualitative and substantive, but even under the reproved "farce" standard the court was not apt to overlook a seriously deficient defense by counsel.[287]

The court's approach to this problem in *Marzullo* indicates, however, that the adoption of the new standard has precipitated changes in the nature and scope of the inquiry and at least presumptively has lessened the burden of proof on the defendant. Marzullo and an accomplice were charged in separate indictments with raping two women. Well before the trial began, the defendant complained that he did not believe his appointed attorney was going to present anything other than a perfunctory defense, but the trial judge denied his request for substitute counsel. Marzullo was convicted of assault with intent to rape and of perverted practices,

287. "Stringent as the 'mockery of justice' standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations . . . ." McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974). Justices White and Rehnquist dissented from the denial of certiorari in *Marzullo*, noting that "the Federal Courts of Appeals are in disarray." 435 U.S. at 1011. The Justices also observed that the distinctions between the standards translated into "disparties in the minimum quality of representation required to be provided to indigent defendants." *Id.* at 1012.

The "farce or mockery" standard never has been construed so as to allow truly defective assistance of counsel. *E.g.*, Mosher v. LaVallee, 491 F.2d 1346, 1348 (2d Cir. 1974) (false statement by defense counsel that judge would give minimum sentence if pleaded guilty); Lunce v. Overlade, 244 F.2d 108, 110-11 (7th Cir. 1957) (denied adequate counsel when Ohio attorney unfamiliar with Indiana practice); Peek v. United States, 321 F.2d 934, 944 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964) (conflict of interest). But nor does the "mockery of justice" standard condemn mere errors or mistakes in judgment that do not prejudice the defendant substantially. *E.g.*, Braxton v. Peyton, 365 F.2d 563, 565 (4th Cir.), *cert. denied*, 385 U.S. 939 (1966) (three-week delay between appointment and first consultation with client does not establish inadequacy); United States v. Hall, 310 F.2d 601, 605 (4th Cir. 1962) (mere mistakes or errors insufficient to violate constitutional right); Palakiko v. Harper, 209 F.2d 75, 83 (9th Cir. 1953), *cert. denied*, 347 U.S. 956 (1954) (mere trial strategy); United States *ex. rel.* Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953) (per curiam) (mere questions of judgment).

Similar results have been obtained under the "reasonable or normal competence" standard. *E.g.*, Loftis v. Estelle, 515 F.2d 872, 875-76 (5th Cir. 1975) (mere brevity of consultation not enough); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (but lack of preparation when appointed day of trial did deny accused effective representation); United States v. Junne, 458 F.2d 1156, 1157-58 (3d Cir. 1972) (under circumstances, appointment two days before the trial was not a violation of the defendant's rights).

Some courts have determined that under the circumstances both standards were violated by counsel's conduct. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207, 214-15 (8th Cir. 1974) (mere interview with client facing first degree murder charge was insufficient under both).

despite testimony that the prosecuting witness, an eighteen-year-old married woman, consented to sexual relations.[288] Marzullo brought this action, alleging that he had been denied effective assistance of counsel. Relying on the farce or mockery standard, the district court judge denied the defendant's petition for habeas relief principally on the ground that Marzullo had waived his right to collateral relief by failing to object at his trial to the alleged errors.[289] On appeal, however, after justifying its switch to a "reasonable competence" standard, the Fourth Circuit reversed the district court, concluding that the "representation of Marzullo . . . was outside the range of competence expected of attorneys in criminal cases."[290]

This reversal demonstrates the immediate practical effect of the change in standards; the range of reversible errors has expanded under this new standard. The decision illustrates even better the changes in the court's analytical style induced by the "reasonable competence" standard. Implicit in the farce or mockery test was the belief that there was no logical way to measure the effectiveness of counsel without reference to the overall fairness of the trial. The use of this standard marked a movement away from upholding the right to effective counsel as valuable in and of itself to an approach whereby right to counsel principles were infused with strong notions of due process. Under the farce or mockery test, regardless of how many mistakes were committed by defense counsel at trial, an otherwise valid conviction would not be overturned unless these errors were so substantial as to completely blot out the judicial character of the proceedings as a whole. The court's inquiry extended well beyond the essence of the attorney/client relation, because the only concern was that the attorney's conduct did not debase the integrity of the process.[291] In effect, then, the conclusion under this standard that effective assistance was denied was

288. *Marzullo*, 561 F.2d at 546. The couple drove around for several hours before stopping in a secluded spot in the country. There was no evidence of penetration or sperm, but the woman had minor cuts and abrasions. The defendant admitted striking her but only during an argument they had. *Id.* at 545-46.

289. *Id.* at 546.

290. *Id.* at 547. The court's elaboration of its standard intimates that the departure from the "farce" standard may not be so great as imagined: "[G]enerally [the accused] must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." *Id.*

291. *Id.* at 544.

tantamount to the decision that reasonable doubt still existed as to the validity of the conviction. In *Marzullo,* however, applying the "reasonable competence" standard, the court narrowed its review to spotlight only the attorney's behavior at voir dire.[292] The defendant's counsel had failed to object when with the jury present the first indictment against his client was dismissed with the state's consent because the prosecuting witness could not identify her assailant, and he voluntarily waived his peremptory challenges before any voir dire examination was ever conducted. The court of appeals reversed the conviction on this narrow ground, even though the trial judge had questioned the jurors about their ability to disregard this.[293]

What the court has adopted is essentially a negligence standard cast in terms of the reasonable competence of practicing attorneys. The question put before the court is, given the sensitivity of the attorney/client relationship, what departure from the norm is objectionable enough to warrant judicial intercession. Without formulating any categorical rules, the court in *Marzullo* sharpened the definition of counsel's constitutional responsibility to his client in terms amenable to objective treatment, thus opening the way for the adoption of specific guidelines such as those articulated in *Coles v. Peyton.*[294] Even more critical to further development of sixth amendment standards, *Marzullo* affords the court greater freedom in policing the accused's right to effective counsel. The court can now reach more errors of the type thought to seriously impair the effectiveness of counsel without broaching the vexatious question of their impact on the trial as a whole.[295]

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292. *Id.* at 546-47 (citing ABA STANDARDS RELATING TO DEFENSE FUNCTION §§ 5.2(b), 7.2(a) (App. Draft 1971) (selection of jury)).

293. *Id.* at 545.

294. *See* notes 282-84 *supra* & accompanying text.

295. But the defendant still does not have the "constitutional right to be represented by Clarence Darrow." Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971).

The experience under the reasonable competence standard demonstrates that the demands on defense counsel may be intensified without jeopardizing the attorney/client relationship and without opening up the court to an unprecedented number of post-conviction claims of ineffective assistance of counsel. *E.g.,* Wyatt v. United States, 591 F.2d 260, 267 (4th Cir. 1979); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 2009 (1979); Proffitt v. United States 582 F.2d 854, 857 (4th Cir. 1978); Fuller v. Luther, 575 F.2d 1098, 1101 (4th Cir. 1978); Tolliver v. United States, 563 F.2d 1117, 1120-21 (4th Cir. 1977).

The Promise of Effective Representation

The adoption of the reasonable competence standard is the judiciary's response to a perplexing problem: to accommodate the need for deferring to an attorney's professional judgment to the greatest extent possible without jeopardizing the accused's right to adequate representation. The purpose was never to reorder the relationship between attorney and client. The courts still follow a laissez faire policy that permits the principals to structure their own relationship and encourages counsel to offer his professional opinion and experience. But the courts are familiar with what can happen when supervision is lacking. By placing the accent squarely on this relationship, the courts have moved toward establishing what is perceived to be a befitting equilibrium between the various competing interets, so that ultimately this standard will act as a true safeguard to the unfulfilled constitutional guarantee of effective representation.

V. Cruel and Unusual Punishment: Psychological Disorders Receive Constitutional Cure

Recent judicial interpretations of the eighth amendment and of prisoners' constitutional privileges have expanded the scope of these guarantees to include the prisoners' right to adequate medical care. Inadequate medical services were held to be an unwarranted infliction of pain and suffering upon inmates offending notions of fundamental fairness. Citing the changing contours of the eighth amendment prohibition of cruel and unusual punishment, the Fourth Circuit has applied this same analysis to require adequate psychiatric or psychological care for inmates suffering from serious mental disorders.

The Dimensions of the Eighth Amendment

Historically, the eighth amendment proscription of cruel and unusual punishment[296] acted as more of an ethical restraint on the kinds of punishment that could be inflicted on a convicted criminal;[297] especially severe punishment that "shocked the conscience"

296. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

297. *See, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130,

or involved the "unnecessary and wanton infliction of pain" was constitutionally impermissible. The scope of the eighth amendment, however, was amenable to a broad application because it drew "its meaning from the evolving standards of decency that mark the progress of a maturing society."[298] With a substantive change in emphasis of penal philosophy from punishment to rehabilitation and the emergence of correctional law, the normal meaning ascribed to the amendment expanded to encompass specific conditions of prison confinement.[299]

Concurrent with the evolution of the concept of humane justice has been the increasing attention given the constitutional rights of the inmate. In the past, notions of due process or fairness were not thought to penetrate prison walls; the inmate was regarded as a "slave of the state."[300] Prison administration remained undisturbed

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136 (1878); Granucci, *"Nor Cruel and Unusual Punishment Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969).

298. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The Court has recognized "that the words of the Amendment are not precise, and that their scope is not static." *Id.* at 100-01 (footnote omitted). "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). "[B]road and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable" to define the limits of the eighth amendment proscription. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968). The proscription of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378.

That the parameters of the eighth amendment still are subject to debate is evident by the continuing controversy over the constitutionality of the death penalty. *See* Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

299. Gregg v. Georgia, 428 U.S. 153, 173 (1976)(plurality opinion)(citing Furman v. Georgia, 408 U.S. at 392-93 (Burger, C.J., dissenting))(punishments grossly disproportionate to the severity of the crime); Robinson v. California, 370 U.S. 660 (1962) (limitations on what can be made criminal and punished). The eighth amendment is applicable to the states through the fourteenth. *Id.* at 667.

The eighth amendment protects even those individuals not actually convicted of any crime, *e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (juveniles committed to state training schools); and proscribes general conditions, not just specific acts directed at particular individuals, *e.g.*, Smith v. Sullivan, 553 F.2d 373, 378 (5th Cir. 1977); Williams v. Edwards, 547 F.2d 1206, 1208 (5th Cir. 1977); Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1301 (5th Cir. 1974).

300. Ruffin v. Commonwealth, 62 Va. (20 Gratt.) 790, 796 (1871); *see, e.g.*, United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712-13 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

by courts seeking to enforce prevailing norms. The general demise of the right/privilege distinction[301] and the rebirth of the sanctity of the individual rights thesis, however, marked the onset of a new jurisprudence: an inmate retained a residuum of liberty within prison walls, [302] forfeiting only these rights revoked by statute or related to penal goals.[303]

As these developments coalesced into a body of correctional law, the courts assumed a greater role in overseeing prison policy. Aspects of daily prison life once thought beyond the ken of judicial expertise were subjected to rigorous scrutiny with predictable results: sweeping reforms were instigated to improve general prison conditions.[304] At this point it was evident that all phases of confinement must meet eighth amendment standards, and that, concomitantly, prison officials had an affirmative obligation to ensure that the prisoners' constitutional rights were honored.[305]

Once the courts began to tinker with penal reform, the old reluctance to interfere in prison administration was replaced by a judicial activism similar to that displayed in other areas of the criminal justice system.[306] But while the once-coveted "hands-off" doctrine was gradually disavowed, the courts were still beset by major limitations upon their power to implement change, some of

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301. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *But see* Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935) (dictum).

302. "There is no iron curtain drawn betwen the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974); *see, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976) (transfers from one correctional facility to another do not implicate constitutional rights); Procunier v. Martinez, 416 U.S. 396 (1974) (first and fourteenth amendment protection against unjustified censorship of communication); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (religious freedom under first and fourteenth amendments); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (protected by due process clause); Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) (right of access to courts).

303. Lawful imprisonment makes retractions of certain rights justified by the nature of the institution to which one is lawfully committed. *Cf.* Parker v. Levy, 417 U.S. 733 (1974) (court martial under Uniform Code of Military Justice constitutional); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (Hatch Act constitutional); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (state statute prohibiting political activity by state employees constitutional).

304. *E.g.*, Johnson v. Levine, 450 F. Supp. 648 (D. Md.), *modified*, 588 F.2d 1378 (4th Cir. 1978) (thorough investigation of prison conditions and procedures); Morgan v. Sproat, 432 F. Supp. 1130, 1140-55 (S.D. Miss. 1977) (broad changes in prison procedure and facilities).

305. *E.g.*, Woodhous v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973) (per curiam) (prison officials must make life in prison safe for inmates).

306. *See* pp. 662-65, 686-91 *supra*.

which became apparent only when the courts began to exercise this prerogative more frequently. The major constraint was imposed by federalism. Because no federal laws could guarantee state prisoners decent conditions, the courts could reach only constitutional abuses. Even though conditions might be undesirable, the court's were powerless to act unless the prisoner could state a prima facie constitutional claim.[307] Whether this limitation was more apparent than real depended upon the current meaning of such flexible concepts as "cruel and unusual" and "due process," but the scope of review was less than what ideally was necessary to effect comprehensive reform. Moreover, even assuming that a complaint was cognizable in the courts, their ability to frame effective relief often was diminished by the limits of the judicial arsenal.

Other limitations were simply vestiges, or slight variations, of the "hands off" doctrine.[308] Before ordering changes in prison conditions or operations, the courts had to consider whether administrative procedures might be preempted and how lower echelon prison officials might react to judicially enforced changes. Prison officials had grown accustomed to the freedom with which they had operated in the past; some antagonism was to be expected when courts spurned abstention ostensibly on the belief that the prison administrators had ignored inmates' constitutional rights. More important, some of these aspects of prison life remolded by judicial design may have existed in areas in which there was a special need for administrative flexibility or in which the courts should defer to the expertise of prison officials. Furthermore, the courts must work within the restraints imposed by the finite financial resources of the state, lest orders for sweeping reforms outstrip state funds.

These constraints played a major role in judicial efforts to im-

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307. The complaints usually allege a violation of civil rights. Section 1983 of Title 42 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983 (West 1974); *see* Fielding v. LeFevre, 548 F.2d 1102, 1108 (2d Cir. 1977).

308. The "hands off" doctrine was a judicially created bar to the review of the deprivation necessary or reasonably concomitant to imprisonment, but the philosophy underlying this doctrine counseled generally for even greater caution in interfering in prison administration. *See, e.g.*, Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (per curiam).

prove general prison conditions, but their impact was even greater when the courts strived to guarantee inmates fair treatment. As long as the target was the often deplorable condition of some prisons, the proscription of the eighth amendment was an effective catalyst for ensuring generally good conditions. Remedying the improper treatment of prisoners, however, gave rise to different problems. For one, the wide discretion of lower echelon prison officials precluded thorough scrutiny of and effective control over their actions.[309] The courts were inclined to use a "decency" standard of review, which was not amenable to principled application. Consequently, while some objectionable conditions disappeared with the revision of correctional philosophy and with the courts' greater role in supervising penal reforms, some problems attributable to improper treatment or neglect of inmates by prison personnel remained. One such issue was provision for adequate medical care for prisoners.

The Idea of Constitutional Malpractice

The quality of medical treatment inside prison walls had been a continuing source of inmate complaints and of growing judicial concern, but the courts' reluctance to interfere and the broad discretion afforded prison personnel had imbued the decisions of prison medical officers with a strong presumption of validity.[310] In 1976, in *Estelle v. Gamble,*[311] however, the Supreme Court took the indispensable first step towards prescribing a judicial remedy when it acknowledged the constitutional dimension to adequate medical care for inmates. The Court held that the eighth amendment prohibits "deliberate indifference to the serious medical needs of prisoners."[312] In devising this standard, the Court's obvious intention

309. Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967) (efforts to impose limitations on discretion of lower prison officials). The difficulty of supervising the conduct of lower echelon officials has been a recurring theme of this Note. *See* pp. 664-65, 687-89 *supra.*

310. *See generally* Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care,* 63 VA. L. REV. 921 (1977).

311. 429 U.S. 97 (1976).

312. *Id.* at 104 (citing Gregg v. Georgia, 428 U.S. at 173); *accord,* Bass v. Sullivan, 550 F.2d 229, 230-31 (5th Cir. 1977), *cert. denied,* 434 U.S. 864 (1978); Arroyo v. Schaefer, 548 F.2d 47, 49-50 (2d Cir. 1977); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080-81 (3d Cir. 1976); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 202-04 (8th Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1301-03 (5th Cir. 1974); Fischer v. Cahill, 474 F.2d 991 (3d

was to distinguish between ordinary malpractice claims and the unconstitutional deprivation of medical attention, for if the standard was stated too broadly so as to encompass negligence or mere errors in judgment, then the courts could expect a deluge of eighth amendment tort complaints. Whatever hesitation the Court might have experienced initially was overcome by pragmatic persuasion; the inmate depended upon prison officials for adequate medical care,[313] and inadequate care could compound the severity of the sentence and impede progress toward rehabilitation.[314]

In *Estelle,* the petitioner claimed that the medical treatment he received for a back injury sustained while on a prison work detail was unconstitutionally inadequate.[315] On seventeen occasions the petitioner visited the prison medical facility for treatment. Despite the frequency of his visits, his condition did not improve.[316] Estelle alleged ostensibly that the doctor's diagnosis and treatment were incorrect and that the doctor's failure to explore alternative forms of treatment gave rise to a constitutional claim.[317] The Court, however, rejected Estelle's argument, thus serving notice that mere negligence or malpractice was insufficient to support a constitu-

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Cir. 1973); *cf.* Little v. Walker, 552 F.2d 193, 197-98 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978) (protection from violent and sexual attacks); Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971) (physical attacks).

313. "It is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926). "An individual incarcerated, whether for a term of life for the commisson of some heinous crime, or merely for the night to 'dry out' in the local drunk tank, becomes both vulnerable *and* dependent upon the state to provide certain simple and basic human needs." Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972) (emphasis in original) (denial of medical care may give rise to a violation of fourteenth amendment due process).

314. The eighth amendment proscribes the "*unnecessary* and wanton infliction of pain." Gregg v. Georgia, 428 U.S. at 173; *cf.* Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). Of course, this does not mean that disciplinary sanctions for disruptive behavior may not be imposed, but only that the severity of the punishment in its entirety, including the environment in which the inmate is placed and the duration of the punishment, must be proportionate to the nature of the crime. *See, e.g.,* Pell v. Procunier, 417 U.S. 817, 823 (1974); United States v. Brown, 381 U.S. 437, 458 (1965); Williams v. New York, 337 U.S. 241, 248 (1949). *But see* Fielding v. LeFevre, 548 F.2d 1102, 1108 (2d Cir. 1977) ("There is no constitutional principle that prefers rehabilitation over deterrence and retribution as a goal of sentencing.") (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

315. 429 U.S. at 99-101.

316. *Id.*

317. *Id.* at 107.

tional claim;[318] the petitioner must allege "act or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[319] It is the indifference to the needless suffering inflicted on the inmates that offends the eighth amendment's prohibition of cruel and unusual punishment.[320]

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318. *Id.* The Court reached this conclusion despite the fact that a *pro se* complaint is to be construed liberally in favor of the petitioner. Haines v. Kerner, 404 U.S. 519 (1972). A *pro se* complaint must be held to "less stringent standards than formal pleadings drafted by lawyers" and can be dismissed for failure to state a claim only when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 520-21 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1951)). Because the complaint was dismissed by the district court for failure to state a claim, the handwritten, *pro se* allegations were presumed true. 429 U.S. at 99 (citing Cooper v. Pate, 378 U.S. 546 (1964)).

319. *Id.* at 106. The circuit courts are in substantial agreement on the proper standard. *E.g.*, Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976) ("denied reasonable requests for medical treatment in the face of an obvious need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible residual injury"); Russell v. Sheffer, 528 F.2d 318, 318 (4th Cir. 1975) ("must be capable of characterization as 'cruel and unusual punishment' "); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975) (quoting Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972)) ("deliberate indifference by prison authorities to a prisoner's request for essential medical treatment"); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), *cert. denied*, 419 U.S. 879 (1974) ("refusal to provide essential medical care after a prisoner brings his medical complaint to the attention of prison authorities . . . [or] the medical care provided is so clearly inadequate as to amount to a refusal to provide essential care or is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition"); Dewell v. Lawson, 489 F.2d 877, 882 (10th Cir. 1974) ("conduct so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to basic fairness"); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973) ("an intent to harm the inmate, or . . . an injury or illness so severe or obvious as to require medical attention"); *accord*, Williams v. Vincent, 508 F.2d 541, 543-44 (2d Cir. 1974); Newman v. Alabama, 503 F.2d 1320, 1331 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970). *See also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957).

320. Knowledge of the inmate's condition may be imputed to prison authorities, and the intent to deprive the inmate of essential medical care may be implied from the circumstances. This is not to suggest that prison officials must be aware of the inmate's serious condition, but that the officials have reason to know of any serious infirmity affecting an inmate. Also on the question of proof of intent, see *Estelle*, 429 U.S. at 116 (Stevens, J., dissenting).

This disregard may be evidenced by the behavior of the prison medical staff, the guards, or any other member of the prison staff intentionally interfering with the inmate's treatment and rehabilitation. For cases regarding the medical staff, see *id.* at 104; Williams v. Vincent, 508 F.2d at 544 (doctor's deliberate indifference toward inmate's medical needs); Thomas v. Pate, 493 F.2d at 158 (nurse injected inmate with penicillin even though knew that inmate was allergic to it; doctor refused to treat allergy); Jones v. Lockhart, 484 F.2d 1192, 1193 (8th Cir. 1973) (actionable claim against paramedic for refusing to treat inmate); Martinez v. Mancusi, 443 F.2d 921, 924 (9th Cir.), *cert. denied*, 401 U.S. 983 (1971) (doctor showed deliberate indifference to inmate's condition and surgeon's orders).

Psychological Care

Estelle established that the medical care within a correctional facility may be so inadequate as to support a claim of an unconstitutional violation of the inmate's rights. The Fourth Circuit Court of Appeals has found in the eighth amendment a concomitant obligation of prison officials to provide essential psychiatric or psychological services to inmates. In *Bowring v. Godwin,*[321] the Fourth Circuit extended the *Estelle* analysis to prohibit the denial of reasonable psychiatric care to any inmate who can show that the treatment is necessary and beneficial to his rehabilitation.[322]

Bowring had been denied parole for several reasons, one being that his psychological evaluation indicated that he was not capable of completing a parole period successfully.[323] In his complaint, Bowring contended that the state must provide sufficient psychological treatment to ensure that psychological problems do not impede his eventual parole.[324] Thus, he maintained that the same

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For cases dealing with guards, see 429 U.S. at 104-05; Westlake v. Lucas, 537 F.2d at 859 (despite inmate's obvious pain, requests directed to guards that doctor be notified were ignored); Fitzke v. Shappell, 468 F.2d 1072, 1074 (6th Cir. 1972) (medical care provided twelve hours after need evident); Hughes v. Noble, 295 F.2d 495, 496 (5th Cir. 1961) (failure of sheriff to see to medical needs of prisoner).

And for cases involving other prison officials, see Wilbron v. Hutto, 509 F.2d at 622 (prison officials refused to provide any further treatment); Cambell v. Beto, 460 F.2d 765, 766-67 (5th Cir. 1972) (claim stated against prison officials); Martinez v. Mancusi, 443 F.2d at 924 (actions of warden, guards, and others); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970) (failure of prison warden to allow plaintiff prescribed medicine); Riley v. Rhay, 407 F.2d 496, 497 (9th Cir. 1969) (actionable claim in alleged failure of prison officials to treat condition); Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966) (failure of prison administrators to treat heart condition).

An inmate's constitutional right to adequate medical care also may be violated by a shortage of medical supplies or the continued use of obsolete techniques. *E.g.,* Newman v. Alabama, 503 F.2d 1320, 1331 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975).

321. 551 F.2d 44 (4th Cir. 1977).

322. *Id.* at 47-48. "In the instant case, petitioner seeks psychological diagnosis and treatment. We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Id.* at 47.

323. *Id.* at 46.

324. *Id.* Bowring's argument was interesting if only due to the fact that an inmate has no legitimate expectation of parole release beyond that which the state may in its discretion grant. Bowring contended that "the state must provide him with psychological diagnosis and treatment in the hope that he may ultimately qualify for parole." *Id.* The supposition is that parole release exists as a matter of statutory right, but a fair reading of the applicable statute suggests that the provision confers only a right to be considered for parole. *See* VA. CODE § 53-251 (Cum. Supp. 1977); *id.* § 53-253 (Repl. Vol. 1974). The statutory presumption is that the individual will serve the duration of the sentence imposed. The inmate is not enti-

constitutional impetus behind assuring inmates adequate medical care should require that inmates with psychological disorders be furnished the treatment necessary to recover. But the argument for proper medical care loses some of its appeal when applied to the treatment of mental disease. Whereas prolonged suffering from physical injuries is unrelated to any correctional goals, incarceration of those with psychological disorders frequently is done for the protection of society alone. Furthermore, psychological illness is not detected and treated so easily as physical injury or disease.[325] If the purpose is to ensure the inmate's rehabilitation, then doctors must learn ways to isolate the psychological factors motivating criminal behavior.

In fashioning an appropriate standard, the court seemed most concerned about the practical difficulties that might arise if psychiatric care was mandated for the entire prison population. The burden on the administration of the prison would be onerous, especially if the inmates thought that requesting this service would improve their chances for an early parole. The court therefore left it to the discretion of prison officials to furnish psychological or psychiatric care for all inmates, but it held that an inmate is entitled to this treatment if, after a preliminary examination, a doctor believes it is necessary.[326] The provision of this service is mandatory

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tled to parole *per se* but only to consideration for parole and to discharge at the expiration of his term. The possibility of conditional freedom cannot be equated with the right to conditional freedom. *See* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir.), *dismissed as moot,* 501 F.2d 992 (5th Cir. 1973); Menechino v. Oswald, 430 F.2d 403, 408-09 (2d Cir. 1970), *cert. denied,* 400 U.S. 1023 (1971); *cf.* Meachum v. Fano. 427 U.S. 215, 228 (1976) (right of inmate to remain at particular facility too ephemeral to trigger due process protections). To be cognizable for due process purposes, though, a claim of entitlement can rest on less than a statutory guarantee of a particular result. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

325. One can imagine the controversy fomented by the in-court clash between psychologists or psychiatrists selected by each side to express their respective point of view. The schism between various schools of psychotherapy is sufficiently broad to ensure that experts will disagree. *See generally Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190 (1974). The vagaries of aberrant behavior, the complications involved in detection, and the substantial disagreement over remedial techniques may preclude prompt and efficient resolution of the issues using the *Estelle* "deliberate indifference" standard.

326. "The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis . . . ." 551 F.2d at 47-48. The court, though, did not state to what extent insufficient state funds may frustrate the inmate's exercise of his eighth amendment rights. It concluded:

> We therefore hold that Bowring (or any other prison inmate) is entitled to psy-

for those inmates who suffer from serious mental disorders, whose debilitating condition is susceptible to treatment, and whose condition requires immediate attention.[327] With these limitations the court tied the availability of this treatment to the assurance of rehabilitation.

Estelle and Bowring: Prisons and the Role of the Judiciary

The courts' radical break with past policy came with ensuring that the basic needs of inmates are not withheld. The line of cases culminating in *Estelle* supports the general proposition that incarceration, although precluding the exercise of some valuable rights, should not subject the inmate to needless suffering that bears no reasonable relation to the goal of rehabilitation. In *Bowring*, the Fourth Circuit took this same reasoning one step further to guarantee that inmates receive necessary psychological treatment. Despite the broad language used in these cases, the courts have moved warily so as not to impinge unnecessarily on the prerogatives of prison officials or to threaten the vital flexibility of prison procedures. Therefore, while the courts demonstrated a willingness to meddle in prison affairs, they have predicated their interference upon compelling reasons, rather than general impressions of what is desira-

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> chological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial . . . . [T]he essential test is one of medical necessity and not simply that which may be considered merely desirable.

Id. The use of the words "ordinary skill and care" and "reasonable medical certainty" suggests that the court anticipates disputes over the validity of the doctor's diagnosis and treatment.

Other than *Estelle*, the court had no firm support for its decision. Although the court cited Newman v. Alabama, 503 F.2d 1320, 1324 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), that case is easily distinguishable. Other cases, though, provide an adequate analogy or suggest a similar result. *E.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) (individual committed to state mental institution as incompetent to stand trial may not be confined indefinitely without treatment); Cruz v. Ward, 558 F.2d 658, 662 (2d Cir. 1977), *cert. denied*, 434 U.S. 1018 (1978) (dictum) ("[I]t would clearly be cruel and unusual to deprive a patient of needed psychiatric care simply in order to punish him for misconduct . . . ."); Morgan v. Sproat, 432 F. Supp. 1130, 1140 (S.D. Miss. 1977) (suggestion that cannot allow prison conditions to cause psychological problems). *See also* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (early suggestion that Constitution may require treatment of criminally insane).

327. 551 F.2d at 47-48; *see* note 30 *supra*.

ble. Moreover, they have strived in their decisions to blend what is practical with what seemingly is a good idea.

CONCLUSION

The courts have always borne the ultimate responsibility for articulating rules to govern the administration of criminal justice. Through these rules or other judicially created remedies, the courts enforce the guiding principles of fairness. But while the commitment to fairness has not been renounced, the conception of this function, and concomitantly its analytical pattern, have changed dramatically. What started with the result-oriented Warren Court as a vindication of the specific pledge of the amendments has been converted behind a law and order backlash to a circumstance-oriented system of mandatory balancing. By opening up this formative process to balancing, the specific amendments have been infused with the same flexibility as the due process clause. And as the courts have moved to consider areas of the criminal law left relatively undeveloped, they have carried this new methodology with them.

The immediate result is that the accused may not invoke trenchant rules but instead must argue the compelling nature of the circumstances or of his predicament. For courts such as the Fourth Circuit who apply the criminal law regularly, this transition means that they are more able to project into the decision-making process the prevailing consensus of opinion. These decisions then come to reflect more social policy than elemental justice for the individual.

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