The Warren Court's Eyewitness Identification Case Law: What if?

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TABLE OF CONTENTS

INTRODUCTION

As developed in the Introduction to this symposium, the Warren Court criminal procedure revolution came with a cost.[1] Journalist Fred Graham wrote that some of the Court's decisions produced a "self-inflicted wound."[2] Commentators believe that the Court's criminal procedural revolution tipped the 1968 Presidential election to Richard Nixon, who then rapidly altered the composition of the Supreme Court with four appointments in his first two years of office.[3]

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1. Many Americans were troubled by Supreme Court decisions, believing the Court to be too lenient on defendants and blaming the Court for rapidly rising crime rates. *See* Hazel Erskine, *The Polls: Causes of Crime*, 38 PUB. OP. QUARTERLY 288, 292 (1974) (listing 1969 Louis Harris & Assoc. poll showing 51% and 23% of Americans believed "Supreme Court decisions protecting rights of accused" were a "Major Cause" and "Minor Cause" of "an increase in crime," respectively); *see also id.* at 294 (detailing a Gallup poll showing 63% of Americans in 1968, and 75% of Americans in 1969, believed "the courts" were "not harsh enough" when "dealing with criminals."); *see also* James Vorenberg, *The War on Crime: The First Five Years*, THE ATLANTIC MONTHLY, May 1972, https://www.theatlantic.com/past/docs/politics/crime/crimewar.htm (on file with *The University of the Pacific Law Review*).

2. FRED P. GRAHAM, THE SELF-INFLICTED WOUND 153–93 (1970).

3. LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 243–49 (1983); *see also* EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW 2 (2016); KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL

The Warren Court had many critics. Commentators continue to question the legitimacy of the Warren Court's Criminal Procedure revolution.[4] Others doubt its wisdom.[5] Some critics have argued that the Warren Court's attention to procedural protections came with a cost to racial justice.[6] For example, in his widely acclaimed book, *The Collapse of American Criminal Justice*, the late William Stuntz argued that the Warren Court deserves much of the blame for the collapse of the American criminal justice system.[7] Specifically, he claimed that the Warren Court's reliance on due process, rather than on equal protection, led to the appearance that the Court was coddling violent offenders at the expense of innocent victims in their protection of African-Americans.[8] The backlash against the Court led to increased punishment, and to the War on Drugs.[9]

Those of us who support the Warren Court's criminal revolution might address any number of criticisms leveled against the Court.[10] Instead, this paper focuses on one specific criticism. Professor George Thomas, a participant in this symposium, has argued that the Warren Court was overly concerned with procedural protections,[11] and that those protections often advanced values unrelated to the

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CONSEQUENCES 37–62 (2011); William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322, 331 (2012).

4. *See, e.g.*, RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA 297–325 (1977) (arguing the "nationalizing" aspect of the Warren Court's decision-making "was not unique to the Warren Court"); *see also* Robert Weisberg, *Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832 (1985); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices* in THE BURGER COURT 62, 63 (Vincent Blasi ed. 1983) (arguing that, "more often than not, [the Warren Court's] criminal procedure decisions reflected a pattern of moderation and compromise," despite its "public reputation as a bold, crusading court.").

5. *See, e.g.*, Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1441 (1985) (attacking the underlying premise of *Miranda* as, inter alia, an unethical attempt to give suspects a "sporting chance"); *see also* Louis Michel Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 744 (1992) (arguing that Warren's most controversial cases are "best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance."); RICHARD A. LEO & GEORGE C. THOMAS III, eds., THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING (1998).

6. *E.g.*, Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002); *see also* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 827 (2017) (reaching the conclusion that *Miranda* has "made it noticeably more difficult for police officers to obtain confessions."); WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 9 (2011); *but see* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 501 (1996).

7. *See* STUNTZ, *supra* note 6, at 9 (arguing "the ways the [Warren] Court exacerbated the inequality and instability that plagued late twentieth-century criminal justice.").

8. *Id.* at 225–36.

9. *See id.* at 244–81 ("By providing focal points for public anger, the coincidence of urban race riots and pro-defendant Warren Court decisions like *Mapp* and *Miranda* helped to nationalize the backlash and made it more extreme when it came.").

10. Along the way we might agree with some of the criticisms without losing faith in the larger body of work.

11. *E.g.*, GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS (2008); *see also* George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1, 2 (2005) (proposing that "once Nixon

protection of the innocent.[12] Thomas has also argued that the primary goal of our criminal justice system should be the protection of innocent defendants, and that the Warren Court justices were indifferent to offenders' guilt or innocence, offering only procedural remedies.[13]

This paper disputes Thomas's view of the Warren Court in one particular area, wherein I argue that the Warren Court was on a path that would have provided meaningful protection for innocent defendants: The Warren Court's efforts to protect against unreliable eyewitness identification. In *United States v. Wade*[14] and *Gilbert v. California,*[15] the Court held that post-indictment eyewitness identification was a critical stage of criminal proceedings, requiring the presence of counsel. *Gilbert* also held that even if a witness made an identification at a lineup without counsel present, the witness might make an in-court identification as long as the prosecution could establish an independent basis for such evidence.[16] Finally, in *Stovall v. Denno*,[17] the Court held that the *Wade-Gilbert* holding did not apply retroactively. Nonetheless, the Court in *Stovall* found that if an identification procedure was so "unnecessarily suggestive and conducive to irreparable mistaken identification," the court must suppress the evidence because its use at trial would otherwise violate due process.[18]

Within just a few years after the Burger Court's inception, the Court eroded many of the Warren Court decisions past recognition.[19] The Burger Court held that *Wade-Gilbert* protection applied only after commencement of formal proceedings[20] and had no application to a photo array or "show-up."[21] Thus, the appearance of counsel at a lineup, as a matter of constitutional protection, continues to be exceedingly rare.[22]

This paper argues that Justice Brennan's majority opinions in *Wade-Gilbert*

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appointed four new justices, the [Warren Court] liberal belief in procedure rather than substance began to appear naïve."); George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169 (2005).

12. *See* Thomas, *Road Not Taken*, *supra* note 11, at 170 ("[T]he road taken by the Warren Court . . . did not produce a fair and just process . . . it harmed innocent defendants."). One might debate, for example, whether the Warren Court's extension of the exclusionary rule, thereby limiting arbitrary police searches, was legitimate, even though enforcement of the Fourth Amendment most immediately protects guilty offenders. Protection for the innocent is less direct and defies calculation: only if police fail to stop, detain and search innocent individuals because they have been deterred by the Fourth Amendment do innocent individuals benefit from the Fourth Amendment.

13. *See* Thomas*, Road Not Taken, supra* note 11, at 7–8 ("Anyone who was designing a criminal justice process from scratch would, I think, worry less about the privacy rights of guilty suspects and more about protecting the innocent from being convicted.").

14. 388 U.S. 218, 240 (1967).

15. 388 U.S. 263, 272 (1967).

16. *Id.*

17. 388 U.S. 293 (1967).

18. *Id.* at 302.

19. *Infra* Part II & Part III.

20. Kirby v. Illinois, 406 U.S. 682 (1972).

21. United States v. Ash, 413 U.S. 300, 321 (1973).

22. THOMAS, SUPREME COURT ON TRIAL, *supra* note 11, at 164–65.

were ambiguous: Were they really Sixth Amendment right to counsel cases, as most commentators see them?[23] Alternatively, were they Confrontation Clause cases?[24] If they were Confrontation Clause cases, they were about protecting innocent defendants from unjust convictions.[25] In addition, the Warren Court's ruling in *Stovall,* upholding the admissibility of identifications made under obviously suggestive circumstances, is certainly open to criticism. Despite that, shortly before the end of the Warren Court, the Court demonstrated a commitment to protecting potentially innocent defendants from unnecessarily suggestive procedures in *Foster v. California*. *Foster* demonstrates that the Court's due process test could have teeth. This paper explores the implications of my argument that the *Wade* trilogy was grounded in the Confrontation Clause, rather than the traditional, narrow interpretation as right to counsel cases. Notably, a suspect might have been entitled to protection under the Confrontation Clause in settings where she would have no protection under the Sixth Amendment right to counsel.[26] As such, the Warren Court could have provided protection against one of the most common causes resulting in the conviction of innocent defendants: eyewitness misidentification.[27]

Part I of this article reviews the Court's eyewitness identification case law, and makes two points: After reviewing the *Wade-Gilbert* cases, the article evaluates the Burger Court's rapid erosion of the *Wade-Gilbert* protections.[28] Second, while those cases were largely rendered irrelevant by the Burger Court, *Wade* and *Gilbert* were ambiguous about whether the Court grounded their holdings in the Sixth Amendment right to counsel or the Sixth Amendment right to confrontation.[29] Part II reviews *Stovall*, the third case in the Court's 1967 trilogy.[30] Even if one recognizes that *Stovall*'*s* result appears indefensible, the Warren Court elsewhere demonstrated a commitment to protecting innocent defendants from unduly suggestive identification procedures.[31] Part III explores the question, "what if?" i.e. had the Court not moved so far to the right so quickly, how might *Wade-Gilbert* have evolved into far more meaningful protection, that would most likely favor innocent defendants, than the Burger Court provided?[32] Indeed, some of the developments in state legislatures and lower courts that provide meaningful relief

23. *E.g.*, Alan K. Austin, *The Pretrial Right to Counsel*, 26 STAN. L. REV. 399 (1974); Howard B. Eisenberg & Bruce G. Feustel, *Pretrial Identification: An Attempt to Articulate Constitutional Criteria*, 58 MARQ. L. REV. 659 (1975); *see also* Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235 (1970) ("[*Wade* and *Gilbert*] involved extensions of the Sixth Amendment right to counsel . . .").

24. *Infra* Part II.

25. *Infra* Part II.

26. *Infra* Part IV.

27. *Infra* Part IV.

28. *Infra* Part I.

29. *Infra* Part I.

30. *Infra* Part III.

31. *Infra* Part III.

32. *Infra* Part IV.

for suspects are consistent with the view that the *Wade-Gilbert* trilogy holdings were about protecting a defendant's rights under the Confrontation Clause (i.e. the right to confront witnesses against him).[33]

I. WADE AND GILBERT

In 1967, the Court decided *Wade*,[34] *Gilbert*,[35] and *Stovall*,[36] all dealing with pre-trial identification proceedings. The Court seemed to ground its holdings in *Wade* and *Gilbert* on the Sixth Amendment's right to counsel clause, but with considerable ambiguity.[37] The Court also seemed to ground the need for counsel on the Confrontation Clause: Without counsel's involvement, a defendant was unable to effectively confront the witness who identified him.[38] This section reviews those cases and then explores how the Burger Court cabined the protections hoped for in *Wade* and *Gilbert.*

In *Wade*, the defendant was indicted for his participation in a bank robbery.[39] Following his arrest, the court appointed counsel for the defendant.[40] Two weeks later, FBI agents placed the defendant in a lineup so that the bank employees could determine if Wade was the robber.[41] The employees identified Wade.[42] At trial, on cross-examination, both employees testified concerning their identification of Wade at the pretrial lineup.[43] Wade's counsel objected to the witnesses's in-court identification because of the out-of-court denial of the right to counsel.[44]

In *Gilbert*, formal proceedings had also begun against the defendant[45] when the police used an unusually suggestive pretrial identification proceeding: About 100 witnesses to several robberies allegedly committed by the defendant identified

33. *Infra* Part IV.

34. 388 U.S. 218 (1967).

35. 388 U.S. 263 (1967).

36. 388 U.S. 293 (1967).

37. *See Wade*, 388 U.S. at 226–27 ("The security of [the accused's right to a fair trial] is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.").

38. *Id.* at 235 ("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.").

39. *Id.* at 220.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* Gilbert v. California, 388 U.S. 263, 269 (1967) (Police conducted the lineup "without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel.").

him in each other's presence.[46] At trial, the prosecution relied on both the witnesses's out-of-court and in-court identifications of Gilbert.[47]

The *Wade* and *Gilbert* decisions held that the Sixth Amendment right to counsel extended to out-of-court lineup procedures. Because the government had not relied on the out-of-court identification in *Wade*, the Court remanded the case to determine whether the in-court identification was the product of the uncounseled out-of-court lineup.[48] *Gilbert* held that the state could not rely on the uncounseled out-of-court identification at all, although it might demonstrate that the in-court identification had an independent source.[49]

Justice Brennan, writing for the majority, seemed to ground the holding in the Sixth Amendment right to counsel clause.[50] The opinion relied explicitly on Sixth Amendment right to counsel cases and focused on whether the pretrial lineup was a "critical stage" of the proceeding using a classic right to counsel analysis.[51] Although the opinion relied on analysis from *Powell v. Alabama,*[52] a pre-incorporation due process case, and *Miranda v. Arizona,*[53] a Fifth Amendment right to counsel case, its discussion focused on the meaningful role of counsel as developed in those cases.[54] The opinion also cited *Massiah v. United States*,[55] which involved police conduct that took place after the government had indicted the defendant. As developed below, viewing *Wade* and *Gilbert* narrowly as Sixth Amendment right to counsel cases allowed the Burger and Rehnquist Courts to render *Wade-Gilbert* protection almost meaningless.[56] However, that narrow view failed to acknowledge the ambiguity in Justice Brennan's opinions.[57]

Wade-Gilbert determined that the line-up was a "critical stage" of criminal proceedings because of the need for counsel to protect a defendant's right to confront the witness against him.[58] As developed more fully below, treating *Wade-*

46. *Id.* at 270.

47. *Id.* at 271.

48. *Wade*, 388 U.S. at 242.

49. *Gilbert*, 388 U.S. at 272–74.

50. *See id.* at 272 ("We there held [in *Wade*] that police conduct of such a lineup without notice and in the absence of his counsel *denies the accused his Sixth Amendment right to counsel* and calls in question the admissibility at trial of the in-court identifications . . .") (emphasis added).

51. *Wade*, 388 U.S. at 236–37; *see also Gilbert*, 388 U.S. at 273.

52. 287 U.S. 45 (1932).

53. 384 U.S. 436 (1966).

54. *See Wade*, 388 U.S. at 227 ("[T]he principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial 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 meaningfully to cross-examine the witnesses against him . . . .").

55. *Id.*

56. *See* discussion *supra* Part I.

57. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 501 (6th ed. 2017); *see also id.* at 499–500 regarding the ambiguity of *Wade*'s constitutional foundation.

58. *See Wade*, 388 U.S. at 224–25 ("[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our

Gilbert as right to confrontation cases would have produced a dramatically different legal landscape, one far more protective of innocent defendants than the one we have today.[59] Here is some of the language suggesting that counsel was a prophylaxis to protect a defendant's right-to-confrontation: ". . . in this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined."[60]

In addition to references regarding the right to confront witnesses, Justice Brennan highlighted the risks associated with eye-witness identification procedures: The improperly suggestive procedures "probably account[] for more miscarriages of justice than any other single factor . . . ."[61] Once a witness has identified a suspect as the perpetrator, the witness seldom retracts the identification in open court.[62] Further, in language that echoes the role of counsel in the *Miranda* setting, Justice Brennan discussed the role of counsel at a lineup: Counsel seemingly would be able to identify and perhaps prevent unduly suggestive influences that would otherwise make cross-examination at trial meaningless.[63] Hence, as with *Miranda,* the Court seemed to require counsel to protect another right: the right to confrontation.

That was not to be. The Burger Court began to narrow *Wade-Gilbert* protections almost immediately. In subsequent cases, the Court narrowed the reading of *Wade-Gilbert* so extensively that one suspects counsel almost never attends a lineup.[64]

Except for a brief moment, the Court continues to hold that the Sixth Amendment right to counsel attaches only after the state has begun formal proceedings. The notable, short-lived exception was *Escobedo v. Illinois*.[65] There,

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cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. The guarantee reads: 'In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence [sic].' (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence [sic].'").

59. *Infra* Part II.

60. *Wade*, 388 U.S. at 223–24.

61. *Id.* at 228–29.

62. *See id.* at 229 (quoting Williams & Hammelmann, *Identification Parades I*, CRIM. L. REV. 479, 482 (1963) ("[I]t is a matter of common experience that, once a witness has picked out 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 (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.").

63. *See id.* at 231–32 ("In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."); *c.f.* Miranda v. Arizona, 384 U.S. 426, 445 (1964) ("An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.").

64. I was unable to find any data on how often counsel attends post-formal charge line-ups. As a matter of common sense, prosecutors prefer pre-indictment line-ups for many reasons, including the need to be sure that the suspect is the right person before formal charges are brought and the desire to avoid the cumbersome involvement of counsel at a line-up.

65. 378 U.S. 478 (1964).

a suspect in police custody requested, and was denied, the right to see his attorney.[66] Despite the absence of formal charges, the Court held that the defendant's right to counsel was violated, at least on the facts of the case, once the police had "focused" on the defendant.[67] Two years later, *Miranda* shifted the analysis from the Sixth Amendment right to counsel to the Fifth Amendment right to be free from being compelled to be a witness against oneself when the police engage in custodial interrogation.[68]

Perhaps—not surprisingly—after *Wade-Gilbert*, lower courts were divided on whether a suspect had a right to counsel at a pre-indictment lineup.[69] In effect, lower courts were at odds as to whether *Wade* and *Gilbert* were pure Sixth Amendment right to counsel cases or whether the constitutional right at stake was the right to confront witnesses at trial, protected by the Confrontation Clause.[70] The newly constructed Burger Court resolved that question in 1972 when it decided *Kirby v. Illinois*.[71]

In *Kirby,* the police arrested the defendant and secured an identification before he had been formally charged.[72] The Court divided 5-4 in its holding.[73] Justice Stewart's plurality opinion (subsequently adopted as the law by a majority of the Court)[74] held that *Wade-Gilbert* applied only after commencement of formal proceedings.[75] Notably, Nixon appointees Warren Burger, Harry Blackmun and

66. *See id.* at 481 ("Notwithstanding repeated requests by each, petitioner and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation.").

67. *See id.* at 490–91 ("We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, 83 S.Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.").

68. *Miranda*, 384 U.S. at 439 ("The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.").

69. LAFAVE ET AL., *supra* note 57, at 500.

70. *Id.* at 501.

71. 406 U.S. 682 (1972).

72. *See id.* at 684 ("In the present case we are asked to extend the Wade-Gilbert per se exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.").

73. *See Kirby,* 406 U.S. 682 (Mr. Justice Stewart announced the judgment of the Court and an opinion in which The Chief Justice , Mr. Justice Blackmun, and Mr. Justice Rehnquist join; Mr. Justice Powell filed statement concurring in the result; Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Douglas and Mr. Justice Marshall joined; Mr. Justice White filed a dissenting statement).

74. *See generally* United States v. Ash, 413 U.S. 300, 322 (1973); *see also* discussion *infra*.

75. *See Kirby,* 406 U.S. at 688 ("In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, it has been firmly established that a person's Sixth and Fourteenth

William Rehnquist joined Justice Stewart's opinion.[76] Justice Powell, the fourth Nixon appointee, concurred and stated tersely that he would not extend *Wade-Gilbert*'s per se exclusionary rule.[77]

In *Kirby,* Justice Brennan wrote for three of the dissenting justices arguing that the plurality's characterization of the issue was wrong.[78] Justice Stewart framed the *Kirby* issue as whether the Court should "extend" the Court's holdings in *Wade* and *Gilbert*.[79] While Justice Brennan acknowledged that those cases involved post-indictment lineups, he urged that "*Wade'*s rationale leaves little doubt that the post-indictment language was merely descriptive."[80] Brennan also emphasized the need for counsel at the lineup as a means of protecting the right to confront witnesses at trial.[81] He made explicit that those cases relied on the Confrontation Clause.[82] Justice White, a dissenter in *Wade* and *Gilbert*, nonetheless also wrote a dissenting opinion in *Kirby* and there stated tersely that *Wade* and *Gilbert* "govern this case and compel reversal of the judgment."[83]

The Court continued to erode *Wade* and *Gilbert* in *United States v. Ash*.[84] There, in an opinion written by Justice Blackmun, and joined by the other Nixon appointees the Court held that the right to counsel did not extend to a post-indictment photo array[85] because it was not a "critical stage" of the criminal proceedings.[86] That, of course, is the language of the Court's Sixth Amendment right to counsel case law.[87] Justice Brennan's dissent in *Ash* relied on his analysis

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Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." (internal citations omitted); *see also id.* at 690 ("We decline to depart from that rationale today by imposing a per se exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.").

76. *Id.*

77. *See id.* at 691 (Powell, J., concurring) ("As I would not extend the *Wade-Gilbert* per se exclusionary rule, I concur in the result reached by the Court.").

78. *See id.* at 696–97 (Brennan, J., dissenting) ("'[T]he initiation of adversary judicial criminal proceedings,' is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial.").

79. *Id.* at 684.

80. Joseph D. Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 726 (1974).

81. *Kirby*, 406 U.S. at 695–96.

82. *Id.* at 696.

83. *Id.* at 705 (White, J., dissenting).

84. 413 U.S. 300 (1973).

85. *See id.* at 321 ("[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government . . .").

86. *See id.* at 300 ("A pretrial event constitutes a 'critical stage' when the accused requires aid in coping with legal problems or help in meeting his adversary. Since the accused is not present at the time of the photographic display, and, as here, asserts no right to be present, there is no possibility that he might be misled by his lack of familiarity with the law or overpowered by his professional adversary."); *see also id.* at 326 (Brennan, J., dissenting) ("The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a 'critical stage' of the prosecution at which the accused is constitutionally entitled to the presence of counsel.").

87. *See* United States v. Wade, 388 U.S. at 236–37 (quoting Powell v. State of Alabama, 287 U.S. 45, 57

from *Wade* and *Gilbert*, with an emphasis on the resulting inability of counsel to effectively confront witnesses whose testimony might have been improperly influenced by a suggestive procedure at the pre-trial identification proceedings.[88]

Subsequent case law has focused primarily on whether particular procedures used by the police were unduly suggestive.[89] Over time, the Court has made clear that the standard to be applied—a totality of the circumstances test—is not especially demanding.[90] Justices seem to believe that trial counsel can erode the jury's confidence in an eyewitness identification if it was based on a suggestive one-on-one show up or photo array, and thus not violative of the defendant's right to confront the witnesses against him.[91]

Piece the puzzle together: if, as some courts believed, Brennan's majority grounded *Wade* and *Gilbert* in the Confrontation Clause, not in the right to counsel clause, the Court would have resolved cases like *Kirby* and *Ash* differently. The Sixth Amendment right to counsel "trigger," commencement of formal proceedings, would be irrelevant. Instead, a court would have to resolve whether the police procedures rendered cross-examination at trial so ineffective that the procedures violated the Confrontation Clause.

(1932) (characterizing the post-indictment lineup as a "critical state" of the prosecution such that a defendant is "as much entitled to such aid (of counsel) as at the trial itself."); *see also* Gilbert v. California, 388 U.S. at 272 ("[A] post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup."); Stovall v. Denno, 388 U.S. 293, 298 (1967) (holding that confrontation of an accused for identification is a critical stage of criminal proceedings, and counsel is required at such confrontations).

88. *See* United States v. Ash, 413 U.S. at 326–44 (Brennan, J., dissenting) (arguing, consistent with the rationale in *Wade* that counsel's function at an identification lineup is to "detect the existence of any suggestive influences" and thereafter "effectively reconstruct at trial any unfairness that occurred," in actuality there is "no meaningful difference, in terms of the need for attendance of counsel, between corporeal and photographic identifications.").

89. *See, e*.g., Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (an identification procedure including only one photograph "may be viewed in general with suspicion," but the Court found no substantial likelihood of irreparable misidentification given the totality of the circumstances); *see also* Moore v. Illinois, 434 U.S. 220, 229–30 (1977) (finding it "difficult to imagine a more suggestive manner" than an identification procedure where the victim "was asked to make her identification after she was told that she was going to view a suspect, after she was told his name and heard it called as he was led before the bench, and after she heard the prosecutor recite the evidence believed to implicate petitioner.").

90. *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 199–201 (1972) (finding "no substantial likelihood of misidentification" in police procedures where, after giving a vague description to police, the witness viewed thirty to forty photographs over a period of seven months and made no definite identification of any suspect—despite the Court conceding "the confrontation procedure was suggestive.").

91. *See* Manson v. Braithwaite, 432 U.S. at 116 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)) ("Surely, we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification'. . . Short of that point, such evidence is for the jury to weigh."); *see also* Kansas v. Ventris, 556 U.S. 586, 594, n.* (2009) (holding statements elicited in violation of the Sixth Amendment admissible to impeach defendant's inconsistent testimony at trial because "[our] legal system. . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."); United States v. Owens, 484 U.S. 554, 561 (1988) (declining to adopt a clear rule that out-of-court statements of identification "with the mere possibility of suggestive procedures" are unreliable and violative of Due Process, instead requiring the question be left to the jury).

II. STOVALL AND BEYOND

Stovall v. Denno[92] was the Court's third eyewitness identification case decided in 1967. Many commentators argue that *Stovall* demonstrates a lack of commitment to protecting innocent suspects.[93] As developed below, while the decision in *Stovall* is hard to justify, *Foster v. California*,[94] decided shortly before Chief Justice Warren stepped down, demonstrated a much greater commitment to protecting innocent suspects from overly suggestive identification procedures.[95]

Stovall involved difficult facts. The eyewitness was the victim of a brutal attack in which her husband was murdered.[96] She lay in a hospital bed where she had just undergone life-saving surgery.[97] Five officers surrounded Stovall, the only African American man in the room.[98] He was handcuffed to one of the officers.[99] She identified Stovall after an officer directed him to make a "few words for voice identification."[100] The procedure took place after the postponement of the suspect's arraignment so that Stovall could retain counsel.[101] At trial, witnesses testified as to the identification in the victim's hospital room and also made an in-court identification of Stovall.[102]

At issue in *Stovall* was whether *Wade* and *Gilbert* applied retroactively.[103] The Court found that those cases did not apply to cases like Stovall's that arrived in front of the Court on habeas corpus (i.e., did not apply retroactively).[104]

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92. 388 U.S. 293 (1967).

93. *See, e.g.,* Thomas, *Road Not Taken, supra* note 11, at 191 ("Thus, the great victory in *Wade* and *Gilbert* turned to ashes, and the losers were not guilty criminal defendants but the innocent who do not need a lawyer but do need a due process protection against unreliable identifications that is more precise and more robust than the vague mess that is *Stovall*.").

94. 394 U.S. 440 (1969).

95. For a discussion of *Foster* and *Stovall* as jurisprudence*, see* discussion *infra*. In a more historical vein: the Court decided *Foster* on April 1, 1969 and Chief Justice Warren handed down the final decision of his Court on June 23, 1969. *See also* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE, 506 (2006).

96. Stovall v. Denno, 388 U.S. 293, 295 (1967).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 294 ("This case therefore provides a vehicle for deciding the extent to which the rules announced in Wade and Gilbert—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively.").

104. *See id.* at 299–300 ("The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Wall, Eye-Witness Identification in Criminal Cases 38. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of Wade and Gilbert 'would seriously disrupt the administration of our criminal laws.' *Johnson v. State of New Jersey,* at 731, 86 S.Ct., at 1780."); *see also id.* at 300 ("At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless,

Apart from the Sixth Amendment *Wade*-*Gilbert* protections, the *Stovall* Court also held that a suspect additionally has a due process right implicated in eyewitness identification procedures.[105] According to *Stovall*, an eyewitness identification that is "so unnecessarily suggestive" may violate due process.[106] In light of the totality of the circumstances, a violation would occur if the suggestive procedures are "conducive to irreparable mistaken identification."[107]

Stovall seems indefensible. As Professor Thomas has observed, "[i]t is difficult to imagine a more suggestive procedure . . . ."[108] Only in partial defense of the decision, the Court relied on the Second Circuit en banc opinion that focused closely on the extreme circumstances of the case with a victim who might not survive, suggesting that the urgency to make an identification overrode concerns regarding what might otherwise be deemed unnecessarily suggestive procedures.[109]

The Warren Court revisited *Stovall* twice. One commentator has argued that *Simmons v. United States*[110] was the first step leading to the erosion of *Stovall*'s already limited protection.[111] The *Simmons* formulation of the due process test was more pro-prosecution: while *Stovall* condemned "unnecessarily suggestive"[112] procedures such that they were "conducive to irreparable misidentification,"[113] *Simmons* stated that a procedure would have to be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[114] Subsequent Burger Court decisions certainly moved even further away from the language in *Stovall*.[115]

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too, inquiry would be handicapped by the unavailability of witnesses and dim memories. We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive.").

105. *See id.* at 302–03 (holding that even if a petitioner is not entitled to protection under *Wade*-*Gilbert*, he may be entitled to relief on a claim that the confrontation conducted was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.").

106. *Id.* at 302.

107. *Id.*

108. Thomas, *Road Not Taken*, *supra* note 11, at 190.

109. *Stovall*, 388 U.S. at 302 ("'Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.'" (quoting Second Circuit Court of Appeals)).

110. 390 U.S. 377 (1968).

111. David E. Paseltiner, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 589 (1987).

112. *Stovall*, 388 U.S. at 302.

113. *Id.*

114. *Simmons*, 390 U.S. at 384.

115. *See generally* Neil v. Biggers, 409 U.S. 188 (1972) (holding that while the station-house identification may have been suggestive, under the totality of the circumstances test the victim's identification of respondent was reliable and was properly allowed to go to the jury where a woman identified her assailant as he walked past her in the police station after being instructed to say "shut up or I'll kill you" just as her original attacker had

Despite the different formulation of the test, the other post-*Stovall* decision dealing with due process protection in the identification setting demonstrated a more robust commitment to protecting suspects than did *Stovall* and post-Warren Court decisions. *Foster v. California*,[116] decided about two months before Chief Justice Warren stepped down, and written by Justice Fortas, involved an eyewitness to a robbery who initially could not make a clear identification of the defendant.[117] The police called the witness to the police station and showed him a lineup consisting of only three people.[118] Foster was about six feet tall and the other members of the lineup were short, perhaps five feet or five and a half feet tall.[119] The witness stated that he thought that Foster's leather jacket was familiar; nonetheless, he could not make a definitive identification.[120] That inability to conclusively identify Foster did not change even after the police brought the witness into a room with Foster for a further interview.[121] Only after the police arranged a second lineup, a week or ten days later, was the witness "'convinced' [that Foster] was the man."[122]

As in *Stovall,* Foster could not claim a violation of his right to counsel because the identification occurred pre-*Wade-Gilbert*.[123] Unlike *Stovall* and *Simmons,* the Court found that the procedure used violated due process, requiring a new trial.[124] The Court made clear that such suggestive procedures could lead to conviction of the innocent.[125]

Certainly, critics of the Warren Court's *Stovall* decision have plenty to criticize. As Professor Thomas has stated, "[i]t is difficult to imagine a more suggestive procedure."[126] Two years later, however, the *Foster* Court demonstrated a much more rigorous approach to its due process suggestiveness test, an approach not followed by the Court since the end of the Warren Court.

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done); *see also* Manson v. Brathwaite, 432 U.S. 98 (1977) (holding that "while the identification procedure was suggestive since only one photograph was used, and while it was unnecessary since there was no emergency or exigent circumstance, there did not, under the totality of the circumstances, exist a substantial likelihood of irreparable misidentification, where the identification was made by a trained police officer who had a sufficient opportunity to view the suspect, accurately described him, positively identified his photograph, and made the photograph identification only two days after the crime.").

116. 394 U.S. 440 (1969).

117. *Id.* at 441.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 441–42.

123. *Id.* at 442.

124. *Id.* at 442–43.

125. *Id.*

126. Thomas, *Road Not Taken*, *supra* note 11, at 190.

III. WADE, GILBERT, AND THE CONFRONTATION CLAUSE: WHAT IF?

As argued above, the Warren Court's Sixth Amendment analysis seemed grounded in concerns about protecting innocent suspects.[127] That is certainly true if one views *Wade-Gilbert* as Confrontation Clause cases. This section lays out some additional support to what I have argued above, demonstrating that those cases did take seriously the Confrontation Clause as a basis for the Court's holding.[128] It also explores some of the confusion generated by the *Wade-Gilbert* decisions, notably, concerning counsel's role at a lineup.[129] In addition, it focuses on Justice Brennan's suggestion in *Wade* that legislatures might come up with alternative protections for suspects forced into lineups.[130] Given the fluidity of the Court's rationale and explicit concern about avoiding misidentification, I argue below that the Court, not dominated by law-and-order justices, may well have evolved *Wade-Gilbert* in a direction clearly aimed not at formal representation by counsel but at protecting innocent suspects.[131]

Above, I cited some of the Confrontation Clause language relied on by Justice Brennan in *Wade.*[132] There was more:

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[133]

The role of counsel in *Wade* seems akin to the role of counsel in the *Miranda* custodial-interrogation setting. Counsel was a means to protect some other fundamental rights: in *Miranda*, the Fifth Amendment right not to be compelled to be a witness against oneself,[134] in *Wade-Gilbert,* the Sixth Amendment

127. *See* United States v. Wade*,* 388 U.S. 218, 224 (1967) (emphasizing the "indispensable" nature of the presence of counsel because "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."); *see also id.* at 228 (warning that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification," with "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses" being "a major factor contributing to the high incidence of miscarriage of justice.").

128. *Infra* Part III.

129. *Infra* Part III.

130. *Infra* Part III.

131. *Infra* Part III.

132. United States v. Wade, 388 U.S. 218, 224–25 (1967).

133. *Id.* at 227–28.

134. Miranda v. Arizona, 384 U.S. 426, 436 (1966) (holding "statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were

Confrontation Clause.

Wade also demonstrated recognition of police tactics leading to potentially false accusations.[135] Brennan's opinion listed numerous examples of highly suggestive lineups.[136] Brennan was explicit:

> [As a] matter of common experience [we know] that, once a witness has picked out 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 (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.[137]

He also referred to a then-developing literature about misidentification and the risk to innocent defendants.[138] Of course, today we know far more about the correlation between misidentification and the conviction of innocent defendants: as found by an Innocence Project study of exonerated defendants, 77% of those cases involved misidentification.[139]

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inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination.").

135. *Wade*, 388 U.S. at 234–35 ("The few cases that have surfaced [] reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather, we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."); *see also id.* at 235 ("The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief-preoccupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a a [sic] danger that this persuasion may communicate itself even in a doubtful case to the witness in some way.") (quoting William and Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 483 (1963)).

136. *See id.* at 232–33 (procedures "for example, that all in the lineup but the suspect were known to the identifying witness [People v. James, 218 Cal.App.2d 166 (1963); People v. Boney, 28 Ill.2d 505 (1963)], that the other participants in a lineup were grossly dissimilar in appearance to the suspect [Fredricksen v. United States, 266 F.2d 463 (D.C. Cir. 1959*);* People v. Adell, 75 Ill.App.2d 385 (1966); State v. Hill, 193 Kan. 512 (1964); People v. Seppi, 221 N.Y. 62 (1917); State v. Duggan, 215 Or. 151 (1958)], that only the suspect was required to wear distinctive clothing which the culprit allegedly wore [People v. Crenshaw, 15 Ill.2d 458 (1959); Presley v. State, 224 Md. 550 (1961); State v. Ramirez, 76 N.M. 72 (1966); State v. Bazemore, 193 N.C. 336 (1927); Barrett v. State, 190 Tenn. 366 (1950)], that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail [Aaron v. State, 273 Ala. 337 (1961); Bishop v. State, 236 Ark. 12 (1963); People v. Thompson, 406 Ill. 555 (1950); People v. Berne, 384 Ill. 334 (1943); People v. Martin, 304 Ill. 494 (1922); Barrett v. State, 190 Tenn. 366 (1950)], that the suspect is pointed out before or during a lineup [People v. Clark, 28 Ill.2d 423 (1963); Gillespie v. State, 355 P.2d 451 (Okl.Cr. 1960)], and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect [People v. Parham, 60 Cal.2d 378 (1963)].").

137. *Id.* at 228 (quoting Williams & Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 482 (1963)).

138. *See generally id.*

139. Barry Scheck & Peter Neufeld, *200 Exonerated: Too Many Wrongfully Convicted*, THE INNOCENCE PROJECT AT BENJAMIN N. CARDOZO SCH. OF L. 18–19, *available at* https://www.innocenceproject.org/wp-content/uploads/2016/10/ip_200.pdf (last visited Apr. 4, 2020) (on file with *The University of the Pacific Law Review*).

Further, Justice Marshall's dissent in *Manson v. Brathwaite*[140] underscores that, at least in his and Justice Brennan's view, the 1967 *Wade* trilogy was to provide protection against improper identification:

> The foundation of the Wade trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. . . . Relying on numerous studies made over many years by such scholars as Professor Wigmore and Mr. Justice Frankfurter, the Court concluded that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." . . . It is, of course, impossible to control one source of such errors the faulty perceptions and unreliable memories of witnesses except through vigorously contested trials conducted by diligent counsel and judges. The Court in the *Wade* cases acted, however, to minimize the more preventable threat posed to accurate identification by "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[141]

Again, this language suggests the primary goal was to protect innocent suspects.

From inception, the role of counsel in *Wade-Gilbert* was uncertain.[142] Was the attorney to make contemporaneous objections if a lineup appeared unfair? Was she to observe potential suggestiveness so that her cross-examination would be more effective because of her personal observations? Was the attorney to become a witness at a suppression hearing and to testify about the corrupting influence of improper police conduct?

Wade suggested that an attorney who witnessed the lineup was in a better position to engage in meaningful cross-examination.[143] In *Ash*, the Court stated

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140. 432 U.S. 98, 118 (1977).

141. *Id*. at 119 (Marshall, J., dissenting).

142. *See* LAFAVE ET AL., *supra* note 57, at 503 (citing Note, 64 J. CRIM. L.C. & P.S. 428, 433 (1973)) ("In post-indictment line-ups it is not readily apparent what immediate assistance an attorney can provide. He cannot stop the line-up or see that it be conducted in a certain manner. He can give no legal advice, proffer no defenses, advance no arguments. The defendant is not in need of legal advice and the lawyer is not in a position to provide on the spot assistance against the skills of the prosecutor.").

143. *See id.* at 499 ("The Court in *Wade* explained that under past lineup practices, the defense was often unable 'meaningfully to attack the credibility of the witness' courtroom identification' because of several facts that militate against developing fully the circumstances of a prior lineup identification by that witness."); *see also id.* ("The intended constitutional foundation of the Wade decision was not entirely clear from the Court's decision. The Court talked about the lineup being a 'critical stage' at which defendant was as much entitled to counsel as at trial, which would seem to indicate that Wade was grounded in Sixth Amendment right to counsel. But in explaining why this was so, the Wade majority referred to the fact that 'presence of counsel itself can often assure

that *Wade* was based on having counsel present because counsel would be "more sensitive to, and aware of, suggestive influences than the accused himself, and better able to reconstruct events at trial."[144] But as an observer, counsel may have relevant information to provide at a suppression hearing.[145] That role, of course, creates problems for defense counsel: according to the Model Rules of Professional Conduct, counsel might have to withdraw and become a witness at trial.[146]

Despite some language in *Wade* suggesting a limited-observer role for counsel at the lineup, other language suggests a more active role. Notably, the court stated, "presence of counsel itself can often avert prejudice,"[147] and can prevent "the infiltration of taint in the prosecution's identification evidence."[148] This suggests that counsel was supposed to negotiate or otherwise insert herself into the identification process. Because the Burger Court so effectively cabined *Wade* and *Gilbert*, the Court never had to explain counsel's role at a lineup.

As the Court did in *Miranda,* Justice Brennan suggested in *Wade* that legislatures might come up with an equally effective remedy to the right to counsel at the lineup:

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today 'in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.'[149]

At a minimum, the language suggests that Brennan's primary concern was the Confrontation Clause problem, not an independent right to counsel. As indicated, prior to *Kirby*, lower courts divided over the meaning of *Wade* and *Gilbert*. What

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a meaningful confrontation at trial.' Indeed the Court repeatedly referred to the Sixth Amendment right to confrontation and cross-examination in Wade, suggesting that the decision was grounded in the Sixth Amendment right of confrontation and cross-examination, with counsel being required simply to give sufficient protection to that other right." (quoting United States v. Wade, 388 U.S. 218, 232 (1967)).

144. United States v. Ash, 413 U.S. 300, 312 (1974).

145. *See id.* at 344 (Brennan, J., dissenting) ("*Wade* envisioned counsel's function at the lineup to be primarily that of a trained observer, able to detect the existence of any suggestive influences and capable of understanding the legal implications of the events that transpire. Having witnessed the proceedings, counsel would then be in a position effectively to reconstruct at trial any unfairness that occurred at the lineup, thereby preserving the accused's fundamental right to a fair trial on the issue of identification.").

146. *See* MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2019) (requiring that a lawyer not "advocate at a trial in which the lawyer is likely to be a necessary witness" to a contested issue).

147. *Wade*, 388 U.S. at 236.

148. *Id.* at 237.

149. *Id.* at 239.

if cases emerged in which the Court had to define counsel's role? What if experience showed that counsel could not do much to protect suspects from suggestive influences in lineups?

We know what kinds of procedures are at least as effective as the right to counsel at a lineup and what kinds are probably more effective.[150] Given the increasing body of literature pointing to the high correlation between the conviction of innocent defendants and inaccurate eyewitness identification,[151] might the Court have pushed law enforcement towards some of the practices developed in states that have taken seriously the concern about convicting innocents?

The past decade has seen efforts from around the country.[152] Several states require lineups to be conducted by an independent administrator who does not know which of the individuals in the lineup is the suspect.[153] Some also require that a person who does identify a suspect specify the level of confidence in making the identification.[154]

Some states additionally require that the police tell witnesses that the

150. *See, e.g.*, LAFAVE ET AL., *supra* note 57, at 516 ("[I]t seems obvious that similarity of race, physical features, size, age and dress of lineup participants is a prerequisite to avoidance of suggestion, at least as to distinctive characteristics described to the police beforehand by witnesses. . ."); *see also* PATRICK WALL, EYE-WITNESS IDENTIFICATIONS IN CRIMINAL CASES 53 (1965) (showing commentators agree that lineups should contain about six similar participants); *see also id.* at 70–73 (proposing a prohibition on photographic identification when a suspect is in custody or a lineup is otherwise feasible [because photo identifications are less reliable.]).

151. *See, e.g.*, BRANDON GARRETT, CONVICTING THE INNOCENT (2011) (finding that 190 in the first 250 DNA-exoneration cases [76%] had at least one erroneous eyewitness identification); Samuel R. Gross at al., *Exonerations in the United States 1989 Through 2003,* 95 J. CRIM. L. & CRIMONOLOGY 523, 542 (2005) (arguing that misidentifications are the leading cause of wrongful convictions); *see also* Comment, 43 SANTA CLARA L. REV. 213, 214 (2002) ("[M]istaken eyewitness identifications were a major cause in sixty of the first eighty-two DNA exonerations handled by the Innocence Project [73%]."); ELIZABETH F. LOFTUS, JAMES M. DOYLE, & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 2–4 (2013); Felice J. Levine & June Louin Tapp, *Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1082 (1973).

152. *E.g.*, Florida passed CS/SB 312-, the Eyewitness Identification, Reform Act, in early 2017. The statute became effective on Oct. 1, 2017. FLORIDA HOUSE OF REPRESENTATIVES, CS/SB 312 - Eyewitness Identification, https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=56856&SessionId=83 (last visited Aug. 20, 2019) (on file with *The University of the Pacific Law Review*).

153. *See, e.g.,* Florida, Fla. Stat. Ann. § 92.70(3)(a)(1)-(3) (West) (A lineup "must be conducted by an independent administrator," or if not, by using an automated computer program, a blind folder-shuffling procedure, or any "other procedure that achieves neutral administration and prevents the lineup administrator from knowing which photograph is being presented to the eyewitness during the identification procedure."); *see also* Illinois, 725 Ill. Comp. Stat. Ann. 5/107A-2(a)(1) (West) (Lineups shall be conducted by an "independent administrator, unless it is not practical"); North Carolina, N.C. Gen. Stat. Ann. § 15A-284.52(b)(1) (West) (requiring an independent administrator or the alternatives listed also in Florida's statute); California, Cal. Pen. Code § 859.7(a)(2) [Operative Jan. 1, 2020] (requiring identification procedures be conducted using "blind administration or blinded administration.").

154. *See, e.g.,* North Carolina, N.C. Gen. Stat. Ann. § 15A-284.52(b)(12) (West) (The independent administrator must "seek and document a clear statement. . . as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator."); *see also* California, Cal. Pen. Code § 859.7(a)(10)(A) [Operative Jan. 1, 2020] ("The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.").

perpetrator may not, in fact, be in the lineup.[155] Other protections include jury instructions about the fallibility of eyewitness identification and/or the use of experts to explain the limits of eyewitness identification.[156] Some states also require videotaping of lineups to allow at least some check on improperly suggestive practices.[157]

Would the Court have required such remedies? I can only speculate. While some state courts have required various remedial steps absent legislative enactment, those courts have usually done so based on their supervisory power, not on constitutional grounds.[158] However, had a post-Warren liberal Court survived, the Supreme Court might have encouraged or required more effective remedies than the limited protection afforded by the *Wade-Gilbert* decisions. If counsel was, in effect, a remedial device—a prophylaxis—to protect core Confrontation Clause protections, those cases would have remained significant because they would have provided meaningful protection against the conviction of innocent defendants.

IV. CONCLUDING THOUGHTS

Did the Warren Court pay too little attention to protecting innocent defendants? Its agenda between 1961 and 1969 was ambitious. Many of its decisions advanced policies other than protecting innocent defendants.[159] Most notably, *Mapp*'s extension of the exclusionary rule to the states has worked as a check on abusive police practices.[160] For better or worse, *Miranda* demonstrated a

155. *E.g.,* Florida, Fla. Stat. Ann. § 92.70(3)(b)(1) (West); Illinois, 725 Ill. Comp. Stat. Ann. 5/107A-2(e)(1)(B) (West); North Carolina, N.C. Gen. Stat. Ann. § 15A-284.52(b)(3)(A) (West); California, Cal. Pen. Code § 859.7(a)(4)(A) [Operative Jan. 1, 2020].

156. *See, e.g.,* State v. Henderson, 208 N.J. 208, 296 (2011) (allowing expert testimony and directing that "enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case," including the witness's opportunity to view the event and degree of attention, time elapsed between event and identification, and witness confidence in the identification); *see also* Commonwealth v. Gomes, 470 Mass. 352, 376 (2015) (requiring, in light of "near consensus in the relevant scientific community," instructions be given to provide juries "more comprehensive guidance when evaluating eyewitness testimony."); State v. Mahmoud, 147 A.3d 833, 839 (Me. 2016) (holding instructions regarding eyewitness fallibility may be given, though not required).

157. *See* Illinois, 725 Ill. Comp. Stat. Ann. 5/107A-2(h) ("Unless it is not practical or the eyewitness refuses, a video record of all lineup procedures shall be made."); *see also* California, Cal. Pen. Code § 859.7(a)(11) [Operative Jan. 1, 2020] ("An electronic recording shall be made that includes both audio and visual representations of the identification procedures.").

158. *See, e.g., Gomes*, 470 Mass. at 352 (providing protection against erroneous witness identification through model jury instructions).

159. This should not be surprising. Specific guarantees in the Bill of Rights advance policies other than protecting the innocent. The Fourth Amendment often protects guilty defendants from improper police conduct. Any protection of the innocent is the result of deterring police from overreaching. The Fifth Amendment right to be free from testifying against oneself often prevents access to highly relevant evidence of the defendant's guilt. Clearly, one should not suppose protection of the innocent as its primary justification.

160. *See* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990 51 (1993) (cited with approval in Hudson v. Michigan, 547 U.S. 586, 599 (2006)).

commitment to equality and limited overreaching by the police.[161] But, to characterize the Warren Court as indifferent to protecting innocent defendant's overstates the case. Notably, as developed in this article, by using express terms in the eyewitness identification cases, the Warren Court was clearly concerned with avoiding convictions of innocent defendants.[162]

But for President Johnson's political mistake in attempting to elevate Justice Fortas, we might well have had a liberal Court well past the 1970's.[163] Of course, one can only speculate how such a Court would have evolved the eyewitness-identification case law. Given the Warren Court's concern with misidentification of innocent defendants, and Justice Brennan's repeated references to the Confrontation Clause,[164] might the Court have expanded protection beyond post-indictment lineups and developed a more robust protection? I wish we could turn back the clock and have a do-over.

161. Michael Vitiello, *Arnold Loewy, Ernesto Miranda, Earl Warren, and Donald Trump: Confessions and the Fifth Amendment*, 52 TEX. TECH. L. REV. 63 (2019) (scholars debate whether *Miranda's* equality concerns were justified); *see also, e.g.*, Caplan, *supra* note 5, at 1441 (attacking the underlying premise of *Miranda* as, inter alia, an unethical attempt to give suspects a "sporting chance."). I have questioned Dean Caplan's position and argued that equality is an appropriate goal.

162. *Supra* Part I.

163. *Supra* Part II & Part III.

164. *Supra* Part II; *see also* United States v. Wade, 388 U.S. 218, 235 (1967).