Yale Law Journal

Volume 77
Issue 2 *Yale Law Journal*

Article 6

1967

Lawyers and Lineups

Lawyers and Lineups

The lawyer has unquestionably become the hero of the Supreme Court's drive to improve criminal justice. The path from *Gideon*[1] to *Massiah*[2] to *Escobedo*[3] to *Miranda*[4] has brought the lawyer, as an all but indispensable appurtenance, from the courtroom to post-indictment investigations to post-arrest interrogations. Last term, in *United States v. Wade*,[5] the Court held that a suspect has a right to counsel at his lineup and, consequently, that testimony describing an out-of-court identification elicited in the absence of counsel must be excluded unless the suspect expressly waived his right.[6] An in-court identification made without reference to a prior unconstitutional lineup is also inadmissible unless the prosecutor can somehow show that the in-court identification was the product of the witness' independent recollection.[7]

1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. Massiah v. United States, 377 U.S. 201 (1964).
3. Escobedo v. Illinois, 378 U.S. 478 (1964).
4. Miranda v. Arizona, 384 U.S. 436 (1966).
5. 388 U.S. 218 (1967).
6. The holding flew in the face of one circuit judge's assertion that right to counsel at a lineup was a " 'Disneyland' contention," advanced by appointed counsel to avoid later attacks on the competency of his representation. Williams v. United States, 345 F.2d 733, 736 (D.C. Cir. 1965) (concurring opinion). There were two companion cases. In Stovall v. Denno, 388 U.S. 293 (1967), the Court decided that the *Wade* rule was not retroactive; but it approved another ground for a constitutional attack on a lineup procedure, citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). In *Palmer*, the Fourth Circuit had held that a patently unreliable identification technique in a Virginia case violated the fourteenth amendment's due process clause. In *Palmer*, the victim of a rape "identified" the accused solely on the basis of hearing his voice from an adjoining room. Moreover, the sheriff had somehow managed to testify that "I didn't want her to see him," *id.* at 202, although this may have sounded sillier than it was—the rapist had worn a "purina chow bag" over his head. In reversing, the court said that a state may not rely "on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction." *Id.* In *Stovall*, however, the Supreme Court decided against the petitioner's due process claim on the facts. The suggestion implicit in the showup in a victim's hospital room was not sufficiently outrageous when balanced by the fact that the victim, the sole eyewitness to her husband's murder, could not be moved to a less suggestive setting, and her life was in doubt.

In the other companion to *Wade*, Gilbert v. California, 388 U.S. 263 (1967), the Court applied *Wade* to vacate a conviction; it also decided, *inter alia*, that a suspect does not have a right to counsel when he is told to produce a sample of his handwriting. *Id.* at 267.

7. In so holding, the Court adopted a test first endorsed in the fourth and fifth amendment context of Wong Sun v. United States, 371 U.S. 471 (1963): "[T]he more apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Id.* at 488. Accordingly, both Wade and Gilbert were returned to the trial courts for a hearing on the issue of "taint."

The problem to which the Court responded is clear enough.[8] It has long been thought that inaccurate eyewitness identifications are the principal cause of erroneous convictions.[9] Edwin Borchard's well-known book, *Convicting the Innocent,* discusses 65 cases where innocent men served prison terms; 29 were the victims of faulty eyewitness identifications. Borchard's first case dramatizes the problem better than any theoretical discussion of perceptual psychology: 17 victims of a bogus-check artist wrongly identified an innocent man, under oath. The real con man, when apprehended, turned out to look nothing at all like the innocent man who had been convicted.[10] It also appeared that the police had suppressed the fact that other victims of the same scheme had stated that the suspect was not the criminal.[11]

And statistical compilations must understate the problem. Cases of known erroneous identifications come to light only after the apprehension—and usually the confession—of the real culprit. Yet in spite of the dangers recognized by all in the often casual and at least occasionally contrived ways in which most identifications are elicited,[12] no legislatures have dealt seriously with the problem. The few courts which have excluded evidence of pretrial identifications have usually eschewed a straight, hard look at the reliability of the testimony and relied instead upon the intricacies of the hearsay rule[13]—for example, when a policeman describes a prior lineup identification by an unavailable witness. Under the conventional wisdom, reliability goes only to the weight to be given the evidence, and not to its admissibility.[14]

8. *See generally* the materials cited by the *Wade* Court, 388 U.S. at 228 n.6, 229 n.7.

9. M. Houts, From Evidence to Proof 10-11 (1956); *cf.* J. Frank & B. Frank, Not Guilty 31 (1957).

10. Of Borchard's 29 instances of erroneous identification, only two involved look-alikes, and in twelve of them the accused was identified by four or more witnesses.

11. E. Borchard, Convicting the Innocent 1-6 (1932).

12. One English critic has charged that the pretrial identification in his country is often "a subtle campaign of suggestion." *The Case Against Personal Identification,* 13 Fortnightly L.J. 87 (1943); Mr. Justice Douglas, speaking for the majority in McDonald v. United States, 335 U.S. 451, 456 (1948), said, "[H]istory shows that the police acting on their own cannot be trusted."

13. *E.g.,* Wilson v. State, 111 Tex. Crim. 134, 11 S.W.2d 803 (1928); *cf.* Poole v. United States, 97 F.2d 423 (9th Cir. 1938). *Contra,* DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925); 4 J. Wigmore, Evidence § 1130 (3d ed. 1940). *See also* Annot., 71 A.L.R.2d 449 (1960).

14. *E.g.,* Golliher v. United States, 362 F.2d 594, 602 (8th Cir. 1966). *But see* Proctor v. State, 223 Md. 394, 164 A.2d 708 (1960). Other cases tend to permit introduction of evidence of a pretrial identification even when the witness is unable to identify the suspect at the trial. *See* United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964); People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960), *noted in* 8 U.C.L.A.L. Rev. 467 (1961); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956).

The strictures of the hearsay rule have been abrogated by statute, too. N.Y. Code Crim Proc. § 393(b) (1958).

At the same time, it should be noted that few courts will sustain a conviction on

Unsatisfied by this lack of legislative and judicial response to the problem, the Supreme Court seized once again upon the lawyer as a solution.[15] This newest assignment for the bar, however, relies upon

extrajudicial identification alone. *See* People v. Gould, 54 Cal. 2d 621, 631, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960); *Note*, 36 MINN. L. REV. 530, 532 (1952). *But see* State v. Findling, 123 Minn. 413, 144 N.W. 142 (1913).

15. The problem of pretrial identification has not been left unsolved for want of study and simple, cheaply implemented safeguards. One proposal would require that a suspect be picked from a group at a lineup and not, as is often done, presented alone (and handcuffed) to the victim of a crime; that a witness not be shown a mugshot unless it is inconspicuously included in a large group of similar photographs; that the witness be given no information concerning the suspect, such as his arrest record; and that identifications be made with no other witnesses present. It would also require, as a prerequisite to the admissibility of identification testimony, that the witness had not failed to identify the suspect at any prior time. Comment, *Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses*, 2 U.C.L.A.L. REV. 552 (1955). For a similar proposal, cited by the Court in *Wade*, 388 U.S. at 236 n.26, see Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, 627-28.

Another commentator has suggested that witnesses be required to furnish police with a signed description of a criminal before they are allowed to identify anyone. Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 229 (1963). Such a requirement, however, would serve to impeach many correct identifications. One critic of eyewitnesses refers (without citation) to a study of 20,000 cases revealing that descriptions of criminals by eyewitnesses overestimate height by an average of five inches, age by eight years, and are wrong about hair color 82 per cent of the time. *The Case Against Personal Identification*, 13 FORTNIGHTLY L.J. 87 (1943). *See also* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 10-11 (1965) [hereinafter cited as WALL]. It would seem that the sense of recognition aroused by a suspect in the flesh is more reliable than a description. But empirical study is needed.

Without resort to the legislature—or a written constitution—English courts have developed substantial restrictions on police conduct of "identification parades." Evidence of a pretrial identification is excluded if the police pointed out the suspect at the lineup. R. v. Chapman, 7 Crim. App. 53 (1911); *cf.* Redmon v. Commonwealth, 321 S.W.2d 897 (Ky. 1959). It is also excluded if, before the lineup, police showed the witness photographs of a suspect already in custody, R. v. Goss, 17 Crim. App. 196 (1923), R. v. Haslam, 19 Crim. App. 59 (1925); or if, though the suspect was not yet in custody, they showed the witness only one photograph. *See* R. v. Melany, 18 Crim. App. 2 (1924). And in some circumstances, a lineup may be *de rigueur*. R. v. Smith & Evans, 1 Crim, App. 203 (1908); R. v. Williams, 8 Crim. App. 84 (1912). In Australia, omission of a cautionary instruction on the danger of suspicious identification evidence constitutes reversible error. Davies & Cody v. R., 57 Commw. L.R. 170 (Austl. 1937). For a discussion of the English and Australian cases, see Paul, *Identification of Accused Persons*, 12 AUSTL. L.J. 42 (1938).

Finally, either courts or legislatures could act to prohibit convictions based *solely* on eyewitness identification, a suggestion made in G. WILLIAMS, PROOF OF GUILT 118 (3d. ed. 1963). No American rule of common law or statute requires corroboration of eyewitness identification. WALL 184. Indeed, such a rule is opposed by Wigmore, 7 J. WIGMORE, EVIDENCE § 2033 (3d ed. 1940), on the grounds that the rule is too rigid. *Cf.* C. MCCORMICK, EVIDENCE 230 n.5 (1954). But Wall would approve such a rule where the evidence was "suggestively obtained"—by which he intends to encompass all single-suspect showups. WALL 190. It seems that Wall's approach could be tempered by an exception for cases wherein the witness had had much more than a fleeting glimpse of the criminal—a kidnap case, for instance. *See* Mr. Justice White's partial dissent in *Wade*, 388 U.S. at 251. In any event, some cases on the books provide Wall with effective ammunition. Notably dramatic are People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963); People v. Cashin, 259 N.Y. 434, 182 N.E. 74 (1932). *See also* Commonwealth v. Kloiber, 378 Pa. 412, 424, 106 A.2d 820, 826 (1954): "[A] positive, unqualified identification of the defendant by one witness is sufficient for conviction even though half a dozen witnesses testify to an alibi." Indeed, the defendant in Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335, 339 (1962), mustered a number of alibi witnesses but was convicted by the court after he had been identified at a showup displaying most

a different rationale than other recent Sixth Amendment cases. As a consequence, the precise role the lawyer is to play at lineups is not immediately clear, nor does the Court make it so. There is, moreover, reason to question how effectively the lawyer can perform any of the several tasks expected of him.

I. "Critical Stages" and Counsel

The cornerstone of the Court's decision in *Wade* was the now familiar concept of the "critical stage."[16] By this analysis the right to counsel must arise "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial."[17] A pretrial identification, the Court found, was such a stage because it was "peculiarly riddled with innumerable dangers and variable factors . . . ."[18] This being so, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[19] Since counsel might, the Court concluded, serve to prevent unfairness, a criminal suspect had the right to such assistance.

Couched in language of such syllogistic simplicity, the decision superficially seems no more than a logically demanded extension of the Court's recent work. But a trial may be "unfair" in several ways. In *Hamilton v. Alabama*,[20] for example, the unfairness arose when the state denied the accused assistance of counsel at a formal pretrial proceeding. And in *Escobedo* and *Miranda*, it arose when the state proceeded to seek a confession: in the absence of advice of counsel, an accused's privilege to remain silent was inadequately protected.

This reasoning cannot apply to the lineup, however, for there it does not appear that counsel is included to protect any legal rights of the accused. Mr. Justice Brennan held for the Court that "[n]either the lineup itself nor anything . . . that Wade was required to do in the lineup violated his privilege against self-incrimination."[21] Rather than

of the known relevant sins. This aspect of the case is treated thoroughly by Kamisar, *The Right to Counsel and the Fourteenth Amendment: a Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 42-56 (1962).

16. *See* Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964).
17. 388 U.S. at 226.
18. *Id.* at 228.
19. *Id.* at 235.
20. 368 U.S. 52 (1961).
21. 388 U.S. at 221. At the same time, it may be that the interests served by *Miranda* will also be served by *Wade*. For as Mr. Justice White pointed out in his *Miranda*

protection of the self-incrimination privilege, the holding of the Court in *Wade* was concerned with the reliability of the fact-finding process. Thus, Mr. Justice Brennan distinguished the denial of a right to counsel at the time of a blood test on the grounds that there "the techniques of science and technology"[22] are sufficiently precise and well-known to allow effective challenge by the accused at trial. In lineups, on the other hand, the reliability of the identification can be affected by "innumerable dangers and variable factors" which the Brennan opinion paraded in careful detail.

Perhaps the most startling aspect of this new rationale for the "critical stage" analysis is its sweep. If any stage where the reliability of the fact-finding process is endangered is critical, should not counsel be required whenever his presence in the investigative process would reduce the danger of unreliable evidence?

The risk of an erroneous identification is certainly at least as great, for example, where the police apprehend a suspect close after the crime and in the same vicinity, and bring him before the still trembling victim; *Wade* would presumably apply. In *Kennedy v. United States*[23] the police arrived at the scene of a robbery in response to a radio call and found two men forcibly detaining Kennedy in the alley. Hearing a woman screaming inside the house where the robbery had occurred, the police took Kennedy in tow and entered. Inside, they found the victim handcuffed to the bannister. She identified Kennedy immediately. In such circumstances the victim's recollection may well be fresher than at a subsequent lineup or trial; but the victim is even more susceptible to suggestion by the police, intended or not ("Isn't this the man?"). On the other hand, it may be argued that the suspect should not be denied the opportunity to be exonerated on the spot. And, by the same token, the police as a practical matter must be given some way to decide whether to settle for the suspect apprehended or search on. The practical difference between lineups and the *Kennedy* situation is the ease with which lawyers can be made available; unfor-

dissent, it seems odd that confessions elicted without warning are per se involuntary, while waivers of the right to counsel will not be. 384 U.S. at 536. By injecting counsel into the process prior to interrogation, the danger of involuntary waivers should be lessened. So should be the danger of the phony lineup mentioned by the *Miranda* majority, where a number of "eyewitnesses" feign recognition of the suspect, implicating him in crimes other than the one under investigation. To escape the false accusations of other crimes, he may confess. 384 U.S. at 453.

22. 388 U.S. at 227.

23. 353 F.2d 462 (1965).

tunately, this critical factor never appears in the rhetoric of the "critical stage" analysis.

Moreover, although Brennan speaks of the "innumerable dangers" inherent in a confrontation between the accused and the victim, a risk of reliability at least as great can arise when the accused is not even personally involved. What if the police show the victim a mug-shot of the suspect? If he is an Oriental and everyone else in the scrapbook is not?[24]

The Court did appear to seek a limiting rationale for the "critical stage" analysis that would key determinations of the need for counsel to whether a lawyer lacking such firsthand knowledge could effectively cross-examine the Government witnesses at trial.[25] This may offer a valid means to distinguish investigatory techniques which can be administered impartially to yield objective results from those which invariably include subjective evaluations and consequently a risk of undetectable error at trial. But the risk of error is only one factor determining the reliability of evidence; the risk of abuse in applying an investigatory technique must also be considered. In fact, most of the horribles paraded by the majority in *Wade* involved the latter.[26] And on this score, it is unclear why a lawyer can better expose a rigged blood test by cross-examination at trial than he can a rigged lineup.[27] The cases must, therefore, be distinguished by some difference in the risk of undetectable abuse, and not merely—as in the Court's opinion—by the difference in the risk of good-faith error.

But criticism of the Court for failing to set or even suggest reasoned limits to the broad sweep of the "critical stage" analysis may be unfair where the Court is concerned with reliability. Having concluded as it obviously did in *Wade* that the problems of reliability in lineups

24. For an exhaustive discussion of identification by photograph, see WALL, ch. V.
25. *See* 388 U.S. at 227-28.
26. *Id.* at 232-34.
27. We have no evidence for the Court's assertion that cross-examination of lineup witnesses will fail to convey at trial an accurate idea of what occurred at the lineup. Moreover, the accused himself is present at a lineup, and there is no reason to doubt that in most cases he will see and be able to relate to his counsel substantially all that occurred. That which the police prevent the accused from seeing (*e.g.*, a peep-hole identification), they can also prevent his counsel from seeing. The Court may, of course, be concealing its unarticulated fear that even an accurate picture of what occurred at the lineup will not dispel from the jurors' minds the force of a subsequent courtroom identification. But if concern over the impressionability of jurors is the basis for the Court's decision, one may legitimately query whether the confusion induced by the cure is any better than the disease. Courtroom identifications based on unreliable pretrial investigations are reduced, at the expense of a total obfuscation of the boundaries of the right to counsel and the concept of a "critical stage."

justified intervention, the Court could perhaps with propriety leave to another day and the concrete circumstances of another case the task of distinguishing other obvious areas of possible unreliability.

The absence of any satisfying indication in *Wade* of what role counsel should or can play at lineups is more disturbing, however. To the extent that lawyers cannot correct the abuses of lineups, the solution chosen by the Court becomes suspect. The obvious alternative was to lay down detailed rules for the conduct of lineups, similar to those established for interrogations in *Miranda*. Since such a decision would have the immediate attractions of creating predictability and consequently reducing the Court's likely caseload, the necessary question is why lawyers can either better eliminate the problems of unreliable identifications at lineups or aid the Court toward an ultimate solution.

II. Lawyers at Lineups

The *Wade* opinion is silent concerning what the lawyer should do at the lineup—it says only that he may prevent unfairness. But how? May he forbid the police to conduct a particular type of pretrial identification? If the self-incrimination privilege does not extend to lineups, the lawyer can claim no authority from that constitutional source. And until the Supreme Court establishes standards for unconstitutional unreliability, he cannot cite any explicit prohibitions to the police. In the absence of any defined rights of the accused to protect, the role of the lawyer in any traditional sense seems limited. To the extent the accused is a passive participant at this stage of the process, with neither rights to assert nor tactical decisions concerning his defense to make, the accustomed role of the lawyer as counsellor, guide and spokesman is irrelevant. Of course, the lawyer can attempt to haggle with the police over what would be "fair," or what a court is likely to consider "fair." But there is nothing in the Brennan opinion to suggest that the police are obligated to reciprocate in haggling sessions. To the extent that they are, the door is open for obstructionist techniques. As Mr. Justice White's dissent pointed out, the attorney's duty to his client is not limited to an intellectually honest quest for truth;[28] traditionally, even the guilty are entitled to the assistance of counsel. Whether such assistance should extend to obstructionist efforts in the stationhouse is a nice question; as a practical

28. 388 U.S. at 256-57.

matter, it is a possibility of which the *Wade* majority gave no indication it was even aware.

Nor did the majority consider what the consequences should be for improper obstructionist efforts by an attorney on behalf of his client. To take an obvious example, the Court held in *Wade* that a voice identification test at the lineup does not violate the accused's privilege against self-incrimination. Presumably, then, the accused has an obligation to participate. What consequences should follow if his lawyer advises him to stay completely silent? Can the lawyer be punished for contempt if he persists after a court order to advise his client to answer? What if his client has by then realized that perhaps staying silent is a good tactic, even if his counsel changes his advice under court encouragement? Are consequences for the defendant at trial proper, such as either a presumption that the witness would have identified his voice, or an instruction for the jury to draw whatever inferences seem proper under the circumstances? In the former case, the penalty may seem too harsh; in the latter case, the guilty accused may have nothing to lose by his refusal to speak, particularly if his attorney can mount some plausible argument to the jury why a voice test would have been unreliable.

To the extent that an affirmative, adversary role for the attorney is envisaged at the lineup, the *Wade* decision thus may create more problems than it solves. But there are suggestions in the opinion that perhaps the majority's image of the lawyer's role is simply that of a witness, aware of the legal implications of that which he witnesses.[29] Thus, Mr. Justice Brennan referred more than once to the need for an attorney with firsthand knowledge of what went on at the lineup to assure "a meaningful confrontation of the Government's case at trial . . . ."[30]

However, this conception of the lawyer's role at the lineup does not solve all the difficulties. Whether the lawyer at the lineup is participant or observer, there remains the possibility that prejudicial techniques may not be the prime cause of erroneous identifications—it may be that the mode of identification pales in significance when compared with other factors, such as the lighting at the scene of the crime or the vindictiveness of the witness, which the lawyer at a lineup can

29. Should this be so, the *Wade* rule becomes conceptually indistinguishable from traditional exclusionary rules of evidence—for example, the rule that wills must be witnessed to be admitted to probate.

30. 388 U.S. at 227-28.

hardly "witness." If faulty identifications do result primarily from factors beyond the control of the police, the *Wade* Court has simply made law enforcement more difficult without attacking the principal cause of unreliability. Second, and perhaps more important, to the extent the police may abuse the process there is reason to question how often a lawyer-witness will catch them at it. A lineup may be rigged more subtly than by placing a Negro suspect on a stage with five white men. How, for example, will a lawyer know from watching the lineup whether a witness has been coached? Or shown a mugshot of the suspect? How can he prevent the use of peep-holes or one-way mirrors to permit the witness to look at the suspect before the lineup? For such abuses, cross-examination will remain his only source of information, as it was before *Wade*.[31]

Finally, if a witness at the lineup is wanted, why choose a lawyer? This indeed is the common center of all the preceding criticism. An impartial court observer could perform the passive function of a witness fully as well as a lawyer, while creating none of the problems an active lawyer attempting to play an adversary role may create.[32] Or the Court could have required that if a lawyer is not present, a record of the lineup—films, tape recordings, etc.—be made available to him in a form which would convey essentially the information a witness at the lineup could collect.[33]

III. Lawyers at Lineups: The Strategic View

Even with full allowance made for the faith and hope which move Supreme Court justices as well as lesser men, the *Wade* majority could not reasonably expect lawyers to eliminate the unreliability of lineup

31. In an "Oklahoma Showup," the police ensure that the witness confronts the suspect prior to the lineup in some apparently inadvertent manner. When the lineup takes place, the witness will be apt to identify the suspect, since he will recognize him and assume that his recognition results from his encounter with the criminal. *See* M. MACHLIN & W. WOODFIELD, NINTH LIFE 56-57 (1961); WALL 48; *cf.* People v. Clark, 28 Ill. 2d 423, 192 N.E.2d 851 (1963). The danger to the suspect is seemingly beyond the protection afforded by *Wade*.

32. Indeed, the Court pointed out in a footnote that "[a]lthough the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel." 388 U.S. at 237 n.27. The thought seems paradoxical, however, if the right to counsel is predicated on the need for firsthand information to ensure effective cross-examination. It may be that the Court simply wishes to subject the police investigation to the impartial scrutiny of an astute observer not connected with the prosecution.

33. The idea was suggested prior to *Wade*, in Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, 628, and was mentioned by the Court, 388 U.S. at 236 n.26.

identifications. Simple rules for the conduct of lineups might have been far more effective at the cost of a far smaller burden on the system. But the Court's lack of experience in this area, plus the rigidity of detailed rules cast as constitutional requirements, provided a strong argument for a more tentative approach.

By creating a new right to counsel but emphasizing that the requirement depends upon the continued categorization of the line-up as a "critical stage," the Court could immediately attack the worst abuses while retaining maximum long-run flexibility. The Court's explicit invitation for legislative action to "eliminate the risks of abuse and unintentional suggestion at lineup proceedings"[34] and thereby "remove the basis for regarding this stage as 'critical' "[35] laid the groundwork for a graceful withdrawal from the field if such legislation materializes. Alternatively, the Court may have good reason to hope for a more affirmative police response to lineup restrictions than to the interrogation restrictions culminating with *Miranda*. A natural desire to convict the guilty allows the police to rationalize interrogation techniques that, while violative of the self-incrimination privilege, are nevertheless likely to produce reliable confessions. But with lineups, the police can never be sure that attempts to elicit identifications result in conviction of the guilty person.

Yet, whether or not legislative intervention or police "self-improvement" comes to pass, the lineup issue will have been kept before the Court as the newly-required lawyers challenge the reliability of various procedures. This continuing supervision of the lineup process can benefit the Court in several ways. Most obviously, if further intervention to assure lineup reliability is necessary, the Court will be better qualified than it was in June to establish constitutional rules for the conduct of lineups. Secondly, because *Stovall v. Denno*,[36] a companion case to *Wade*, announced no test to determine when unreliability, in lineups or elsewhere, reaches constitutional dimensions, challenges to the reliability of other aspects of police investigation are inevitable. The Court is presently ill-equipped to deal with reliability: as an issue of constitutional dimensions, reliability has been before the Court only in what might be called a "shock the conscience" context,[37]

34. 388 U.S. at 239.
35. *Id.*
36. 388 U.S. 293 (1967), discussed in note 6 *supra*.
37. *See* Rochin v. California, 342 U.S. 165 (1952), where evidence obtained by pumping a suspect's stomach was held inadmissible: the method of gathering it "shocked the conscience" of the Court. *Id.* at 172.

where no evidence at all appears in the record,[38] or where other important issues were obviously lurking—as in the coerced confession cases where the self-incrimination issue finally surfaced. The tactical use of a right to counsel permits the Court to act deliberately in blocking out the boundaries of a constitutional problem ultimately more closely related to the procedural integrity of the system embodied in the concept of due process of law than to the protection of the human dignity of individual defendants. Although jailing an innocent man may be the worst affront to human dignity we are capable of administering, the affront consists in his imprisonment, and not in indignities inflicted upon him while obtaining factually unimpeachable evidence to send him there. It would be a fool's errand to attempt to chalk the limits to which the Court will permit the impeachment of evidence gathered by unreliable techniques before anyone—justices, lawyers or academicians—has any clear notions of how and when unreliability reaches intolerable proportions. The presence of lawyers at lineups will focus professional attention on the prickly issues raised by attempts to evaluate the reliability of investigatory technique.[39]

A third possibility, however, must be considered. There is precedent in the Court's history for the conversion of what is ostensibly a reliability issue into a self-incrimination issue: the confession cases, from *Brown v. Mississippi*[40] in 1936 through *Massiah* to *Miranda*, followed this pattern. The introduction of a lawyer into the lineup process to protect the defendant from inaccurate identifications may provide the foundation for a new look at the scope of the self-incrimination privilege.

38. *See* Thompson v. Louisville, 362 U.S. 199 (1960).

39. For one approach to the notion of a due process law of evidence, see Richardson, *Rochin and Breithaupt in Context*, 14 VAND. L. REV. 879 (1961): "[T]he proposition here advanced is that if the particular process . . . is so unreliable as to have little or no probative value, the admission on behalf of the state of the results thereof in a criminal prosecution would violate due process."

At the same time, there is much to be said against a due process approach to reliability. Mr. Justice Black's dissent in *Wade* complained that the majority opinion made "the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness . . . ." 388 U.S. at 247. It might be added that in addition to the implied lack of predictability under the Court's approach, there is an economic argument against use of the due process clause to make nice evidentiary distinctions: if the admission of evidence is to be keyed to its reliability, every evidentiary ruling by a trial court, state or federal, becomes the stuff of constitutional litigation. Thus, federal district courts might become no more than third-level appellate courts in evidentiary due process cases. While such a result would impose heavier docket loads, there is no reason to believe that federal courts are better able to consider relative reliability than are the highest courts of the several states; accordingly, the marginal utility of a due process approach may be minimal.

40. 297 U.S. 278 (1936).

Although a majority of the justices found no violation of the self-incrimination privilege in the lineup *cum* voice identification test in *Wade*, the factionalization of the Court suggests that it may have wished to temporize on this issue as well as the question of just how the problem of unreliable identifications can best be solved. Justice Douglas adhered in his dissent to his position in *Schmerber v. California*[41] and would find any compulsory lineup violative of the privilege.[42] Mr. Justice Black, also clinging to his *Schmerber* dissent,[43] argued that the voice-identification to which Wade was subjected violated his test, but voted to affirm Wade's conviction, since the defense, and not the prosecution, had elicited the evidence of the prior lineup.[44] Mr. Justice Fortas, joined by the Chief Justice and Mr. Justice Douglas, agreed with the majority that a mere lineup did not violate the privilege, but dissented from its conclusion that Wade's compelled utterances were also not privileged. For Fortas, the crucial failing of the latter was that it required a "volitional act" by the accused which was "within the historical perimeter of the privilege."[45] Even Mr. Justice Brennan for the majority was careful to say only that "it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege";[46] his opinion suggests that the majority left open the question whether lineup practices might violate even the "testimonial" test of *Schmerber*.

Thus, even last June the Court was anything but unified in its conception of the privilege. A "volitional act" gloss on the "testimonial" test is among the least radical possible modifications of the Court's position.[47] And even the "testimonial" test without explicit

41. 384 U.S. 757, 778 (1966).
42. 388 U.S. at 243.
43. 384 U.S. 757, 773 (1966).
44. 388 U.S. at 247. In addition, Mr. Justice Black dissented from the majority's disposition of the case—the remand for what he called a "tainted fruit" hearing—since he felt that the majority had written a "novel rule of evidence" in derogation of the states' criminal jurisdiction. *Id.* at 248-49. And in *Stovall*, he dissented from the Court's approval of *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966). To judge the issue of whether a given procedure violated the due process clause, argued Mr. Justice Black, "is to make this Court not a Constitution-interpreter, but a day-to-day Constitution-maker." *Id.* at 305. On the other hand, he would have agreed with the *Wade* majority, had the state attempted to introduce testimony concerning the lineup. Thus, while Mr. Justice Black does not wish the Court to formulate evidentiary rules for the states, he is willing to exclude evidence when it is arrived at in the absence of a particular safeguard of reliability—counsel.
45. *Id.* at 260.
46. *Id.* at 223.
47. Four justices—Black, Douglas, Fortas, and the Chief Justice—believed that compelling a suspect to speak, even for purposes of voice identification, violates the fifth amendment's privilege against self-incrimination. Mr. Justice Clark, who joined

modification establishes anything but a well-defined pale around the privilege.

The earlier discussion suggested that one consequence of a "case by case" approach to the problem of reliability in lineup identifications may be a sizable swell of cases. To the extent the Court is willing, if not eager, to consider further the none too distinct lines it has drawn around the self-incrimination privilege as well as to familiarize itself with the subject of reliability breached in *Wade*, this consequence may not be an unpleasant side effect, but a considered purpose of the decision. The confession cases came to the Court for many years under the due process clause. Increased familiarity with the factual permutations of that problem convinced the Court, at length, of a need to expand the protection of the privilege and lay down explicit rules for interrogations. The result may be similar—although, in all likelihood, less dramatic—in the area of lineups.

in the majority view, has since left the Court. For a state case taking the minority's side, see Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942). *Contra*, Johnson v. Commonwealth, 115 Pa. 369, 9 A. 78 (1887).

It should be noted in passing that the "volitional act" concept is not new. It was utilized by some Southern courts of an earlier era to prohibit an accused from being made to stand up in court for identification. State v. Jacobs, 50 N.C. 259 (1858); Wells v. State, 20 Ala. App. 240, 101 So. 624 (1924). The Alabama court has persisted, apparently because its constitution's self-incrimination clause uses the words "give evidence against himself," rather than the more common "testify." ALA. CONST. art. I, § 6; *see* Smith v. State, 247 Ala. 354, 24 So. 2d 546 (1946); F. INBAU, SELF-INCRIMINATION 27-28 (1950).