Constitutional Interpretation and Criminal Identification

Carl McGowan
CONSTITUTIONAL INTERPRETATION AND CRIMINAL IDENTIFICATION

CARL McGOWAN*

No one undertaking this lectureship can be insensible of the many associations it has with the very foundations of legal scholarship in this country. They focus mainly, of course, upon that remarkable man, George Wythe, who was an ornament of classical learning as well as a pioneer teacher of the law. His extraordinary talents in both of these pursuits contributed greatly to the reception of the Enlightenment in the new world on this side of the Atlantic, and to the embodiment of reason in the jurisprudence taking shape here.

In my current role as a judge, I can only view with envy the happy circumstance that Wythe, in the course of his service as a member of the Virginia High Court of Chancery, had Henry Clay as a law clerk. I like to think that the docket of Judge Wythe's court was not so crowded as to preclude the senior member of that duo from savoring to the full the rich and engaging personality of the younger man, who went on to become one of the more exciting personalities of American politics—a son of the South who could never quite convince it that his eyes did not stray too much to the North. That there was time for these amenities is evidenced by Clay's absorption of classicism as well as law from his employer; and Wythe may well claim great credit for the informed and balanced rationality which Clay brought mightily to bear upon the crises which repeatedly threatened the stability of the infant Republic.1

*Member of the United States Court of Appeals for the District of Columbia Circuit.

This article is based upon the annual G. B. Sherwell Lecture, delivered by the author at the Marshall-Wythe School of Law, College of William and Mary, on October 15, 1970.


[ 235 ]
As one who once earned his living as a law professor, I also remark the great good fortune Wythe enjoyed in the calibre of his pupils. We can only wonder whether the present Law School Aptitude Test would unerringly have identified in advance the latent gifts of Thomas Jefferson and John Marshall. Unaided by these modern admission devices, Wythe must, however, have recognized very quickly the extraordinary talents of these two young men, and gloried in the quality of the material which they put to his hand.

Unlike Marshall, who was exposed only to Wythe's formal lectures on law as a professor of this College, Jefferson studied law for five years as an apprentice in Wythe's law office, where he performed a variety of practical tasks. In this respect his legal education partook largely of the clinical character which is the focus of much attention today. For students who profess impatience with any other form, I throw out the reminder that Jefferson did not look back on this educational format with unalloyed satisfaction. He later wrote that "[t]he only help a youth wants is to be directed to what books to read and in what order to read them." 2

Wythe would not have been dismayed by the essential diversity of Marshall and Jefferson. That fundamental difference prefigured one of our deepest and most significant cleavages over constitutional interpretation. Indeed, it must be one of the assets of this Law School that its traditions derive from early Virginia personalities who held strong—and disparate—opinions about the proper balance to be struck in translating into action the words of the 1787 Constitution.

We read almost with amazement about the early constitutional struggle over federal financing of internal improvements. It was a struggle which arrayed Presidents Madison and Monroe (and their mentor, Jefferson) on one side, and Calhoun and Clay, on the other. It was Calhoun who professed impatience with the restriction, by Presidential veto, of Congress to its enumerated powers when those powers did not expressly include the building of roads and canals. Clay echoed this sense

2. D. MALONE, JEFFERSON THE VIRGINIAN 67 (1948). This first volume of Professor Malone's definitive life of Jefferson, which has thus far encompassed four volumes under the general title of JEFFERSON AND HIS TIME, is particularly successful in its evocation of Jefferson's life in Williamsburg as a student at William and Mary and as a legal trainee in Wythe's office. Jefferson's relations with Wythe were not, however, restricted to those of master and apprentice; they shared infinitely wider intellectual interests, including those of a scientific nature. Throughout Jefferson's subsequent career he was in close touch with Wythe until the latter's death in 1806. One major legal project in which they were associated was the collection and codification of the statutes of colonial Virginia.
of frustration in his assertion, after the Cumberland Road bill was vetoed, that the Constitution should not be interpreted by reference to the needs and circumstances of 1787.³

The passionate feelings about so-called broad and narrow principles of constitutional interpretation periodically burst into flame. In a recently published book,⁴ Professor Gerald Gunther of the Stanford Law School identified and established the authenticity of certain pseudonymous letters written by Chief Justice Marshall to Philadelphia and Alexandria newspapers in 1819. These letters took vigorous exception to criticisms of his McCulloch⁵ decision by two distinguished Virginia state court judges which also appeared under assumed names in letters to the editor of the Richmond Enquirer. This book should be read by those who may think that preoccupation with canons of constitutional construction is a new political phenomenon.

This controversy is of long standing and promises to continue as long as we live under a written Constitution which contemplates that the final word as to the meaning of its language lies with a court.⁶ There are

---

3. A curious issue of this controversy was the informal and private submission by President Monroe of his veto message to the members of the Supreme Court in an apparent invitation of their views as to the soundness of the constitutional views which he had expressed. An account of this incident, including the responses which the President received, is to be found in 1 C. Warren, The Supreme Court in United States History 595-97 (rev. ed. 1926).

4. G. Gunther, John Marshall's Defense of McCulloch v. Maryland (1969). In his perceptive introduction, Professor Gunther stresses that the disputants on each side rightly foresaw the significance of the McCulloch decision for future "allocation of power between nation and state . . . the pervasive problem of our federalism . . . " Their debate was not about the particular result reached in the McCulloch litigation, but about the reach of the principles followed by Marshall in achieving that result. Although Marshall's letters amply confirm his "passionate personal commitment to the principles of McCulloch," Professor Gunther notes the Chief Justice's concern to emphasize that those principles were not to be taken as throwing wide the flood-gates of federal power, or as giving, as one of his adversaries claimed, "a general letter of attorney to the future legislators of the union." Marshall's letters indicate that he was genuinely outraged by this charge; and the editor of his letters some 150 years later concludes that the "degree of centralization that has taken place since his time may well have come about in the face of Marshall's intent rather than in accord with his expectations."


6. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In this first assertion by the Supreme Court of a power to declare an act of Congress invalid as incompatible with the Constitution, Chief Justice Marshall relied heavily on Hamilton's exposition in the Federalist Papers. Judge Learned Hand, in his Oliver Wendell Holmes Lectures, The Bill of Rights 5 (1958), characterized the power as "not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation . . . ," and, as such, one which must be assumed to exist, however cloudy the purposes of the Framers may be thought to be. For a recent painstaking effort
lessons to be learned from the long view. One is to note the quicksand quality of categorization, especially with respect to individuals. Calhoun is not now thought of as a "broad" constructionist, but how could his position on internal improvements have escaped that classification in its contemporaneous context? Jefferson himself, fulminating steadily from his mountaintop in his old age against the "broad" heresies of John Marshall, must have been very sensitive to questions about the constitutional foundations of his statesmanlike acquisition of the Louisiana country.

These difficulties continue today in any attempt accurately to identify the philosophies of latter-day Supreme Court Justices, Presidents, and Senators as either strict or expansive. These difficulties derive not so much from the perverse and erratic elements in human nature as from the analytical inadequacies of the labels used in describing what we assume to be personal constitutional credos.

What is of even more interest and importance is the operation of the laws of action and reaction—and the latter word is not used in a pejorative sense. A new constitutional interpretation thrusting in a direction popularly termed broad or loose may expose or create problems which will yield only to another departure which risks the categorization of narrow or strict. In actuality, the labels may be meaningless in each case, and the net result of both may be an advance in the administration of justice. An example of this interacting process may perhaps be taking shape in the area of criminal procedure and evidence relating to identification; and it is this narrow corner of only one major area of recent constitutional development that I propose to explore on this occasion.

The vagaries of visual identification evidence have traditionally been of great concern to those involved in the administration of criminal law. It has been thought by many experts to present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished. A perceptive friend of mine, who had partici-
participated in a symposium on the merits of the *Miranda* rule restricting uncounseled interrogation of suspects after arrest, told me that the most impressive argument against that rule was made by a veteran police officer who had seen many suspects go to prison on the basis of identification testimony which, to the officer, seemed very doubtful indeed. It was the policeman’s position that he slept much better at night when the suspect had admitted his guilt upon questioning after arrest than he did when the only evidence consisted of identification by the victim or other eyewitnesses.

We know from personal experience in non-criminal contexts how easy it is to give a description of someone we have seen briefly, and how hard it is to recognize that person on a second meeting. These difficulties tend only to be compounded by the emotional stress inevitably incident to crime. The fact is that much of the crime that rightly gives us the greatest concern at the moment—robberies, house-breakings, street assaults—is soluble only through visual identification.

The youth who takes a wallet on the street today in an unwitnessed encounter will usually not have that wallet in his possession when he is arrested. All that the police can do is attempt to find him through the means of the victim’s personal recollections of what he looked like. Case after case presents the spectacle of the prosecution having to rely solely upon identification evidence; and it is always with relief that judges turn to appeals where the government’s case is not confined to that kind of showing.

It was this state of affairs which caused the Supreme Court to turn in due course to the matter of criminal identification. In 1967, it handed down the so-called *Wade-Gilbert-Stovall* trilogy—three cases decided the same day and all concerned with the proper reach of the Fifth and Sixth Amendments in relation to identification evidence. The first two cases involved extensions of the Sixth Amendment right to counsel, and represented a “broad” construction of that right.

In both cases, the police held lineups after arrest in which the suspects were viewed without their having counsel present. Remarking that “[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

---


the Court held that the lineups were a stage in the criminal process at which the constitutional right to counsel attached. The presence of counsel would, it was said, serve two vital purposes: reduce the likelihood of an unacceptably suggestive showing, and make it possible for counsel at trial to challenge effectively either the admissibility or the credibility of the identification evidence.

In order to deter public officials from denying this newly-created right, the Court prescribed the sanction of exclusion from the government’s evidence at trial of testimony concerning the uncounseled lineup, and of an in-court identification by a witness who had earlier identified the defendant at an uncounseled lineup. In Stovall the Court limited the availability of this exclusionary sanction to cases involving uncounseled confrontations occurring after its decisions in the trilogy of cases. It insisted, however, that the Due Process Clause of the Fifth Amendment had always been thought to comprehend a right to be free of an unduly suggestive pretrial exhibition of the arrestee to the eyewitnesses for identification purposes; and it asserted that the sanction of exclusion was available for all identification evidence of, or tainted by, such an exhibition. And, in the Simmons case, decided a few months later, the Court made clear that this construction of the Fifth Amendment applied not only to pretrial confrontations in the flesh but also to those involving the exhibition of photographs.

These forays by the Court into the field of criminal identification, although not arousing a tempest comparable to that loosed by Miranda, have not been without critics nor entirely overlooked in the national debate over law and order. The Congress of the United States has already responded by enacting legislation purporting to restrict the exclusionary sanction in its impact upon in-court identifications, whatever may have been the circumstances of the pretrial confrontation.

10. 388 U.S. at 228. The Court marshaled a large number of authorities on the inherent weaknesses of identification evidence, and characterized “the annals of criminal law [as] rife with instances of mistaken identification.”


12. 18 U.S.C. § 3502 (1968), which was enacted as a part of Title II of the Omnibus Crime Control and Safe Streets Act (82 Stat. 211), provides as follows:

. 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.
ever may be the merits or demerits in constitutional terms of this legis-
lative intervention, it appears to fail to meet one highly practical aspect
of the prosecutor’s problems, namely the fact that juries tend to be mass-
ively unimpressed by identification evidence which consists solely of
identification of the defendant by the witness from the witness stand.

As practical people, jurors know that the trial in front of them would
not be going on at all if the prosecution had no way of being sure that
the witness would respond affirmatively when called upon to make the
in-court identification. This suggests to even the most legally untutored
mind that there must have been an identification confrontation of some
kind after the offense but prior to trial. Trial judges of my acquaint-
ce report that juries not infrequently acquit when they are given nothing
but an in-court identification; and in some instances individual jurors
have complained to the judge later that, in not being told about pretrial
identification, they were being treated like children.

Our court heard a recent appeal in which the jury, after beginning
its deliberations, sent in a note asking the question: “How was identi-
fication made before arrest?” I very much doubt that they were satis-
fied with the only answer which the court could properly send back,
namely, a note which read: “You must decide this case on the basis of
the evidence as you recall it and no additional information not in the
record can be given you.” To them this must have been a peculiarly
aggravated—and aggravating—example of the legal mind at work.

There are, thus, real benefits to be realized by the prosecution, and the
public it represents, in presenting evidence of a pretrial identification
made under conditions which vouch for its fairness and, hence, its prob-
able accuracy. An identification made at a lineup with counsel present
is more likely to impress the jury than any number of vehement assert-
ions from the witness stand that the defendant is the man. In appearing
to construe the Sixth Amendment broadly, therefore, the Supreme
Court may conceivably have caused the conviction ratio to increase. If
this is so, one can only wonder whether the Court should, in current
polemical jargon, be characterized as rigidly or loosely constructionist in
its approach.

If the prosecutor may paradoxically find his job of securing a guilty

---

13. United States v. Williams, 421 F.2d 1166 (D.C. Cir. 1970). It was urged upon
appeal that the trial court should sua sponte have instructed the jury that it could have
inferred from the absence of prearrest identification evidence that such evidence
would have been adverse to the prosecution. This contention did not prevail, but it
underlines the problems of the government in having pretrial identification evidence
which it cannot use.
verdict made easier by the new constitutional limitations upon pretrial identifications, it is also evident that these limitations have presented the police with some new problems. The function of the police is to investigate, and to arrest when investigation supplies the legal basis in terms of probable cause to believe that the suspect has committed the crime. To the extent that Wade-Gilbert-Stovall seemed to contemplate that most, if perhaps not quite all, pretrial confrontations should take place in the counseled formal lineup, probable cause to arrest appeared essential in order to subject the suspect to such a lineup.

There are many situations, however, in which investigative efforts may focus upon a suspect but, absent a viewing by eyewitnesses, fall short of probable cause as that concept has traditionally been articulated. What are the police supposed to do then—abandon what is otherwise a promising, and often the only available, lead; or set up a confrontation which falls below the Supreme Court's Fifth or Sixth Amendment requirements? Should, alternatively, the judicial definition of probable cause be relaxed, with all that that implies in terms of interference with individual liberty?

A recent case in our court pointed up these dilemmas. In an armed robbery of a retail shop, an employee was confronted by a robber whom he had never seen before. There were no leads for the police, and all they could do was to show books of photographs to the employee. He at length picked one out, but would say only that it looked like the man, and that he could not, and would not, say more without looking at the subject of the photograph in person, which he asked to be permitted to do. The police officer testified that he did not at this juncture think he had probable cause to arrest—a legal judgment that was almost certainly correct by traditional standards. By any measure of the reasonableness of official action, however, it seemed in the public interest for the employee to be given a chance to see the

---

14. There are some areas of doubt remaining as to whether one under arrest can under no circumstances be exhibited to the eyewitnesses except in a formal lineup. See Justice Douglas' statement in Biggers v. Tennessee, 390 U.S. 404, 408 (1968), that "[o]f course, due process is not always violated when the police fail to assemble a lineup but conduct a one-man showup." The problem has arisen in cases where the suspect is returned promptly to the scene of the crime for showing to the victim. See Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968), cert. denied, 393 U.S. 1034 (1969). Cf. Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).
subject of the photograph. How was this to be done without violating the Fifth and Sixth Amendments?

The policeman simply sent out a witness summons to both the employee and the suspect, asking them to come at the same time to a complaint office in the courthouse. Several people were in the room when both arrived. The employee went immediately to a policeman and told him that his assailant was in the room. The government included evidence of this confrontation in its direct case, and the court felt obliged to reverse the conviction because of what was, in effect, an informal, uncounseled lineup.

The court was at some pains, however, to take cognizance of the dilemma in which the police officer had been placed by Wade-Gilbert-Stovall. It said that “[r]esponsible police action would hardly encompass dropping the matter [at the point of highly tentative photographic identification] simply because, as [the police officer] believed, there was no probable cause to arrest.” Since formal lineup facilities with counsel present are normally available only at police stations, and as long as the law was taken to be that no substantial deprivation of personal liberty could occur without probable cause to arrest, “the problem was one of how to compel a suspect to present himself for a lineup viewing.” What the police officer needed, the court observed, was “some creative legal thinking”—a need which was characterized as “plainly evident on the day the Wade-Gilbert-Stovall decisions were rendered nearly three years ago,” and one which “has been a long time in receiving the attention it merits.”

This last was a reference to the fact that, on March 9, 1970, nearly three years after the Wade-Gilbert-Stovall decisions, the Department of Justice announced that it was sending to Congress a legislative proposal directed to this need. Its scheme was to authorize the courts, upon a proper showing but one falling short of probable cause to arrest, to require federal criminal suspects to submit to a variety of non-testimonial investigative procedures, including formal lineups for identification.  

---

16. Id. at 196, 197.
17. The draft bill, which accompanied the Attorney General's letter to the Vice President, was introduced by Senator Hruska as S. 3563, 91st Cong., 1st Sess. (1969). Some months earlier, on October 7, 1969, Senator McClellan, for himself and Senators Allott and Hruska, had introduced S. 2997, which was directed to the same ends and provided for substantially similar methods. The two bills were the subject of public hearings by a sub-committee of the Senate Judiciary Committee on March 10 and 11, 1970.
18. The non-testimonial identification to which the suspect may be ordered by a court to submit is defined as including “identification by fingerprints, palm prints,
The effect of the measure would be to curtail individual freedom of movement temporarily and to bring about a limited police custody without probable cause to arrest. The analogy which comes most readily to mind, although it is far from a perfect one, is the judicial authority to issue search warrants. The rationale is that the dangers to individual liberty in a magistrate’s order to search one’s home are not markedly greater than his command to present one’s person at the police station for viewing.\(^9\)

Whether this is the best or only device that can be contrived to meet the problem, it cannot be denied that it is responsive. Its constitutional underpinnings would presumably be in doubt until the Supreme Court ruled on the question. The conventional doctrine has long been that the police acquire no substantial dominion over one’s person in the absence of probable cause to arrest for a particular crime, and that investigative arrests are incompatible with the guarantees of the Bill of Rights. This view raises the question of whether a judge prepared to find a new constitutional base for this response to a need seemingly created by the “broad” interpretations manifested in \textit{Wade-Gilbert-Stovall}, would himself be most accurately classified as a “strict” or a “loose” constructionist.

In which camp was the Court majority in the 1968 case of \textit{Terry v. Ohio},\(^{20}\) apparently the first case definitively holding that probable cause

footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, handwriting exemplars, voice samples, photographs, and lineups.” The showing to be made to the judicial officer must support findings by him that (1) there is probable cause to believe an offense has been committed, (2) there are reasonable grounds, not amounting to probable cause to arrest, to believe that the suspect committed the offense, and (3) the results of specified non-testimonial procedures will be of material aid in determining whether the suspect committed the offense.

The judicial order is required to state, among other things, the approximate length of time required for the procedures, and that the suspect will not be required to submit to interrogation or to make a statement. Failure to appear in response to the court order is punishable by contempt. Within forty-five days after the examination, a return must be made to the court, and, if probable cause to arrest has not been established, the court shall direct that all products of the examination be destroyed.

\(^{19}\)On October 1, 1969, the Colorado Supreme Court, under its rulemaking power, acted to provide judicial authority to compel a suspect to present himself for fingerprinting. CoLo. R. CRiM. P. 41.1, Court Order for Fingerprinting. During the first ten months of its existence it was used once, with affirmative results and a resulting arrest for burglary. For an account of the origins of the proposed rule within the Denver Police Department, the presentation made to the Colorado Supreme Court in its support, and a description of the rule as finally issued, see Carrington, \textit{Speaking for the Police}, 61 J. CRiM. L.C. & P.S. 244, 265-74 (1970).

\(^{20}\)392 U.S. 1 (1968). No statute was involved in \textit{Terry}. Decided at the same time, and illuminative of the scope of the \textit{Terry} doctrine, were two companion cases from
to arrest is not an essential precondition to any restraint, however limited, of the individual's liberty of movement? It was pronounced by the pundits before that decision that, under the shield of the Constitution, no heed need be paid the commands of any policeman not possessed of legal grounds to arrest. The day after Terry, it appeared that the Court had interpreted the Constitution either very rigidly or very sweepingly, depending upon your point of view about the balance to be struck between the powers of the police and the protection of society against crime.

Terry has furnished room for the exercise of legal creativity in the area of police investigation prior to arrest, and may conceivably hold the key to a defensible escape from the prearrest identification dilemmas posed by Wade-Gilbert-Stovall. This speculation is given substance by an observation volunteered by the Court, at the Term following Terry, in Davis v. Mississippi.21

In Davis, the only clue to an especially brutal crime was a fingerprint. The police response was to round up a number of persons in the area and to hold them incommunicado for several days of investigation, which included the taking of fingerprints. The Court, not surprisingly, condemned this action. In apparent recognition, however, of the investigative difficulties posed by the probable cause barrier, the Court posed the question of whether imaginative invocation of judicial authority under narrowly defined circumstances might result in a constitutionally permissible compulsion to submit to fingerprint examinations, and to a limited custody for this purpose, despite the absence of probable cause to arrest. Should such an approach fairly be termed a narrow view of the great role of the constitutional guarantees in protecting the free movement of the individual from official restraint, or a broad construction of those provisions which strikes a reasonable balance between that freedom and the interests of society in the detection and punishment of crime?

The United States Court of Appeals for the District of Columbia Circuit has heretofore dealt in some degree with the police dilemmas created by Wade-Gilbert-Stovall. The court was confronted with an appeal in which an abortive attempt had been made at an armed robbery of a liquor store.22 The bandits fled without accomplishing their pur-

---

pose, and were captured a few minutes later. They were taken immediately to the police station at two o'clock in the afternoon. Formal lineups were held in which the proprietor of the liquor store identified them as the men who had tried to hold him up. This supplied the probable cause which warranted their being charged with attempted robbery and taken without further delay before a committing magistrate, as Rule 5(a) of the Federal Rules of Criminal Procedure requires.

The police, however, did not do this. Instead, they kept the suspects at the police station where, throughout the evening and the next morning, more lineups were held to which were brought the owners and employees of other liquor stores which had been recently victimized by armed robberies. In one of these lineups a liquor store owner identified them as the men who had robbed his place of business a few days before. Only then were they taken before the magistrate. The prosecutor eventually elected to proceed against them on the charge of the actual robbery and not the attempted one.

The court held that the Rule 5(a) requirement of speedy presentation to the magistrate could not be evaded in this manner, and reversed the conviction as involving, with respect to the actual robbery, a purely investigatory detention which had no warrant in law. It was observed, however, that the police might justifiably assert that it was reasonable for them to have an opportunity to confront these defendants with the victims of similar liquor store robberies.

\[\ldots\] The police have, of course, a legitimate interest in seeking to explore the possible relationships between persons apprehended under such circumstances as were appellants, and other open crimes of a similar nature. The facts of life with respect to liquor store robberies in this community today suggest that there may be a not improbable connection between some of those robberies and persons caught in the act of fleeing from an abortive attempt to rob a liquor store. But, had the police heeded Rule 5(a) and taken appellants after booking before a magistrate, it is by no means certain that the police could not legally have arranged for other victims to view appellants in line-ups.\[\ldots\]^{23}

Those comments were designed to meet a complaint by the police that, had they gone before the magistrate promptly, release might have been required under the provisions of the Bail Reform Act,^{24} which

---

23. Id. at 578.
contemplates that pretrial release shall be the norm rather than the exception, and police control for purposes of further lineups would be lost. The court suggested that, once under judicial authority by virtue of presentment under Rule 5(a), the police could conceivably invoke that authority to make the prisoner reasonably available for lineup viewing in respect of other crimes for which there is less than probable cause to arrest.

That was, of course, only a suggestion, and not a holding. But the court made it the occasion for remarking that to proclaim that the police are utterly frustrated is not a realistic response to forward-looking legislative reforms like the Bail Reform Act, and to innovative judicial improvements in criminal identification like the Wade-Gilbert-Stovall cases. The problems raised by the immediate case, it was said, appeared to fall into

one of those areas where the police require skillful and imaginative legal planning, bottomed upon cooperative utilization, rather than utter disregard, of judicial power, and designed to achieve legitimate ends by means which have some appeal in terms of their concern for statutory and constitutional protections. . . . [U]ntil that kind of effort has been made and established to be unavailing, we do not find an adequate substitute for it in barren reiteration of the proposition that the only way the police can function under Rule 5(a) is to ignore it.26

In this instance the idea was not ignored. A few months later the court was asked to nullify a procedure which had been contrived by the prosecutor in response to that idea. An arrest was made of a man charged with robbing a record shop. When presented to the magistrate, the latter was asked by the prosecutor to sign a form order requiring the suspect to appear for a lineup at a specified future date to be viewed by witnesses of the record shop robbery “in addition to other complainants [the government] may produce.” The judge interpreted this latter request as limited to crimes involving a modus operandi similar to that of the record shop robbery, and signed the order. A challenge was made to the order insofar as it permitted the lineup to be attended by victims of crimes other than the one for which the suspect had been arrested.

Stressing the limitation of the viewing to the witnesses of similar crimes, and noting that the suspect would be provided at the lineup with

25. 399 F.2d at 579.
counsel as required by *Wade* and *Gilbert*, the court rejected the challenge.\(^\text{26}\) The result has been the utilization in the District of Columbia of what have come popularly to be known as "Adams orders" (that being the name of the case in which the court's suggestion was first made). I have no exact information as to its effectiveness, although I have been told that the Adams order has enabled the police to solve many open crimes on their books. This is not to say that its legality in every possible aspect has been definitively established, and it certainly remains open to individual defendants to challenge the fairness of the lineups as they may actually be conducted.

What has been demonstrated thus far is that utter negativism is not the only response which police and prosecutors are compelled to make to the restrictions which flow from legislative and judicial advances in the criminal field. Imagination and innovation, soundly conceived in relation to specific problems, need not be the exclusive stock-in-trade of defense counsel or reform-minded legislatures and courts. The police in particular are entitled to the same kind of creative, probing, wide-ranging legal thinking which is not content to concede that, because things have always been done a certain way in the past, they must continue to be done in the same way in the future or they cannot be done at all.

There is, I believe, a visible under-commitment of resources to the police of this country, and one which in many places is perilously inadequate to the dimensions of the problems with which they must cope. This problem is exemplified by the lack of imaginative legal assistance and planning directly available to the police by lawyers who are familiar with police operations, and who can design new ways of achieving legitimate police objectives which also take account of constitutional necessities. A fair accommodation of the two is surely one of the reasons why legal education exists, and why lawyers, whether they represent the police or General Motors, are trained not to fight the problem but to solve it.

A superlative example of the former would appear to be the Con-

\(^{26}\) United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969). See Spriggs v. Wilson, 419 F.2d 759 (D.C. Cir. 1969). The Metropolitan Police Department of the District of Columbia has recently promulgated regulations, prepared by its General Counsel, addressed to pretrial eyewitness identification procedures. Memorandum Order No. 16, Series 1970, issued May 15, 1970. These prescribe the procedures to be followed in (1) on-the-scene identifications of suspects by victims and eyewitnesses to a crime, (2) the use of photographs for identification purposes, and (3) court-ordered lineups.
gressional response to Wade-Gilbert-Stovall. The Omnibus Crime Control and Safe Streets Act of 1968 provides simply that the testimony of an eyewitness shall be admissible in any federal court. Its purpose is to assure that in-court identifications may always be made, irrespective of the nature and circumstances of any pretrial confrontations between the witness and the defendant. This is, of course, directly counter to what the Supreme Court in Wade and Stovall has said the Constitution requires. But a majority in Congress took a different view of the Constitution, as evidenced by the Report of the Senate Judiciary Committee, which devotes one brief paragraph to the justification of this provision. That paragraph flatly declares the Court’s ruling in Wade to be “disastrous,” and unwarranted by the Constitution.

As a practical matter, the Congressional action has proved to be meaningless. The inferior federal courts have considered themselves bound by the Supreme Court’s reading of the Constitution rather than that of the Congress and have appeared to ignore the new statute. It exists on the books more as the expression of a legislative hope than as a binding rule of decision, and it will presumably continue in this posture until the Supreme Court, if it ever does, overrules or modifies its identification decisions.

The ineffectiveness of this statute became inevitable when the Congress, in response to a storm of protest from the bar, eliminated from the bill the companion provision which purported to abolish the jurisdiction of the federal courts to review final state court and federal trial court decisions making in-court identifications invariably admissible. Had this remained, the stage might have been set for a definitive resolution of the great constitutional questions about the relative power relationships of Congress and Court—questions which derive from the Article III grant of power to the one to regulate the appellate jurisdiction of the other, and which persist despite Ex parte McCardle.

The more relevant question for present purposes, however, is whether the Congressional response in this instance represented a useful expenditure of legislative time and energy. It appeared to overlook completely

29. 74 U.S. (97 Wall.) 506 (1869). The most recent exploration of the question is in R. Berger, Congress v. the Supreme Court (1969). It is there concluded, by reference to the historical evidence, that the “exceptions” clause of Article III is “altogether unrelated to a power to deprive the Court of jurisdiction of Constitutional claims.” The doubts continue, however. See Pollak, Book Review, 79 Yale L. J. 973 (1970).
the threat to the conviction rate inherent in the impatience of juries with prosecution cases limited to in-court identification. It showed no awareness of the values that may reside, for the prosecution as well as the defense, in tightening up pretrial identification procedures so that impressively credible identification evidence can be adduced. There is, one may think, something very reassuring about evidence which increases in weight in the ratio that it reflects conscious concern for fair treatment in the methods used for its accumulation.

There was no precise identification by the Congress of the very real dilemmas created for the police in their investigatory functions by the new constitutional restrictions upon pretrial identification. The legislators appeared to be preoccupied with destroying Wade because of its assumed evils, rather than with exploring avenues of accommodation which could contribute to achievement of justice for all—suspect and public alike.

One such avenue might be found in the pending proposals for prior judicial authorization of commands that suspects present themselves for viewing in formal lineups. Such proposals require the most careful weighing, in which other possible alternatives are to be considered, and throughout which a conscious concern for fairness to the individual is always of primary importance. Even these standards may arguably be thought to conflict with constitutional guarantees. My point for present purposes is neither to assert nor to deny the legality of any such approach, but only to suggest that this manner of legislative response to the problem of criminal identification is conceivably more fruitful than the one that was forthcoming. Certainly it is one more likely to have a practical effect in solving what is obviously a very real problem in terms of both public and private interest.

If any such measure should emerge, there is but one thing of which we may presently be sure. The debate about its validity will resound with the catchwords which have long been used to characterize the process of constitutional interpretation. Because of the elements of novelty, it will be variously—and simultaneously—asserted that its constitutional foundations can be found only in an unacceptably loose reading of the relevant constitutional phrases or, contrarily, in an unreasonably narrow and restricted perception of what those phrases may properly be taken to mean.

That was the climate of controversy in the wake of Wade-Gilbert-Stovall. It will be the climate of any further development of the procedures of criminal identification. The nature of the change may cause
some realignment of the singers, but the words will be the same. They will be of meager utility in the attainment of a rational result. They will be of even less worth as a basis for locating the springs of judicial action.