BLACKS, DUE PROCESS AND EFFICIENCY IN THE CLASH OF VALUES AS THE SUPREME COURT MOVES TO THE RIGHT

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> *Some of the great provisions of the Constitution lay dormant for large numbers of our people until the Warren Court gave them life across the land. Stare decisis. Let them be.*
>
> — Judge Charles Fahy[1]

I.

CONSERVATIVES AGAINST PRECEDENT

THE ULTIMATE IRONY of the conservative Nixon Justices is the increasing evidence of their radical disposition to overturn past principle in quest of an efficient and streamlined criminal justice system. Led by its law enforcement-oriented Chief Justice,[2] an emerging majority[3] of the Court has managed to reverse or seriously abridge precedents — both recent and time-honored — which ensured some fairness for minority defendants. Two alarming decisions handed down at the close of the Court's last term indicate that the Black man may no longer be the special ward of the Supreme Court.[4] At best he is now emancipated, at worst, orphaned. For the Court now seems ready to ignore the very special impact of criminal justice decisions on racial minorities. The icy detachment of Mr. Justice Rehnquist's Moose Lodge opinion,[5] in itself perhaps only a disturbing symbol and affirmation of the persistent virus of racism, has characterized the Court's abridgement of the recently evolved right to a lawyer at a lineup and the centuries-old right to unanimous jury verdicts. The concern of the Court for the oppressed seems to have all but run its course.

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1. Fahy, Book Review of Equal Justice: The Warren Era of the Supreme Court by Arthur Goldberg, 67 Nw. U. L. Rev. 146, 151 (1972).
2. "Chief Justice Warren E. Burger, 65, may be the most law-and-order-minded member of the bench, as well as its most zealous advocate of judicial restraint. On a number of occasions, he has written opinions inviting Congress to deprive the courts of authority over certain subjects." L.A. Times, Oct. 2, 1972, Pt. I, at 18, col. 1.
3. "[The Nixon] appointees are identifiable as a bloc. Last term they voted together on 54 of the 67 cases in which all four participated." *Id.*
4. As long ago as the Slaughter House Cases, 16 Wall 36, 71 (1872), the special Constitutional status of the Black man was recognized by the Supreme Court when Mr. Justice Miller declared that "the one pervading purpose found in [the Civil War Amendments], lying at the foundation of each, . . . [was] the freedom of the slave race, the security and firm establishment of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

   Even scholars who believe that "neutrality" is the best policy in racial matters concede that there is "some historical support" for any claim by Blacks for "a place as special ward of the Constitution." Kaplan, *Segregation Litigation and the Schools — Part II: The General Northern Problem*, 58 Nw. U. L. Rev. 157, 186 (1963).

   This is not the place to refight the war over judicial neutrality, but Judge Skelly Wright has written with special urgency about the Constitutional propriety of special judicial concern for Blacks:

   > "Special protection of Negroes' rights, however is not necessarily a breach of neutrality. So long as the Court would have aided any group comparable situated in our society it acts with the requisite neutrality. Just because no other group, given the appalling history of slavery, black codes and compelled segregation, may in fact be comparably situated does not alter hte neutrality. Indeed, the three constitutional amendments required to give the Negro equal legal rights attest to the fact that no other group *is* comparably situated.
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   > "In other words, so long as the Court acts to protect any group whose legitimate interests are consistently and shamefully neglected by the political processes, it acts neutrally. The Court, then, protects Negroes not simply because they are Negroes, or because the Justices think them especially worthy people, but because their legitimate interests continue to go unprotected elsewhere." Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 Cornell L. Rev. 1, 17 (1968).
5. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The plaintiff, a prominent member of the Pennsylvania State legislature, was refused service by the Moose Lodge although he was the guest of a white member. Justice Rehnquist "distinguished" Burton v. Wilmington Parking Authority, 365 U.S. 715 (1951), and held that even though the state had issued a liquor license to the Moose Lodge, there was no significant state involvement in the private discriminatory scheme and hence no violation of the Fourteenth Amendment. Justices Brennan, Douglas and Marshall dissented, with Douglas pointing out in his dissent the substantial state support of the Moose Lodge's discriminatory practice, and declaring that the "scarcity of licenses restricts the ability of Blacks to obtain liquor, for liquor is commercially available *only* at private clubs for a significant portion of each week. Access by Blacks to places that serve liquor is further limited by the fact that the state quota [of liquor licenses] is filled. A group desiring to form a nondiscriminatory club which would serve Blacks must purchase a license held by an existing club, which can exact a monopoly price for the transfer." 407 U.S. at 182-183.

A. *Lineups: Police Only, No Lawyers Allowed*

Consider first *Kirby v. Illinois,*[6] the lawyerless lineup case. In a plurality opinion by Mr. Justice Stewart,[7] the Court held that prior to indictment, or formal charge, defendants do not have a constitutional right to the presence of counsel. In the space of but a few pages of the United States Reports, the Court undercut the necessity of what had become routine practice in the judicial systems of nearly all the major metropolitan areas—the assignment of Public Defenders to participate in all lineups staged by police prior to arraignment or the assignment of counsel.[8] The practice had been premised on the assumption that *United States v. Wade*[9] and *Gilbert v. California,*[10] two decisions as recent as 1967 excluding from trials any testimony stemming from lineups held in the absence of previously assigned or retained counsel, also required that lawyers be present at lineups whether fortuitously or purposefully staged prior to the retention or appointment of counsel.

This recently developed practice under the *Wade-Gilbert* reign and schema had solid interpretative support in the decisions of the state and federal courts. Thirteen state courts had held that lawyers must be present at all lineups.[11] Only five states had refused to apply *Wade* to pre-indictment lineups.[12] Moreover, of the eight United States Court of Appeals that had considered the question, all had ruled that *Wade* required the same protection for defendants before indictment afforded them after the indictment and subsequent appointment or retention of counsel.[13]

Wade was a valiant attempt to counteract the "all Coons look alike to me" prenomenon that has doomed so many Black defendants.[14] The notorious unreliability of eyewitness identification[15] is even more unreliable when a Black man is at the wrong end of a pointing finger.[16]

6. 406 U.S. 682 (1972).
7. The deciding vote was cast by Mr. Justice Powell who, however, did not join the opinion.
8. For instance, in Chicago, Los Angeles and New York, public defenders are regularly assigned to cover lineups to protect defendants who are unable to, or who have not had an opportunity to retain counsel.
9. 388 U.S. 218 (1967).
10. 388 U.S. 263 (1967).
11. People v. Fowler, 461 P.2d 643 (Cal. 1969); State v. Singleton, 215 So.2d 838 (La. 1968); Commonwealth v. Guillory, 254 N.E.2d 427 (Mass. 1970); Palmer v. State, 249 A.2d 482 (Md. 1969); People v. Hutton, 175 N.W.2d 860 (Mich. 1970); Thompson v. State, 451 P.2d 704 (Nev. 1969); State v. Wright, 161 S.E.2d 581 (N.C. 1968); State v. Isaacs, 265 N.W.2d 327 (Ohio 1970); Commonwealth v. Whiting, 266 A.2d 738 (Pa. 1970); In re Holley, 268 A.2d 723 (R.I. 1970); Martinez v. State, 437 S.W. 2d 842 (Tex. 1969); State v. Hicks, 455 P.2d 943 (Wash. 1969), and Hayes v. State, 175 N.W.2d 625 (Wis. 1970).
12. State v. Fields, 455 P.2d 964 (Ariz. 1969); Perkins v. State, 228 So.2d 382 (Fla. 1969); Kirby v. Illinois, 257 N.E.2d 589 (1970); State v. Walters, 457 S.W.2d 817 (Mo. 1970), and Buchanan v. Commonwealth, 173 S.E. 792 (Va. 1970).
13. U.S. v. Greene, 429 F.2d 193 D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); U.S. v. Ayers, 426 F.2d 524 (2d Cir. 1970); Government of Virgin Islands v. Callwood, 440 F.2d 1206 (3rd Cir. 1971); Rivers v. U.S., 400 F.2d 935 (5th Cir. 1968); U.S. v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); U.S. v. Phillips, 427 F.2d 1035 (9th Cir. 1970), and Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972).
14. Felix Frankfurter once wrote, "The old song, 'All Coons Look Alike to Me,' represents a deep experience of human fallibility." F. Frankfurter, *The Case of Sacco and Vanzetti* 31-32 (1972).
See F. Allport, *The Nature of Prejudice* 131-132 (Anchor ed. 1958), wherein Professor Allport declares: "So overpowering is the impact of color upon our perceptions that we frequently go no further in our judgement of the face. An Oriental is an Oriental — whether Chinese or Japanese we fail to determine. Nor do we perceive the *individuality* of each face. While we are usually frank in admitting that all Orientals look alike to us we are scandalized to learn that a common complaint on the part of Orientals is that 'Americans all look alike.' One experiment dealing with memory for Negro and white faces shows that people with a high anti-Negro bias fail to recognize the faces of as many *individual* Negroes whose photographs they have seen, as well as they recognize the individual faces of whites."
15. "In his important book *Convicting the Innocent,* which was published in 1932, E. M. Borchard had these observations to make about the causes of the appalling miscarriages of justice (American and British) which he related: 'Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these convictions' (out of a total of sixty-five dealt with). Since then, quite a number of false identifications have come to light; and in 1961 the Lord Chief Justice felt himself called upon to voice the warning that cases of identification were difficult and could lead to a miscarriage of justice." Williams & Hammelmann, *Identification Parades,* Pt. I, (1963) Crim. L. Rev. 479 (1963).
Judge Jerome Frank has said that "erroneous identification of the accused constitutes the major cause of the known wrongful convictions." J. Frank and B. Frank, *Not Guilty* 61 (1957).
16. "The lineup situation or other police-sponsored confrontation between the accused and witnesses is, in fact, inherently suggestive regardless of how fairly conducted. A gross example of the type of suggestion possible would be the presentation to an identifying witness of a group of men in which the suspect was the only Negro." Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution,* 29 Pitt U. L. Rev. 65, 67 (1967).
A classic (and hopefully atypical) abuse of the lineup is related in Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). The case involved an alleged rape by a Black wearing a "purina chow bag" over his head and face and an orange-colored shirt. The rapist supposedly had a "high, childlike voice." Four or five Blacks were placed in a lineup and made to speak so as to test the victim's ability to identify voices. Thereafter she was told by the police that they had arrested a "Negro" suspect and wanted her to listen to his voice. Prior to the voice test, the victim was shown an orange-colored shirt which was taken from the accused. There was no lineup and the victim was not permitted to view the suspect, nor did the police provide any other Black voices for comparison. The suspect and two police officers conversed in one room while the victim listened from an adjoining room. After he repeated words allegedly used during the rape, the victim identified the accused. The court condemned the proceedings as violative of the Due Process clause of the Fourteenth Amenment, and observed that "the highly suggestive atmosphere that had been generated could not have failed to affect [the victim's] judgment." *Id.* at 201.

Once identified, subsequent trials are often a mere formality and thus the lineup oft-times is the most critical stage in criminal cases where the identity of the crime's perpetrator is the only significant issue of fact.[17]

Of course *Wade* was no radical breakthrough. Rather the extension of the critical stage thesis to the all-important lineup situation,[18] had its roots in a long line of decisions in that incremental fashion which has so characterized Supreme Court (indeed, Anglo-American) jurisprudence.[19] Though the Warren Court held open the door of the police precinct for the lawyer in *Wade,* the opinion went only as far as the threshold, for it was significantly silent as to the limits or mode of participation by the lawyer in the lineup.[20] This essentially conservative determination by the Warren Court provoked a flurry of speculation among commentators,[21] and as the Appendix to this article indicates led to much disagreement among lawyers as to their role at the lineup proceeding.

But, at least, the principle and utility of presence was affirmed by the Court. And in support of the Court's assessment of the value of monitoring lineups, as the Appendix to this article also indicates, lawyers had begun to develop a diversified set of strategies and tactics to protect the accused against misidentification. The mechanics of the decision were left to the practical exigencies of local law enforcement and criminal justice systems.[22] Lower courts, too, were to etch in the details of the confrontation between lawyer and police at lineups. As indicated, most of them decided that the principle that required lawyers subsequent to formal charge, also required counsel at lineups which were held before the defendant could, in the normal course, secure an attorney. Indeed, it seems clear that lawyers are probably more necessary at lineups prior to indictment and the appointment of trial counsel, than afterwards.[23] For clearly the knowledge that an attorney is present in a case is likely to provoke a greater consciousness and conscientiousness about the rights of a prisoner.

With a pronounced proclivity for fine distinctions, the Court declined to agree with the terse one-sentence dissent of Mr. Justice White who declared that *Wade*

17. "The cornerstone of the Court's decision in *Wade* was the now familiar concept of the 'critical stage.' 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. A pretrial identification, the Court found, was such a stage because it was 'peculiarly riddled with innumerable dangers and variable factors . . .' 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.' Since counsel might, the Court concluded, serve to prevent unfairness, a criminal suspect had the right to such assistance." Note, *Lawyers and Lineups,* 77 Yale L. J. 390, 393 (1967), quoting phrases from U.S. v. Wade, 388 U.S. 218, 226, 228, 235 (1967).

18. "[T]he decision superficially seems no more than a logically demanded extension of the Court's recent work." *Id.* at 393.

19. The decision had its origins in two currents of cases that flow out of Powell v. Alabama, 287 U.S. 45 (1932). Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S. 59 (1963) developed the principle that any stage prior to trial could be "critical" for the purpose of requiring the assistance of counsel if significant rights, which counsel could protect, might be jeopardized. Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); and Miranda v. Arizona, 384 U.S. 436 (1966) provided the concept that the sixth amendment right to counsel was necessary to safeguard other Bill of Rights guarantees.

20. "The Court's failure to define the role of counsel at the lineup or at least to suggest what counsel's duties in 'averting prejudice' might involve, creates the potential for considerable confusion as well as the possibility of unnecessarily hampering the investigative utility of the lineup process. Questions arise as to whether counsel is to be permitted to interview the witnesses; whether he may object to or forestall any or all parts of the proceedings; whether he may require police to provide him with a copy of the original description of the criminal given by the witness; and whether he may advise his client to refuse to perform some requested act, or refuse to participate at all." Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution,* 29 U. Pitt. L. Rev. 65, 73-74 (1968).

21. *See, e.g.,* Note, *Lawyers and Lineups,* 77 Yale L. J. 390 (1967); Note, *Right to Counsel at Pretrial Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution,* 29 U. Pitt. L. Rev. 65 (1967); and Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?,* 17 UCLA L. Rev. 339 (1969).

22. In what was to become an oft-employed Warren Court strategy to allay criticism, Justice Brennan suggested that legislatures or police departments could devise procedures which would "eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial." 388 U.S. at 218.

Professort Anthony Amsterdam has said that in a ". . . very recent development, the Court has begun to couch its legislative holdings in terms that permit — indeed, invite — legislative or executive retraction of the rights declared in the holdings . . . The Court may well be feeling, and attempting to remedy, the difficulties that a longtime subconstitutional lawlessness has posed for its own lawmaking in this area." Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. Rev. 785, 801 (1970).

23. "In both *Wade* and *Gilbert* the lineups were conducted after indictments had been returned; in the case at bar, the lineup occurred before petitioner had been formally charged. But surely the assistance of counsel, now established as an absolute post-indictment right, does not arise or attach because of the return of an indictment. The confrontation of a lineup . . . cannot have constitutional distinction based upon the lodging of a formal charge. Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere. We hold that petitioner had a right to counsel at the lineup here considered." Chief Judge David T. Lewis speaking for the Court of Appeals for the Tenth Circuit in Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972).

and *Gilbert* "govern this case and compel reversal of the judgment of the Illinois Supreme Court."[24] Speaking for himself, Chief Justice Burger and Justices Blackmun and Rehnquist, Mr. Justice Stewart reasoned that the *Wade-Gilbert* exclusionary rule was ground solely in the Sixth Amendment. Since in Stewart's view, a person's Sixth Amendment rights attach definitionally only at or after the time adversary judicial proceedings have been initiated, no attorney was required for lineups held before the filing of an indictment. Justice Stewart escaped the analogical force of *Miranda*'s requirement of the presence of a lawyer at an earlier stage in the criminal process,[25] by finding that no problem of self-incrimination was involved at a lineup.[26] This position which had been taken by Mr. Justice Brennan when he wrote the *Wade* decision[27] ultimately returned to haunt him in *Kirby*.

In abandoning defendants to un-monitored police procedures prior to the initiation of judicial proceedings, the Court characterized lineups as "routine police investigation" and refused to "import" into the initial stages of investigations "an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings."[28] The court thus drew a sharp — and for many defendants, probably fatal — line between police investigations and prosecutions.

To borrow a phrase from Mr. Justice Brennan's characterization of the California Supreme Court's decision in *People v. Fowler*[29] requiring counsel at lineups prior to indictment, the *Kirby* majority hardly had "an eye toward the real world."[30] Quoting his majority opinion in *Wade*, Justice Brennan's dissent pointed out that "... 'it is a matter of common experience that, once a witness has picked out a the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may ... for all practical purposes be determined there and then, before the trial.' "[31] Such was the apparent case in *Kirby* where the petitioner and another suspect were seated at a table in a room to which the victim was brought by police. The police, according to the robbery victim, asked if the suspects were the robbers and he said they were. At trial the prosecutor asked Willie Shard if he had positively identified the petitioner at the station, and Shard of course responded in the affirmative.

That the station house two-man "lineup" occurred before Kirby and his companion had obtained a lawyer, rather than afterwards, made no difference whatsoever in whether the *Gilbert v. California per se* exclusionary rule should have been followed, argued Brennan. Again using language from his opinion in *Wade*, Brennan said that rather than the arbitrary and convenient line of commencement of prosecution, the more fundamental and controlling principle for pretrial confrontations " '... requires that we scrutinize any pre-trial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meanfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.' "[32]

Denying that the lineup was a "mere" preparatory and investigative stage like gathering fingerprints, Brennan pointed out that the dynamic nature of the lineup mandated counsel's presence in a peculiar and unique way. Again, from *Wade*, Brennan argued:

24. 406 U.S. at 705.
25. Miranda v. Arizona, 384 U.S. 486 (1966). Interestingly, White seemed more bothered by Escobedo v. Illinois, 378 U.S. 478 (1965) than Miranda, declaring that *Escobedo* was "[t]he only seeming deviation from this long line of constitutional decisions [holding that the Sixth Amendment right to counsel attaches only after the initiation of adversary judicial proceedings]. But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination ...' Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts. ... and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689.
26. 406 U.S. at 687-688.
27. 388 U.S. at 221.
28. 406 U.S. at 690.
29. People v. Fowler, 461 P. 2d 643 (Cal. 1969).
30. 406 U.S. at 699 N.8.
31. *Id.* at 700.
32. *Id.* at 694.

> "Insofar as the accused's conviction may rest on a courtroom identification, in fact the fruit of a suspect pretrial identification, which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him . . . and even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye-witness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness — 'that's the man'."[33]

Why the plurality grounded its analysis in the "abstract consideration of the words 'criminal prosecutions' in the Sixth Amendment"[34] rather than in the real dangers of eyewitness identification is not clear from Mr. Justice Stewart's rather terse opinion. But perhaps Mr. Justice Powell revealed the heart of the matter when he observed in his one sentence, "thus far and no further" concurrence, that he would not "extend" the *Wade-Gilbert per se* exclusionary rule.[35]

B. *Towards a Double Standard of Justice: Two Versions of the Sixth Amendment.*

Justice Powell again joined his Nixon bloc colleagues in the other decision under consideration in this discussion, a ruling even more fraught with consequnces for Black Americans. But while the President's appointees remained obdurate and essentially united in the majority jury case, Justice Stewart, the author of the *Kirby* plurality, dissented. Mr. Justice White, *Kirby's* laconic dissenter, shifted positions with Stewart and voted to affirm the conviction.[36] The White opinion in *Johnson v. Louisiana* upheld the constitutionality of provisions in both the state constitution and Code of Criminal Procedure which permitted felony convictions where nine of twelve jurors were convinced of the defendant's guilt.[37] His opinion in *Apodaca v. Oregon* affirmed convictions in two cases where a lone juror voted for acquittal and upheld a conviction in another prosecution where two jurors disagreed with the other ten on the question of guilt.[38]

Although Justice Powell provided the decisive vote, as he did in *Kirby*, he again refused to sign the opinion, taking a more restrained and one must say, less radical view of the situation than did the other Nixon conservatives. "In an unbroken line of cases reaching back into the late 1800's," said Powell, "the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial."[39] However, qualified Powell, "due process does not require that the states apply the federal jury trial right with all its gloss."[40] Thus holding the states to a different and relaxed standard, a majority of the Court decided that a majority jury verdict somehow met the requisites of due process in a state court prosecution, for example, of a grocery store robbery, but would be unconstitutional in a federal court prosecution for a bank robbery. Of all the conceivable glosses on the Federal jury trial right, it seems curious that the requirement of a unanimous jury would be characterized as mere gloss, and not the bedrock of the Federal right. Perhaps what we are watching in this decision is the beginning of a film of Supreme Court incorporation decisions run in reverse — a process of disincorporation.[41]

Justice White's sanction of state elimination of what had been treasured for

33. *Id.* at 695.
34. *Id.* at 696.
35. *Id.* at 691
36. As far as minority defendants are concerned, the net result is the same — a new "working majority" has emerged to check further enlargement of the rights of the accused.
37. 406 U.S. 356 (1972).
38. 406 U.S. 404 (1972).
39. 406 U.S. 356 at 369.
40. *Id.* at 371.
41. The image of the motion picture camera is that of John Holland, a third year UCLA law student, whose discussions were invaluable in the preparation of this article.

literally centuries[42] as a star in the Anglo-American constellation of criminal justice safeguards was divided between the two opinions. In *Johnson,* White argued that the requirement of proof beyond a reasonable doubt is satisfied where nine jurors agree as to the defendant's guilt just as much as if all 12 concur. The number of jurors applying the standard is not part of the reasonable doubt formulation. The standard exists apart from the number of persons who apply it. "Of course," concludes White in his *tour de force* of rationalization, "the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors — a substantial majority of the jury — were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable doubt standard."[43]

In *Apodaca,* White "disposed" of the argument that split jury verdicts violated the 14th Amendment's Due Process Clause. In the least convincing part of both opinions, White argued that the conclusive historical evidence that the framers of the Constitution meant unanimous juries when they spoke of the jury concept was inconclusive.[44] However, the heart of *Apodaca*'s plurality is its discussion of the role of the jury in contemporary society. White argued that the major function of the jury "lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen."[45] Such a role was fulfilled, in White's view, regardless of the division among the jury on the question of guilt. The fact of the consideration and deliberation was sufficient.

Finally, and of most relevance to Blacks and minority groups, White denies that unanimity is indispensible for effective application of the requirement that juries constitute a cross-section of the community. First, argued that a cross-section was not required in every case, only that no section be systematically excluded.[46] And in a phrase terrifying for its ambiguity, White declared, "No group . . . has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined."[47] Second, White argued that the power to forestall convictions was not necessary in order for minority jurors to be heard (racial or otherwise). White was either unaware of, or unwilling to concede or deal with, the substantial possibilities, unleashed by his decision, of a white majority overriding the views of a Black minority on irrational grounds.[48]

42. "The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdic had to be unanimous. See 1 Holdsworth, *A History of English Law* 318 (1956); Thayer, The Jury and Its Development, 5 Harv. L. Rev. (pts 1 and 2), 249, 295, 296 (1892)." Apodaca v. Oregon, 406 U.S. 404, 407 n. 2 (1972).
43. 406 U.S. 356 at 362.
44. 406 U.S. 404. *Cf.* Justice Douglas' discussion about the Framers' intent, 406 U.S. 356 at 381-383. As Douglas suggests, "[t]he unanimous jury have been so imbedded in our legal history that no one would question its constitutional position . . . ." *Id.* at 382 n.1.
45. 406 U.S. 404 at 410.
46. *Id.* at 413.
47. *Id.*
48. Evidence abounds, however, that white juries are capable of deciding cases on the "irrational" grounds of racial prejudice. "Harold Garfinkel, who examined 821 homicides in 10 counties of North Carolina between 1930 and 1940, concluded that proportionately few indictments were made (94 percent) when Negroes killed whites. Of those charged with first degree murder, 28 percent of the whites who killed Negroes, but only 15 percent of the Negroes who killed whites, were acquitted.
"... Guy B. Johnson studied 220 homicide cases in Richmond, Virginia, from 1930 to 1939, and 330 homicides in five counties of North Carolina from 1930 to 1940. There were five cases of whites killing Negroes, but not a single conviction, and 24 cases of Negroes killing whites, of which 22 resulted in conviction." M. Wolfgang and B. Cohen, *Crime and Race* 77 (1970).
Giving serious consideration to the question of whether white juries are sometimes racially biased is akin to seriously considering whether segregation benefits Blacks. Both propositions, as Professor Charles L. Black said of the latter, forces one to take refuge in "one of the sovereign perogatives of philosophers — that of laughter." Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L. J. 421, 424 (1959).
For a general consideration of bias among white jurors, *see Minimizing Racism in Jury Trials* (A. Fagan, ed. 1969), especially excerpts of the testimony of Dr. Bernard Diamond who testified in one of the prosecutions of Black Panther leader Huey P. Newton that white racism affects the perceptions, judgment and behavior of a white person. "[G]iven what we know about the pervasiveness and subtlety of prejudice towards Negroes in America, we question whether the *voir dire*, as conventionally conceived and traditionally used, is adequate any longer to the task of identifying enmity or bias toward Black defendants among prospective jurors." *Id.* at 216.

The court split, as it is said, all over the lot. A majority of the court agreed that the Sixth Amendment required unanimous verdicts. But Powell permitted a lesser standard for the states and thus provided the decisive vote. Blackmun signed the opinion, but indicated that the logic of the split jury had its limits: "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty."[49]

Stewart, Brennan, Marshall and Douglas all filed dissents. Stewart struck at the very heart of the opinion and in a few words demonstrated its lack of realism.

> [T]oday's judgment approves the elimination of the one rule that can ensure that [universal participation of the citizenry in the administration of criminal justice] will be meaningful — the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class . . . . [O]nly a unanimous jury . . . can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.[50]

This theme was pursued in turn by Brennan and Marshall. Said Brennan: "When verdicts must be unanimous, no member of the jury may be ignored by others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace."[51] Mr. Justice Marshall, in one of his strongest and most biting dissents, attacked the Court for "cut[ting] the heart out of . . . [the defendant's] right to submit his case to a jury, and the right to proof beyond a reasonable doubt."[52] He also pointedly rebuked Powell for his suggestion in the concurrence that "removal of the unanimity requirement could well minimize the potential for hung juries occasioned either by bribery or jury irrationality."[53] In Marshall's view, if the jury was properly selected, "the 'irrationality' that enters into the deliberation process is precisely the essence of the right to a jury trial. . . . To fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests."[54]

But of all the dissents, the most persuasive, in terms of legal as differentiated from political considerations, was that of Douglas, who saw that the majority decision constituted a "radical departure from American traditions."[55] As Douglas indicates, one of the anomalies, if not absurd results of the majority position, is that "a man's property may only be taken away by a unanimous jury vote [because of the Seventh Amendment's requirement of unanimity],[56] yet he can be stripped of his liberty by a lesser standard."[57]

Douglas argues that in every essential feature of the application of the Bill of Rights protections through the Fourteenth Amendment, coextensive coverage of the guarantees was accorded to the citizens of the various states.[58] Conceding that states should be granted flexibility in solving social and economic ills, Douglas argued that "to permit States to 'experiment' with the basic rights of people" is to "open a veritable Pandora's box. For hate and prejudice are versatile forces that can degrade the constitutional scheme. . . . [I]n cold reality [civil rights] touch mostly the lower castes in our society . . . the Blacks, the Chicanos, the one-mule farmers, the agricultural workers, the off-beat students, the victims of the ghetto."[59] Douglas dissented from a decision which permits the states to experiment with the right of the oppressed classes to unanimous jury verdicts.

49. 406 U.S. 356 at 366.
50. *Id.* at 397.
51. *Id.* at 396.
52. *Id.* at 399.
53. *Id.* at 402.
54. *Id.*
55. 406 U.S. 356 at 381.
56. Citing American Publishing Co. v. Fisher, 166 U.S. 464 (1897).
57. 406 U.S. 356 at 383.
58. See cases cited by Justice Douglas, 406 U.S. 356 at 384-386.
59. 406 U.S. 356 at 387.

Though Douglas' "absolutist" position on the Bill of Rights was written with characteristic forcefulness, the most significant part of his dissent was his demonstration that by permitting majority juries, the Court was permitting "prosecutors in Oregon and Louisiana to enjoy a conviction-acquittal ratio substantially greater than that ordinarily returned by unanimous juries."[60] In exposing the danger of "short cuts" in jury deliberation, Douglas explained:

> "[N]onunanimous juries need not debate and deliberate as fully as most unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority. Such persuasion does in fact occasionally occur in States where the unanimous requirement applies. 'In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance.' One explanation for this phenomenon is that because jurors are often not permitted to take notes and because they have imperfect memories, the forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked. This collective effort to piece together the puzzle of historical truth, however, is cut short as soon as the requisite majority is reached in Oregon and Louisiana . . . . To be sure, in jurisdictions other than these two States, initial majorities prevail in the end, but about a tenth of the time the rough and tumble of the juryroom operates to reverse completely their preliminary perception of guilt or innocence. The Court now extracts from the juryroom this automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters."[61]

Douglas declared that "we have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt 'as concrete substance for the presumption of innocence.' That procedure has required a degree of patience on the part of the jurors forcing them to deliberate. Up until today the price has never seemed too high. Now a 'law and order' judicial mood causes these baricades to be lowered."[62]

II.

THE EMERGING TRIUMPH OF THE LAW ENFORCEMENT PERSPECTIVE IN CRIMINAL JUSTICE DECISIONS

Despite an occasional step forward,[63] the Court has clearly taken steps backwards in what increasingly appears to be a conscious process of withdrawing critical protections indispensable to fairness for the criminal accused, a disproprotionate number of which, it goes without saying, are Black. The rising tide of discontent, indeed alarm, over the escalating crime rate has seeped into the court's opinions. Though not slavishly following the Nixon /Mitchell/Kliendienst line,[64] the new Justices on the Court, along with former Attorney General Byron White, mark the ascendency of a law enforcement oriented court. The two opinions discussed here are stressed not because they are the only opinions that undercut the advances of the Warren Court, but principally because they are opinions that clearly have special significance for Blacks and other unpopular minorities.

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60. *Id.* at 388.
61. *Id.* at 388-389.
62. *Id.* at 393.
63. See discussion p. .... *infra.*
64. "Mr. Nixon has appointed four of the nine justcies and is likely to appoint two more if reelected, possibly the most important stake in the election. They form a remarkably cohesive, conservative bloc. . . . Fortunately there is another factor at work; when Oliver Wendell Holmes ruled adversely to President Teddy Roosevelt in a case the latter growled that he could carve a stronger backbone out of a banana. 'It's very difficult to know what a new member will be like until he's there for five or 10 years because few new members have been free and independent before.' . . .

"Once you name a court you can't be sure of it. The court unanimously, 8-0 (with Rehnquist not participating), tossed out Atty. Gen. John Mitchell's outrageous contention that he had 'inherent power' to wiretap suspected domestic subversives without a warrant. Again, Chief Justice Burger . . . wrote the unanimous opinion upholding modified school busing which Mr. Nixon finds so disappointing.

"And here in his Labor Day speech Mr. Nixon is attacking Justice Powell, of all people, the man from the very region which the Senate was supposed to condemn. The justice had the audacity to reject a plea from Augusta, Ga. to ban school busing. 'The Powell decision leaves no doubt whatever that only the anti-busing legislation I have proposed will do the job,' Mr. Nixon told the Nation." TRB, "Nixon's Radical Challenge of High Court's Power," LA Times, Oct. 4, 1972, Pt. II at 7, col. 3.

A. *The Limits and Ambiguities of Supreme Court Cases.*

Over reaction is never the proper response to Supreme Court decisions. Even so successful an advocate as Professor Anthony Amsterdam, who helped convince the Court to outlaw the death penalty (for the time being),[65] has warned against expecting too much from the Court.[66] As he suggested, and the experience of defense lawyers more than affirms, Supreme Court opinions have at best an uncertain impact on trial court decisions, and almost none on the police. Trial court judges achieve nullification of the spirit, even sometimes the letter, of the opinions by factual constructions which steer clear of Constitutional "shalt nots."[67] Police, regularly testify under oath in court that they have followed rules on the street, which they have in fact totally disregarded in making arrests.[68]

And even if the police follow the decisions, and the trial courts apply the law in the spirit of the opinions, there is still room for doubt as to just how liberal the liberal decisions of the Warren Court were As one indisputably sympathetic student of the Court has suggested, ". . . a careful look at the major areas of growth reveals that the Court's public reputation for bold, crusading, uncompromising reforms is a major overstatement. This Court was not as dogmatic or as 'legislative' as some previous courts — nor as courageous. The pattern of moderation and compromise was most clearly evident in the criminal procedure decisions. . . . The most publicized decisions may have favored the accused, but the most important cases in terms of nuts and bolts of the criminal process were pro-prosecutor."[69]

Interestingly, this tradition of "backing and filling," seems to have lapped over into the present Court. Thus some of the Warren Court advances have been consolidated, if not furthered. *Gideon*[70] has been extended to misdemeanors by *Argersinger v. Hamlin*[71] with the Nixon appointees concurring. Similarly, though in varying degrees, all the Justices recently agreed that *Griffin v. Illinois*[72] ought to be extended to insure free transcripts are available to appellants in misdemeanor cases.[73] And of course there were the decisions outlawing the death penalty.[74]

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65. *See* Furman v. Georgia 408 U.S. 238 (1972). Companion cases were argued successfully by other counsel.
66. Professor Amsterdam suggests that the court "lacks the sort of supervisory power over the practices of the police that is possessed by the chief of police or the district attorney." . . . Second, because of "a back-breaking docket. . . . the Court can only hear three of four cases a year involving the treatment of criminal suspects by the police" and is thus "uniquely unable to take a comprehensive view of the subject of the suspects' 'rights." Third, the Court "is further disabled by the fact that almost the only law relating to police practices or to suspects' rights is the law the Court itself makes by its judicial decisions. . . . The ubiquitous lack of legislative and executive attention to the problems of police treatment of suspects forces the Court into the role of lawmaker in this area and makes it virtually impossible for the Court effectively to play that role." Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. Rev. 785, 786, 788, 790 (1970).
67. "Trial judges . . . , and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book. These trial judges and magistrates are the human beings that must find the 'facts' when cases involving suspects' rights go into court. . . . Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect." *Id.* at 792.

    See also, A. Blumberg, Criminal Justice 21-22 (1967), where he observes that, "The legalistic rules of 'Due Process' are in large measure ideal expressions and do not sensitize us to the reality of the criminal court process in its daily operations. But [the Supreme Court decisions] are of great interest because they underscore the hiatus between the stated rules and the operative realities. We can see what happens to them as they filter through the organizational structures designed for their enforcement."
68. ". . . [M]ost cases do not go to court. In these cases, the 'rights' of the suspect are defined by how the police are willing to treat him. With regard to matters of treatment that have no evidentiary consequences and hence will not be judicially reviewable in exclusionary rule proceedings, the police have no particular reason to obey the law, . . . With regard to police practices that may have evidentiary consequences, the police are motivated to obey the law only to the extent that (1) they are more concerned with securing a conviction than with some other police purpose which is served by disobeying the law (in this connection, it is worth noting that police departments almost invariably measure their own efficiency in terms of 'clearances by arrest,' not by conviction), and (2) they think that they can secure the evidence necessary for conviction within the law," Amsterdam, note 67 *supra,* a t792-793.
69. Blasi, *A Requiem for the Warren Court,* 48 Texas L. Rev. 608, 610 (1970). Professor Blasi points out that "[t]he Warren Court legitimated the two enforcement tactics that many authorities, including police, contend are the most vital — stop-and-frisk and anonymous informers. Both practices entail serious invasions of civil liberties, but the need for effective law enforcement was thought by the Court to be more important. Wiretapping and electronic eavesdropping were approved. . . . Many of the landmark decisions were denied retroactive effect, . . . For most victims of the criminal process there are four crucial stages: bail, plea bargaining, sentencing, and prison. There are gross abuses at each of these checkpoints — and the Warren Court, with ample textual ammunition available in the sixth and eighth amendments, looked the other way." *Id.,* at 613.

    For a post-Warren Court treatment of the guilty plea, see Chief Justice Burger's opinion in Santobello v. New York, 404 U.S. 257 (1971).
70. Gideon v. Wainwright, 372 U.S. 335 (1963).
71. 407 U.S. 25 (1972).
72. 351 U.S. 12 (1955).
73. Mayer v. City of Chicago, 404 U.S. 189 (1972).
74. Furman v. Georgia, Jackson v. Georgia, Branch v. Texas, 408 U.S. 438 (1972).

B. *Warren Court Concerns Yield to Burger Court Imperatives*

Though a comparison of the first years of the Burger Court with the significantly longer history of the Warren Court might lead to the hypothesis that the relative achievements may be due partially to differences in style and emphasis, the increasing acrimony between the remnants of the Warren court (frequently Brennan, Douglas and Marshall; occasionally Stewart, and now and then White), and the Nixon appointees indicates a fundamental difference in perspective. This difference in horizons, as suggested by the cases here under consideration, does not augur well for the fates of minority defendants faced by an undeniably law enforcement-oriented criminal justice establishment.

Even when compromising with the imperatives of police work, the Warren Court perspective was filled with sympathy and concern for the oppressed. As Professor Blasi has said, the Warren Court was "the first . . . in history that chose to champion the downtrodden."[75] In many cases the Court strove to make a viable reality out of the words chiseled in marble on the facade of the Supreme Court building — "Equal Justice Under Law." Though not entirely losing sight of the problems of indigents and minority groups, the Nixon appointees — particularly Burger — have exhibited in their recent criminal procedure decisions a predominant interest in the demands of law enforcement and the requisites for an efficient criminal justice system with "two basic purposes — the first to protect society; the second to correct the wrongdoer."[76] In his recent *Report on Problems of the Judiciary* delivered at the Ameri can Bar Association's 95th Annual Meeting, the Chief Justice reduced the quest for efficiency to the formula: "We must constantly keep in mind that the duty of lawyers and the function of judges is to deliver the best quality of justice at the least cost in the shortest time."[77]

Since Stewart dissented in the majority jury cases, but wrote the opinion in the lawyerless lineup decision, it is fair to say that though the Burger Court is obsessed with efficiency, it is at the very least neutral with respect to the racial impact of its criminal process decisions. But, of course, that is what is precisely disturbing. The decisions indicate that for what on occasion is a majority of the Court, racism and discrimination have receded in importance. Instead, law and order and an efficient Court system are in ascendency as paramount considerations.[78] The lineup case is calculated to speed up the identification process,[79] though probably it will be more conducive to the production of lineups which will run afoul of *Stovall v. Denno*.[80] The majority jury verdict means quicker deliberations, and minimizes the problem

75. Blasi, note 69 *supra*, at 618.
76. The phrase is from the Chief Justice's article, *No Man Is An Island*, 56 A.B.A.J. 325, 326 (1970). Burger's oft-expressed concern for the administrative problems that beset overcrowded courts appears surfaced in his concurrence in Mayer v. City of Chicago, 404 U.S. 189, 200-201 (1971), in which he agreed that indigent defendants had a right to free transcripts but lamented the fact that "[e]very busy court is plauged with excessive demands for free transcripts in criminal cases. . . . Unfortunately one consequence of the advent of the Criminal Justice Act and state counterparts is that when costs are paid by the public, counsel are sometimes profligate in their demands, . . . This is more than a matter of costs. An affluent society ought not be miserly in support of justice, for economy is not an objective of the system: the real vice is the resulting delay in securing transcripts and hence determining the appeal."
77. The report was delivered in San Francisco on August 14, 1972 and is reprinted in the Supreme Court Reporter, Vol. 93, No. 1 (Nov. 1, 1972).
78. The rightward drift in criminal justice is in progress on both sides of the Atlantic. "Britain's system of criminal justice, viewed as a hallmark of British society and extolled for its honesty and fairness, is coming under intense attack from the police, senior judges, Conservative party politicians and others worried about crime.
"Powerful voices are heard almost daily urging that the scales of justice be tipped more in favor of the prosecution . . . .
"Just as conservatives in America see hope in the new 'Nixon court' to redress what they regard as past wrongs in building safeguards for defendants, British forces of 'law and order' are encouraged by the trends here." Shuster, "British Criminal Justice Assailed," N.Y. Times, August 7, 1972, at 1, col. 3.
79. Early critics of *Wade* spoke in terms of efficiency and economy. "Another consequence of the opinion is that indigent defendants will have to have counsel appointed for them (assuming they had not intelligently waived this right). The cost of assigning counsel for untold numbers of pre-trial identification proceedings may be so excessive as to prohibit such proceedings entirely. As a consequence, law enforcement may be severely delayed. The mandatory presence of counsel at pre-trial identifications would also prove uneconomical for the lawyers themselves who will not be eager to perform these time consuming tasks, far removed from the courtroom, and demanding little or no legal skills. The use of lawyers primarily as professional witnesses would be an uneconomical use of a scarce talent." *Note, U.S. v. Wade — Right to Counsel at Pre-Trial Lineup*, 63 Nw. U. L. Rev. 251, 260 (1968).
80. 388 U.S. 293 (1967). *Stovall*, the third case of the *Wade* trilogy, robbed the rule requiring lawyers at lineups of retroactivity, but did hold that lineups held prior to *Wade* could be attacked if the police procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. *Id.* at 302.

of the hung jury, thus reducing the number of retrials. In the words of an earlier Louisiana decision the majority jury system is designed to "facilitate, expedite, and reduce expense in the administration of criminal justice."[81] For Justice White such a "statuatory scheme serves a rational purpose and is not subject to constitutional challenge."[82]

This "speed up" in the justice system is, of course, a less costly substitute for more judges, more lawyers, more courtrooms, more tax dollars — the other yet obviously less politically palatable answer to the criminal justice crisis. Ominously, however, while conservative justices and judges devise or approve time and money saving strategems at the expense of due process, politicians allocate a disproportionate share of public resources to the police and enforcement arms of the criminal justice system.[83] The clamor for safe streets is thus met with official action. But as Chief Justice Burger has himself recognized: "Prosecutors could win every prosecution, convict every defendant and imprison every guilty person; yet society would still fail."[84] Burger was speaking of the scandalous prison conditions and the problem of recidivism which permeate American criminal justice. High conviction rates are deceptive if prisoners are paroled only to be recycled back into the penitentiaries. Yet the demands of due process are of greater consequence than an efficient prosecutorial system and a prison system which reforms instead of represses. For the problem of a fair and humane judicial system overlaps an effective approach to the problem of corrections. The process of reconciliation commences when the suspect is first apprehended. As the "great teacher,"[85] the government, from cop on the beat to Supreme Court Justice must show a scrupulous concern for "fairness" and "equal justice" if those convicted are to be reconciled with the system. There can be no reconciliation where those charged with crimes believe the system essentially and fundamentally unjust.[86]

Clearly, a jury system which places minority jurors in an advisory role, which robs them of the only real power they have to persuade others to listen to their point of view, satisfies neither the requisites of participation nor the ethical demands of fairness. A jury system which places a premium on power rather than consensus has within it the seeds of a pervasive sense of powerlessness and alienation.[87] Finally, a criminal justice system which asks Blacks and other racial minorities to trust the police, the one sector of the establishment they have learned to fear and distrust most,[88] which permits the police to exclude officers of the court from the critical process of identification, can hardly be said to place sufficient emphasis upon the appearance,[89] let alone the substance of fairness.[90]

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81. State v. Lewis, 56 So. 893, 894 (1911).
82. 406 U.S. 356 at 363.
83. In the 1969-1970 fiscal year, the State of California alone spent $147,259,556 on law enforcement agencies (such as the California Highway Patrol) and allied systems, but only $7,967,055 on the Supreme and Appellate courts. Not included in the State statistics are the hundreds of millions spent on municipal police forces. It is to understate the situation to say that there has been a disproportion between the amount spent on the structures of enforcement and the funds allocated to those sectors of the criminal justice system concerned both with the rights of the accused and the rehabilitation of offenders. Certainly the manpower needs of the courts have gone unmet, not only with respect to the number of judges and supporting court personnel, but even more so in the provision of competent counsel upon whom rests the burden of making the adversary system of justice function. "It is obvious that neither the prosecution nor the defense side is adequately financed under many, if not most, of the State systems." Silverstein, *Manpower Requirements in the Administration of Criminal Justice* in Task Force Report: The Courts 152, 158 (Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, 1967).
84. Burger, *No Man Is An Island*, 56 A.B.A.J. 325, 328 (1970).
85. "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example." Mr. Justice Brandeis dissenting in Olmstead v. U.S., 278 U.S. 438, 485 (1928).
86. "The frustrations of powerlessness have led some Negroes to the conviction that there is no effective alternative to violence as a means of achieving redress of grievances, and of 'moving the system.' These frustrations are reflected in alienation and hostility toward the institutions of law and government and the white society which controls them, and in the reach toward racial consciousness and solidarity reflected in the slogan 'Black Power.'" *Report of the National Commission on Civil Disorders* 5 (1968).
87. Black economist and nationalist David H. Swinton has written that "[s]egregation . . . is clearly only a symptom of the lack of effective power in the Black community. It is not itself the cause of the myriad problems confronting the Black community in the area of education and elsewhere. To attack the symptom may do nothing at all to eradicate the disease. . . . The true cause of the Black problem is the lack of basic economic, political and social power, as is indicated by the Black people's inability to take the decisions and allocate the resources that are required to deal with the Black situation. This lack of power results from white dominance of the instruments and processes of power." Quoted by Charles V. Hamilton in *The Nationalist Versus the Integrationist*, The New York Times Magazine, Oct. 1, 1972, pt. 1, at p. 38.
88. Malcolm X expressed the dominant and pervasive Black community view of the police when he said, "Harlem is a police state; the police in Harlem, their

presence is like occupation forces, like an occupying army. They're not in Harlem to protect us; they're not in Harlem to look out for our welfare; they're in Harlem to protect the interests of the businessmen who don't even live there." G. Breitman ed., *Malcolm X Speaks* FF (G. Breitman ed. 1966).

Government studies indicate Malcolm's rhetoric is the tip of an iceberg of hatred and distrust. "It may be paradoxical that the same people who are most victimized by crime are most hostile to the police, but it is not remarkable. In view of the history of race relations in America and of the ghetto conditions in which most minority-group members live, doubt about American ideals and resentment against authority are to be expected among Negroes, Puerto Ricans and Mexican-Americans. . . . Throughout the country minority-group residents have grievances not just against society as a whole, but specifically against the police." *The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and the Administration of Justice* 99 (1967).

A year later, after the Black uprisings of 1967, the Kerner Commission echoed the Crime Commission findings: "To some Negroes police have come to symbolize white power, white racism, and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among Negroes in the existence of police brutality and in a 'double standard' of police protection — one for Negroes and one for whites." *Report of The National Advisory Commission on Civil Disorders* 5 (1968).

89. "[O]nly a unanimous jury . . . can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. . . . And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines." Justice Stewart dissenting in Johnson v. Louisiana, 406 U.S. 366, 398 (1972).

90. "The requirement that the verdict of the jury be unanimous, surely as important as . . . other constitutional requisites, preserves the jury's function in linking law with contemporary society. It provides the simple and effective method endorsed by centuries of experience and history to combat th injuries to the fair administration of justice that can be inflicted by community passion and prejudice." *Id.* at 399.

APPENDIX*

Lawyers at Los Angeles Lineups

During May of 1971, 360 lawyers and 50 judges, members of the Los Angeles Criminal Courts Bar Association, were asked about their experiences with lineups held under the *Wade-Gilbert*[a] aegis. In essence, the survey revealed that of the 84 respondents, most of them regarded the safeguards available as a result of *Wade*[b] as minimal, had widely disparate notions about the limits of their intervention at the police station, and were far more concerned with the defense of their clients than they were with hampering police efforts at curbing crime.

In addition to providing evidence as to how lawyers interpret the Supreme Court opinion which thrust lawyers into a new role without guidelines for their conduct, the survey results indicated that defense lawyers, many of them with Warren Court-conditioned reflexes (and traditional notions of the lawyers as hired gun) are in a terribly ambiguous position representing defendants at the station house lineup where they confront the police on the front lines of crime. The professional and ethical problems that inhere in the situation are apt to multiply now that *Kirby* permits the police to exclude lawyers from a substantial percentage of the lineups, thereby robbing *Wade* of some of its "moral" force, and given the Supreme Court's continued failure to suggest guidelines governing counsel's role at lineups.

The results of the survey are presented in the following order: (1) a description of the personal characteristics of the respondents; (2) opinions regarding proper behavior at a lineup; (3) estimates of the effect on juries of unfair lineups; (4) opinions on potential reform of lineup procedures, and (5) attitudes on ethical problems presented by lineup participation.

*Andrew Friedman of the California Bar, Alice L. McGee of FundScope magazine, and Michael J. Strumwasser assisted in the design of the questionnaire, the analysis of the responses and the preparation of this Appendix.
Generous support from the UCLA Center for the Study of Afro-American Life and Culture was invaluable in the conduct and analysis of the survey which was the basis for this Appendix.

a. U.S. v. Wade, 388 U.S. 218 (1967) and Gilbert v. Calif., 388 U.S. 263 (1963).
b. *Id.*

THE SAMPLE

Of the 84 respondents, seven (8.3%) were judges. Sixty-three of the attorneys (75% of all respondents) were defense counsel, the other 14 (16.7%) being prosecutors. A large majority, 79.8%, characterized their practices as being principally concerned with the criminal law. Table 1 shows the distribution of criminal law practice among the respondents; it indicates that roughly half of these lawyers spend more than three-quarters of their time in criminal law practice.

As a group, the respondents are relatively experienced attorneys, averaging about a decade of practice. See Table 2 for the breakdown of the sample according to years of practice.

Surprisingly, a majority of the respondents (60.7%) had never been present at a lineup as a defense attorney (ironically, perhaps a reflection of the fact that the Public Defender represents most defendants in lineups typically staged prior to the formal commencement of judicial proceedings).[c] This left 32 respondents who had been present at lineups. Of these 32, nine (28.1%) had attended only one or two lineups, 12 (37.5%) at three or four lineups, eight (25%) at five to 10 lineups, and only three (9.4%) had been present at more than 10 lineups. One of the 32 declined to answer the question whether he had ever been counsel at an unfair lineup, and the remaining 31 split almost evenly: 16 said they had experienced unfairness and 15 said they had not. Almost all who said they had experienced an unfair lineup objected to some feature of the procedure that caused too much contrast between their client and the others. Table 3 summarizes their complaints. All 16 said they expressed their objections at the time to the officer in charge, 13 only by complaining but two by refusing to continue. (One didn't say he objected.) Of the 16 who objected, seven said their objection was successful and nine said they were unsuccessful.

TABLE 1

Types of Legal Practices of Respondents

Percent of Practice Devoted to Criminal Law	Percent of Respondents	Cumulative Percent of Respondents
Less than 25%	6.7%	6.7%
25% - 40%	10.7%	17.3%
41% - 60%	16.0%	33.3%
61% - 75%	10.7%	44.0%
76% - 90%	8.0%	52.0%
91% - 99%	10.7%	62.7%
100%	37.3%	100.0%

TABLE 2

Respondents' Experience

Years of Practice	Percent of Respondents	Cumulative Percent of Respondents
2 or less	2.5%	2.5%
3 - 5	32.9%	35.4%
6 - 8	15.2%	50.6%
9 - 11	12.7%	63.3%
12 - 15	8.9%	72.2%
16 - 20	17.7%	89.9%
21 - 25	5.1%	94.4%
26 or more	5.1%	100.0%

TABLE 3

Objections to Lineups at which Respondent was Defense Counsel

Objection to a Lineup at which Respondent Was Defense Counsel	Number Raising this Complaint
Racial Contrast	1
Age Contrast	2
Clothes Contrast	2
General Contrast	3
Too Few in Line	1
Exclusion of Counsel	1
Other miscellaneous	6

c. See pp. .... *supra*.

PROPER BEHAVIOR AT LINEUPS

There is some evidence that the respondents viewed themselves as being more liberal than they really are. Only 28.7% said they felt defense counsels' role at lineups should be passive rather than active. (65.7% favored activism and 3.7% said he should be both.) However, in the battery of questions concerning what lawyers should be permitted or required to do when faced with an unfair lineup, roughly 50% favored none of the actions except stating objections. The distribution of the responses to these questions is given in Table 4.

The respondents' consensus regarding the relative sensitivity of various ways of achieving lineup fairness described in the questionnaire was interesting. One measure, of course, was the percent who would neither have permitted nor required each act of protest set out in the questionnaire. For statistical reasons, this procedure did not actually measure accurately the cumulative preferences of all respondents. Thus Scalogram Analysis was used to construct from the eight questions a "Guttman Scale" of vigorous defense techniques.[d] Using this technique, it was discovered that the respondents tended to rate the various acts in the following order, ranging from least to most objectionable:

1. state objections
2. request specific gestures by persons in lineup
3. request specific clothes for persons in lineup
4. insist on specific composition of lineup
5. request members of lineup to speak
6. insist on specific procedures
7. cross-examine the witness
8. strenuously object.

Note that the lawyers felt raising objections was relatively mild, but raising them strenuously was comparatively intolerable. Note also the extreme sensitivity to placing any pressure on witnesses — perhaps for fear of intimidation. There is also more tolerance of defense counsels' influence on the composition and appearance of the lineup than on its procedures. Generally, the respondents appeared to resist any act that made the lawyer personally conspicuous.

d. The scale has a coefficient of reproducibility 0.8125, which is 23.5% above minimum marginal reproducibility, and a coefficient of scalability of 0.5563. These numbers are somewhat low, indicating that the respondents were not in complete agreement that this list of defense counsels' acts lies on a one-dimensional scale, suggesting a complex perception of multiple issues involved in setting defense attorneys' standards. Nonetheless, these results are potentially useful to assess the resistence of the bar to introduction of various defense tactics.
The mathematical technique for the analysis is discussed in W. S. Torgeson, *Theory and Methods of Scaling* (1958) and Edwards, *On Guttman Scale Analysis*, 8 Educational Psychology Measurement 313 (1948).

TABLE 4

Appropriate Behavior of Defense Counsel at Lineups

Behavior	Opinions of Respondents		
	Required	Permitted	Neither
State objections	39.3%	41.7%	19.0%
Strenuously object	13.1%	29.8%	57.1%
Insist on procedures	11.9%	33.3%	54.8%
Insist on composition	15.5%	34.5%	50.0%
Cross-examine the witness	13.1%	29.8%	57.1%
Ask persons in lineup to speak	9.5%	38.1%	52.4%
Ask persons in lineup to wear specific clothes	10.7%	44.0%	45.2%
Ask persons in lineup to make specific gestures	10.7	44.0%	45.2%

It is interesting to compare the responses to these questions with the self-characterized preference of the attorney for an active versus passive role at lineups. While those claiming a preference for active defense counsel at lineups generally seemed more tolerant of most acts by attorneys, the differences between the two groups were small. There was no significant difference between the proponents of an active lawyer and those favoring a passive lawyer in receptiveness to attorneys raising objections or requesting members of the lineup to say or wear specific things. Regarding the remaining five acts (items 3-8 on the scale), there was a statistically significant but small correlation between the tendency to prefer active defenses and to accept these acts; the correlation never exceeded 0.26. This relationship is rather mild and can be explained in only two ways: Either the respondents were not candid in their self-evaluation, wanting to appear more tolerant of active attorneys than they actually are, or they view the eight acts as not constituting an "active" defense. One possibility is that though 67.5% of the lawyers said they preferred an active defense, the number is far smaller — perhaps falling between a third and a half.

Twelve respondents felt that additional acts by defense attorneys should be permitted: four called for written objections, two said there should be advance agreement over procedures; two wanted a tape recording of the lineup (videotape?), one thought separate witnesses should be present, two said the attorney should refuse to allow the lineup to be completed, and one simply called for a "fair lineup."

A considerable majority of the respondents felt that the appropriate party to whom requests should be taken was the officer in charge. The full distribution of the opinions of the 65 respondents who answered this question is given in Table 5.

The professional position of the respondent had a mild influence on his view of appropriate lineup behavior for defense counsel. Judges were slightly less tolerant of vigorous defenses than either prosecutors or defense attorneys. Surprisingly, prosecutors were about as tolerant of the various acts as were defense attorneys. The most sizeable differences occured over the following acts: cross-examination of the witness (85.7% of the judges and 78.6% of the prosecutors were opposed, compared to only 49.2% of the defense attorneys); allowing counsel to request persons in the lineup to say specific words (opposed by 85.7% of the judges and only 50.0% of the prosecutors and 49.2% of the defense attorneys); specifying clothes to be worn by persons in the lineup (opposed by 85.7% of the judges, 44.4% of the defense attorneys, and 28.6% of the prosecutors); and specifying gestures for persons in the lineup (opposed by the same 85.7% of the judges but only 42.9% of the defense attorneys and 35.7% of the prosecutors).

TABLE 5

To Whom Should Requests/Demands Be Made?

Party	Respondents Favoring Requests of that Party	
Officer in charge	42	(64.6%)
Superior Officer	7	(10.8%)
Prosecutor	1	(1.5%)
Superior Officer & Prosecutor	1	(1.5%)
Superior Officer & Magistrate	2	(3.1%)
Investigating Officer	2	(3.1%)
Watch Commander	1	(1.5%)
Officer in Charge & Watch Commander	1	(1.5%)
Everyone Possible	1	(1.5%)
Someone Else (misc.)	7	(10.8%)

EFFECTS ON A JURY OF AN UNFAIR LINEUP

Only 22 respondents (26.8%) felt that participation by an attorney through completion of an unfair lineup would be

taken by a jury to imply ratification of its procedures; 50 (61.0%) felt it would not. Another ten (12.2%) gave answers amounting to "perhaps." Two respondents failed to respond to this problem. The respondents' answers to this question appear to be independent of their professional position: Among defense attorneys 27.9% said completion would bias the jury compared to 28.6% of the prosecutors and 14.3% of the judges. Clearly defense and prosecution attorneys are in agreement; given the small number of judges in the sample, it is impossible to assert that the distribution of their opinions is significantly different. Similarly, the distributions of opinions does not appear to be affected by whether the attorney's experience is in criminal or civil practice, nor by whether he has ever been present at a lineup.

The 22 who feared bias plus four of the ten who said bias might result, answered the question concerning jury instructions. Twenty-two of the 26 (84.6%) said instructions to the effect that completion of the lineup does not imply defense ratification would help counter the bias. Only four of the 26 (15.4%) said instructions would not help.

Fifty-five respondents suggested additional means to counteract the assumption of ratification. The suggestions are listed in Table 6.

TABLE 6

Other Means of Avoiding Jury Bias

Suggestion	Number Suggesting
Argument to Jury	12
Other Witnesses to Lineup	11
Lawyer's Testimony	11
Instructions	8
Making it a Matter of Law	5
Written Record of Lineup Session	4
Tape Recording of Lineup	2
Movies or Photos of Lineup	2

LINEUP REFORMS

There appears to be some sentiment in the criminal bar for new judicial-administrative rules in lineup procedures, but little consensus for any specific reforms. Fifty-eight respondents answered the question asking "[a]re new judicial/administrative rules necessary in this area?", of whom 39 (67.2% of those answering, 46.4% of the total sample) said new rules were needed and 19 (32.8% of those answering and 22.6% of the total sample) said they were not. This would seem to imply fairly widespread dissatisfaction with existing rules, but two factors suggest some caution in drawing conclusions: First, the "self-selection problem" is of greatest concern in a question like this one; persons interested in reform are much more likely to go to the trouble of answering this kind of survey than those against or indifferent. Second, some of the 26 respondents who failed to answer this question were probably answering with a "silent no." Thus perhaps the most prudent conclusion is that a majority of those who expressed an opinion on the subject favor new rules.

As might be expected, the respondent's present position was highly influential in formation of the opinion on whether new rules are needed. Among defense attorneys 79.5% favored new rules, while only 40% of the prosecutors wanted new rules; and *none* of the judges said new rules were necessary while four of the seven said they were not needed. These differences are statistically significant at the .01 level. In contrast, the opinions of the respondents were unaffected by whether they had predominantly civil or criminal law practices, nor by their previous experience with lineups.

Table 7 shows that there is hardly any unanimity regarding what new rules are necessary. Of the 39 who said they felt new rules are called for, 33 specified some reform, and their opinions were scattered among ten different categories.

There is no widespread support evidenced in the survey for the presence of

TABLE 7

Suggested Areas for New Judicial/Administrative Rules

Suggestion	Number of Respondents
New Rules for Lineup Staging	7
Color Photos of Lineup	6
Admit Objections	5
Movies of Lineup	5
Magistrate to Conduct Lineup	4
Record Objections	3
Require DA's Presence	3
Require Police Conducting Lineup Entertain Objections	2
Permit Counsel to Order Disobedience	2
Modification of Trial Rules	1

a magistrate at lineups. Of the 81 respondents answering the question, only 27 (33.3%) said the presence of an independent judicial officer would be desirable; 50 (61.7%) said it would not be desirable, and four (4.9%) gave ambivalent answers amounting to "maybe." On this issue, there was no difference in the distributions of opinions between prosecutors and defense attorneys (35.7% of the prosecutors and 36.7% of defense counsel favored the presence of a magistrate), but the opinions of judges differed markedly from those of the advocates: six of the seven judges were opposed to new rules, with the seventh saying "maybe." Again, answers to this question were uninfluenced by the principal field of the respondent's practice and by his previous experience with lineups.

There is considerably more receptivity to the presence of a prosecutor at the lineup than to the presence of a magistrate. Again, 82 of the 84 respondents answered the question, but here 66 (78.0%) favored the presence of a DA, and only 18 (22.0%) were opposed. However, the questionnaire asked about the presence of the prosectuor immediately after the magistrate question and this might have invited the respondent to try to "compromise" and thereby have slightly inflated the number of positive responses. In any case, it is clear there is less resistance to the presence of the DA than to the requirement of a magistrate. With this question, judges, prosectuors, and defense attorneys did not appear to be affected by their professional status; neither were the respondents influenced by any of the other data we have on their practice or experience.

THE VIGOROUS DEFENSE AND PROFESSIONAL ETHICS

While nearly two-thirds of the respondents felt a defense attorney should be active rather than passive in representing clients at lineups, of 78 respondents who answered the first question of the survey — whether a failure to object should constitute a waiver of objections to the lineup — 73.1% of them (57 respondents) said the failure to object should not constitute a waiver. Only 17 (21.8%) felt it should cause forfeiture of the objection. There were four other opinions offered: that it should depend on whether objection was possible; that there should be no right to object (a respondent sensing the shifting winds to the right; that it should be a matter for the court to decide, and that the failure to object should merely shift the burden of proof.

Thus, it appears that either the respondents were willing to allow the defense attorney the right to vigorous activities at the lineup without requiring their exercise, or else, again, it seems they are less in favor of active defense counsel than they claim. None of the personal or professional characteristics of the respondents — including professional position — seemed to affect the responses to this question.

A rather small number were actually prepared to advocate acts of protest by the attorney at the lineup. Only six said threatening to walk out was appropriate; 11 favored actually walking out; none favored disruption of the proceedings; and 15 said the attorney should order his client not to obey the officers.

There was very little sensitivity to the ethical issues involved in having the attorney testify in behalf of his client.[e] Only 23 said such testimony is unethical while 46 said it was not. (The remaining 14 presumably found the question of ethics too theoretical for them.) Those who said the lawyer could ethically testify cited 12 reasons, most of them dealing solely with practicality and not ethics. Twenty cited 6 reasons why it would be unethical, which are summarized in Table 9.

TABLE 8

Why Counsel Can Ethically Testify in his Client's Behalf

Reason	Number Giving that Reason
He's the only witness	5
It is necessary	4
It leaves the defendant's rights unwaived	3
It is impractical for him not to	2
Consequence of duty to do all he can for his client	2
Required by circumstances	2
Analogous to prosecutor's dual role	2
Can get another lawyer to represent defendant	2
Remote from circumstances of the crime	2
Serves the interests of justice	2
He is available for cross-examination	1
Defendant can give his consent	1

TABLE 9

Why It Is Unethical for Counsel to Testify in Client's Behalf

Reason	Number Giving that Reason
Inconsistent with role as counsel	6
Makes attorney's credibility an issue	4
Lawyer is not believable	4
Self-corroboration	4
Cross-examination may hurt defendant	1
Each function weakens the other role	1

e. The ethical problems triggered by *Wade* may be grasped from a consideration of Canon 5 of the ABA Code of Professional Responsibility, Ethical Considerations 5-9 and 5-10 (1969):

"EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

"EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

See also Sutton, *The Testifying Advocate*, 41 Texas L. Rev. 477, 481-482 (1963), where the author points out:

"Ultimately, the testifying advocate occupies the dubious and embarrassing position of one trying to argue convincingly to the jury the strength and impartiality of his own testimony. The dual role is too difficult; the lawyer should not be subjected to such a riptide of demands unless in some exceptional circumstances fairness and duty to the client dictate otherwise. . . . [But] the fountainhead of the underlying policy consideration [is that], in fairness to his client, a lawyer who will be a witness should not be converted into a more interested and thus a less effective witness by becoming an advocate as well."

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