II. Criminal Law and Procedure

A. Border Searches of Body Cavities—Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); Morales v. United States, 406 F.2d 1298 (9th Cir. 1969).

A major problem confronting law enforcement officers in the United States is the growing use of drugs and the mounting wave of crime incident to their use. The vast majority of drugs are smuggled into this country from Mexico. Operation Intercept, the federal government’s program for more thorough searches at the Mexican border, has heightened public awareness of the problem and illustrates the extent to which the authorities will go to halt the drug influx. Operation Intercept, however, is aimed primarily at reducing the smuggling of marijuana. The illegal importation of hard drugs like heroin poses a much graver problem in terms of both the dangers incident to their use and the difficulty in controlling them.

Since the difficulty in controlling drug use increases greatly once drugs have entered and been dispersed throughout the country, the logical place to stop the drug flow is at the border. Among the methods employed by customs officials to block this flow is the search of body cavities, which are frequently used by smugglers to conceal their illegal cargoes. Such searches, however, frequently conflict with the right of the citizen to be free from unreasonable searches and seizures. The resolution of this conflict is of utmost importance to the federal government’s drug control problem.

The first session of Congress in 1789 passed legislation authorizing the search for and seizure of contraband aboard vessels or in buildings where the customs agents had “reason to suspect” it was concealed, but set no clear standard for determining the point at which the search was to be made or the manner in which it was to be conducted. Modern statutes continue to employ language authorizing the official to search

1. Huguez v. United States, 406 F.2d 366, 376 (9th Cir. 1968); Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967); Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958).

2. The fourth amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized” (emphasis added).

3. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.
and seize goods when “he . . . shall suspect there is merchandise” that is either subject to a duty or illegally imported.4

Since 1789, the courts have uniformly considered border searches to be different from normal police searches because of the need to protect our national security5—a need that requires control over the influx of persons and property into the United States. Nevertheless, the courts have held that border searches, like normal searches, must meet the fourth amendment requirement of reasonableness,6 although there is no need for either probable cause,7 a search warrant, or an arrest, before conducting a search.8 “[T]he mere fact that a person is crossing the border is sufficient cause for a search.”9 Furthermore, within certain limits set by decided cases, searches requiring invasion of the body have been sanctioned by the courts. The protective umbrella of the fourth amendment guards the individual only against unreasonable searches and unjustified intrusions, and not against all such invasions of the body.10 The problem, therefore lies in the extent to which the courts consider the acts of the customs inspectors to be reasonable.

The thesis of this Note is that the time has come for the courts to measure the reasonableness of border searches of body cavities by the already well-defined yardstick of probable cause, which has traditionally been used to determine the constitutionality of normal searches. The courts have in recent years relied on the less stringent test of “clear indication” in deciding whether the search of the defendant’s body was warranted. An individual’s constitutionally protected right of privacy and his right to remain free from the gross humiliation of a search of intimate body cavities, however, are far too important to be left to what will be seen is the nebulous and ill-defined standard of “clear indica-

5. E.g., Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967); Denton v. United States, 310 F.2d 129, 131 (9th Cir. 1962).
9. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967) (court’s emphasis). It must be noted that border searches differ significantly among themselves. While the crossing, in and of itself, justifies a search of vehicles and baggage, it surely cannot justify a search of body cavities. The emphasis of “a” indicates that the court had this distinction in mind. Huguez v. United States, 406 F.2d 366, 377 (9th Cir. 1968).
10. See, e.g., Blackford v. United States, 247 F.2d 745, 753 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958).
tion." Any test less exacting than probable cause is "fraught with almost certain abuse."11

Clear Indication—Its Development and Application

The test of clear indication came into being in Schmerber v. California12 and was first applied to border searches in Rivas v. United States.13 In Schmerber, the defendant was convicted of driving while under the influence of liquor. While he was being treated at a hospital, a blood sample was taken, over his protests, by a physician at the request of a police officer. The Supreme Court, upholding the conviction, declared:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any . . . intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.14

In Rivas v. United States, the Ninth Circuit for the first time applied this test in determining whether the customs officers had a sufficient basis for suspicion to warrant a search of a body cavity. The court stated:

[A] search involving an intrusion beyond the body's surface . . . cannot rest on the mere chance that desired evidence may be obtained. . . . There must exist facts creating a clear indication, or plain suggestion, of the smuggling.15

The application of the test developed by these two cases was extended by the Ninth Circuit in Henderson v. United States16 to visual inspections of a body cavity. There, the court was appalled at the invasion of privacy and reversed the conviction, observing:

[If] there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. . . . Surely . . . to be warranted, the official's action should be backed at least by [a] "clear indication" [or] "plain suggestion" . . . .17

The Ninth Circuit Court had the opportunity in two recent cases to reject the clear indication standard and adopt the test of probable cause, but unfortunately failed to do so.18 In Morales v. United

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11. Id. at 754-55 (dissenting opinion).
13. 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967).
15. 368 F.2d 703, 710 (9th Cir. 1966).
16. 390 F.2d 805 (9th Cir. 1967).
17. Id. at 808.
18. Morales v. United States, 406 F.2d 1298 (9th Cir. 1969); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).
States, where the court encountered a situation similar to Henderson, the defendant was convicted of importing cocaine and heroin into the United States in violation of sections 173 and 174 of Title 21 of the United States Code. Morales was stopped at the California-Mexico border solely on the information that her car was seen parked in the driveway of a cohort of a known narcotics dealer. A preliminary search was conducted and defendant was made to disrobe and expose her vaginal area. This visual inspection revealed “something ‘sort of like a bubble’” protruding from her vagina. Defendant was then taken to a physician whose examination revealed no indication that she was either a user or under the influence of narcotics. A vaginal search, however, produced one packet of cocaine and three of heroin. The Ninth Circuit, in overturning the conviction, held that the vaginal probe by the doctor could not be justified by the discovery of the “bubble” because there was no clear indication that the defendant had drugs secreted there prior to the visual inspection. The court declared that while the facts might lead one to suspect that the defendant was carrying narcotics, there was no clear indication of it. The court termed the treatment suffered by the defendant a “serious invasion of personal privacy and dignity.”

In Huguez v. United States, which involved a fact situation similar to Rivas, a different panel of judges held that the appellant, who had also been convicted of violating section 174 of Title 21 of the United States Code, was illegally searched. Huguez was stopped at the San Ysidro border crossing by a customs inspector who became suspicious that the defendant was under the influence of drugs. A thorough strip search revealed needle marks on defendant’s arms. He was then taken to another room in the baggage area where he was examined by a physician. The doctor concluded he was under the influence of narcotics and requested permission to conduct a digital probe of the rectum to ascertain whether any drugs were secreted there. Huguez refused and was forced to lean over an examining table against

19. 406 F.2d 1298 (9th Cir. 1969). The panel consisted of Circuit Judges Merrill and Duniway, and District Judge Crary.
20. Id. at 1299.
21. Id. at 1300.
22. Id., quoting Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).
23. 406 F.2d 366 (9th Cir. 1968).
24. The panel consisted of Circuit Judges Barnes and Ely, and District Judge Hauk.
25. The customs inspector who made the first inspection testified that he also found a “greasy substance” on Huguez’s buttocks. However, it was not noticed by the physician who later examined the defendant, nor did the first agent pass this information on to the doctor. Thus, there was even less reason for the physician to make a rectal probe. 406 F.2d at 372.
his verbal and physical protests. He suffered some minor cuts to his wrists because of his treatment.26 The Ninth Circuit, reversing the conviction, stated that the doctor and the agents involved in the rectal search “did not and could not have even [a] ‘mere suspicion’ ... let alone any ‘clear indication’ or ‘plain suggestion’ of any cache of narcotics in Huguez’s rectum. ...”27

Thus the courts have plainly indicated that the authorization by the First Congress of a search based on suspicion alone is insufficient to protect the individual’s right to be free from unreasonable searches and seizures. The language of the Huguez and Morales decisions, based on the holdings of Schmerber and Rivas, fully illustrates this. When body cavities are to be invaded the Constitution demands more than a “reason to suspect.” Unfortunately, instead of applying the well-defined standard of probable cause, the courts have required the presumably less restrictive and infinitely more nebulous standard of “clear indication.”28

Clear Indication—What Is It?

The phrase “clear indication” is a rather elusive term. The Ninth Circuit in Rivas v. United States29 attempted, unsuccessfully, to give some substance to the standard and defined it thusly: “ ‘Indication’ is defined as ‘an indicating suggestion.’ ‘Clear’ is defined as ‘free from doubt’; ‘free from limitation’; ‘plain.’ ” The court’s definition is obviously not very helpful. Semantically there seems to be an inherent contradiction in the term. “Clear” implies certain as in “rear” or “free from doubt.” “Indication,” on the other hand, implies an uncertainty as in “suspicion” or “suggestion.” The court in Henderson, however, specifically states that a “real suspicion” is not sufficient for a

26. There is a very marked dispute between the majority opinion and the dissent over the harshness of the treatment and the seriousness of the injuries to Huguez. The majority states that the treatment was grossly unwarranted, while the dissent vigorously denounces such an interpretation of the facts. 406 F.2d at 372-73, 386-87.
27. Id. at 378.
28. It should be noted that in Huguez a motion for an en banc hearing was denied with four dissenting votes. The petition for rehearing stated two reasons for the motion. First, that the standard of “clear indication” as set forth in Rivas v. United States, was subsequent to the decision in the District Court. Thus it was assumed by the prosecution that only enough evidence to show “mere suspicion” was necessary, and that additional evidence to meet the “clear indication” standard was not introduced. “Change in legal standards should not prevent a retrial where the evidence may show that the stricter standard was satisfied.” Petition for Rehearing at 2, Huguez v. United States, 406 F.2d 366 (9th Cir. 1968). Second, that the decision was inconsistent with Rivas. Id. at 3. See Thompson v. United States, 411 F.2d 946, 948 (9th Cir. 1969), where Judge Ely, in his dissent, seems to imply that the majority of the 10 judges felt that a “clear indication” was not present.
29. 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967).
visual examination of a vagina or an intrusion into the body cavity.\textsuperscript{30} This difficulty indicates the uselessness of the standard and offers a persuasive rationale for its abandonment.

The lack of guidelines leaves the test of clear indication open to abuse, even by well-intentioned customs agents. With the courts playing games with semantics, substituting one phrase for another, the bewildered border official can hardly be expected to understand what the standard is and know when to apply it.

Judge Ely, in his concurring opinion in \textit{Huguez} and his dissenting opinion in \textit{Thompson v. United States},\textsuperscript{31} offers another sound rationale for the rejection of the clear indication test. He points out the lack of substance in the standard and states that the application of it is so inconsistent on the part of the judges, that a change of just one member of the three man panel often changes the result. This causes uncertainty and inequity in the law.\textsuperscript{32}

Counsel for appellant in \textit{Huguez} argued in his opening brief that clear indication means a sufficient amount of evidence to create a high probability that there is something concealed in the body cavity to be searched,\textsuperscript{33} and therefore that probable cause is a less stringent test than clear indication.\textsuperscript{34} This is clearly erroneous. Probable cause has been defined as a combination of “facts and circumstances . . . [which are] sufficient in themselves to warrant a man of reasonable caution” to believe that an offense has been committed.\textsuperscript{35} While a comparison of these terms might lead one to conclude that it would take more evidence to reach a clear indication than probable cause, this is definitely not the way the courts have interpreted it. In \textit{Rivas}, the Ninth Circuit specifically stated that clear indication is a less demanding standard than probable cause.\textsuperscript{36} The above disagreement lends additional credence to the claim that the court’s failure to adequately define clear indication has produced confusion among those called upon to make practical application of the concept.

While drawing the line between the standards of clear indication and probable cause is difficult at best, the author feels that the following hypotheticals might illustrate the distinction sought to be made by the courts.

\begin{enumerate}
\item Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).
\item Thompson v. United States, 411 F.2d 946, 947 (9th Cir. 1969).
\item \textit{Id.}; Huguez v. United States, 406 F.2d 366, 383 (9th Cir. 1968) (concurring opinion).
\item Brief for Appellant at 4, 12, Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).
\item \textit{Id.} at 35.
\item Carroll v. United States, 267 U.S. 132, 162 (1925).
\item Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), \textit{cert. denied}, 386 U.S. 945 (1967).
\end{enumerate}
(A) Suppose X is crossing the border and is acting in a suspicious manner. An examination reveals needle marks on his arms. Because some suggestion of the presence of narcotics in the suspected cavity is necessary, this should not be sufficient to create even a clear indication.\(^37\)

(B) Suppose the same facts as in (A) plus the fact that X is a registered addict. While this could be considered enough to warrant a body search on the basis of clear indication—since where a user is crossing the border "it follows almost as night follows day that he is carrying narcotics somewhere" \(^38\)—it is not sufficient for probable cause. "While it is no doubt true that a substantial number of body cavity probes have unearthed narcotics, those facts by themselves do not furnish probable cause to believe that a given user is carrying narcotics in [a body cavity]\(^39\)

(C) Suppose the same facts as in (B) and in addition a "greasy substance" is found on X’s buttocks. This would be sufficient to create a probable cause and hence is more than sufficient for finding a clear indication. The existence of such a substance gives rise to a great degree of probability that something has been concealed in X’s rectum.

**Clear Indication—Is It a Satisfactory Standard?**

With these hypotheticals in mind, it then becomes necessary to consider whether clear indication serves as a satisfactory standard in balancing the competing interests of society and the individual.

Those who are primarily concerned with the interests of society maintain that the difficulty in stemming the flow of illegal narcotics warrants the use of the less restrictive clear indication standard. These advocates point to the harmful effects of narcotics as the basis for their position. If the requirements for a search are too high and certain areas of the body are made inaccessible, smugglers will use such odious means almost exclusively. "There is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for carrying narcotics."\(^40\)

Government statistics, however, reveal that between December 19, 1963, and May 2, 1966, a period of more than two years, customs officials at the San Ysidro crossing between California and Mexico discov-

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37. Befare v. United States, 362 F.2d 870, 875 (9th Cir. 1966).
38. Brief for Appellee at 6, Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).
39. Id.; Brief for Appellant at 43 (emphasis original).
40. Blackford v. United States, 247 F.2d 745, 753 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958).
ered narcotics secreted in vaginas on only 17 occasions.\textsuperscript{41} Testimony by Dr. Paul Salerno, the physician involved in Blefare, Rivas and Morales, revealed that approximately 80 to 85 percent of body cavity searches fail to result in any discovery of narcotics.\textsuperscript{42} As Judge Ely points out in his strong dissent in Thompson v. United States,\textsuperscript{43} it can be assumed that these unsuccessful searches were also done under the reasoning of clear indication. The gross disparity between the number so intimately searched the actual number of offences amply illustrates that the use of clear indication as a foundation for such intimate searches is totally inadequate. Furthermore, no record exists of the number of other innocent travelers who were subjected to such visual inspections without being taken to a doctor for a search!\textsuperscript{44} The implication is inescapable that as in Morales and Huguez where narcotics were actually found, the vast majority of those unsuccessfully searched were done so unconstitutionally.

The problems that customs officials encounter are undeniable. Yet “[t]he existence of difficult problems of enforcement cannot over-ride a constitutional prohibition against [an] unreasonable search [and seizure].”\textsuperscript{45} In this author’s opinion, the test of probable cause is the best method of resolving this problem. The probable cause standard would offer better protection for the individual because its parameters have been much more fully delineated by the courts, and thus is more susceptible to consistent and equitable application on the part of border officials. In addition, border officials plagued with the nearly impossible task of making a constitutionally practical application of the test of clear indication, would find the firmer and more fully defined guidelines of probable cause easier to apply, and the searches performed pursuant thereto less susceptible to constitutional objection.

The clear indication test has proved to be so nebulous and obscure that an inordinate amount of abuses have been perpetrated upon a great number of innocent travelers, all in the name of society’s interest. As Justice Douglas has so aptly argued:

If law enforcement were the chief value in our constitutional scheme, then due process would shrivel and become of little value in protecting the rights of the citizen. But those who fashioned

\textsuperscript{41}. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967). Huguez v. United States, 406 F.2d 366, 376 (9th Cir. 1968), states that there were 20 such discoveries in body cavities at San Ysidro between July 1, 1965, and May 26, 1966.

\textsuperscript{42}. Thompson v. United States, 411 F.2d 946, 948 (9th Cir. 1969) (dissenting opinion), citing Morales v. United States, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969).

\textsuperscript{43}. 411 F.2d 946, 948 (9th Cir. 1969).

\textsuperscript{44}. Id.

\textsuperscript{45}. Rivas v. United States, 368 F.2d 703, 711 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967); accord, Huguez v. United States, 406 F.2d 366, 376 (9th Cir. 1968).
the Constitution put certain rights out of the reach of the police
and preferred other rights over law enforcement.\textsuperscript{46}

In the final analysis the resolution of the problem of body searches
at the border involves a balancing of two conflicting values—the need
of society to protect itself and the rights of the individual. Halting
illicit drug traffic is one of the major problems facing customs inspec-
tors. The courts have frequently taken judicial notice of this and also
that the United States-Mexico border is the major corridor through
which narcotics enter this country.\textsuperscript{47} The necessity of inspection in
order to enforce the customs laws has always been an infringement on
the individual’s privacy. As long as the search is limited to an examina-
tion of baggage, vehicles and clothing, such an infringement, even on
the grounds of less than mere suspicion, must be tolerated. At this
stage the need for enforcement of customs laws outweighs the need for
protection of the individual from minor searches. Such searches are
normally anticipated by travelers, and hence do not result in any great
humiliation or invasion of privacy. When the search goes beyond this
cursory stage, however, the balance should tip in favor of the individual
and the test of probable cause should be applied.

The Supreme Court itself has recognized the utility of the probable
cause standard in balancing the opposing interests of law enforcement
and personal rights. Twenty years ago in \textit{Brinegar v. United States},\textsuperscript{48}
a case involving the illegal interstate transportation of liquor, the Court
stated:

The rule of probable cause is a practical, nontechnical conception
affording the best compromise that has been found for accommodat-
ing these often opposing interests. Requiring more would unduly
hamper law enforcement. To allow less would be to leave the
law-abiding citizens at the mercy of the officer’s whim or caprice.\textsuperscript{49}

It is to be hoped that the courts will reappraise their position con-
cerning the standards to be applied to body cavity searches. The need
to prevent the importation and use of drugs is important, but surely it
is outweighed by the constitutional rights of the individual. The Con-
stitution is the supreme law of the land. It is the responsibility of the
courts to effectively protect the rights guaranteed by it and to prevent
the continuation of such indignities.

\textit{Gregory C. Paraskou}\textsuperscript{*}

\textsuperscript{47} Huguez v. United States, 406 F.2d 366, 376 (9th Cir. 1968); Rivas v.
United States, 368 F.2d 703, 710 (9th Cir. 1966), \textit{cert. denied}, 386 U.S. 945 (1967).
\textsuperscript{48} 338 U.S. 160 (1949).
\textsuperscript{49} \textit{Id.} at 176.
\textsuperscript{*} Member, Second Year Class.

With the landmark decision of Mapp v. Ohio, all evidence seized by federal or state officers in violation of the fourth amendment prohibition against unreasonable search and seizure is inadmissible in federal or state criminal trials. Recently, however, the Ninth Circuit in Stonehill v. United States emphatically reasserted an earlier holding that the Mapp exclusionary rule does not apply to seizures made by foreign officers.

Harry Stonehill, an American entrepreneur living in the Philippines, was suspected by the Philippine National Bureau of Investigation (N.B.I.) of activities not in harmony with the banking and revenue laws of that country. N.B.I. agents obtained evidence from him by searches and seizures which "flagrantly violated basic provisions of the Philippine Constitution borrowed directly from the Fourth Amendment." Evidence of United States tax irregularities was turned over to an agent of the Internal Revenue Service attached to the American Embassy in Manila. In an action for foreclosure of federal tax liens, the taxpayers moved to suppress the evidence on the grounds that the searches and seizures were illegal because made in violation of the fourth amendment and that United States agents participated in the illegal

2. Weeks v. United States, 232 U.S. 383 (1914), first imposed the exclusionary rule of evidence illegally seized by federal officers. Then in Elkins v. United States, 364 U.S. 206 (1960), evidence illegally seized by state officers was excluded from federal criminal trials. Finally, Mapp precluded the use in state courts of evidence illegally seized.
6. Stonehill v. United States, 405 F.2d 738, 747 (9th Cir. 1968) (dissenting opinion).
7. The court in Stonehill expressly did not decide whether the exclusionary rule should be applied to civil cases. 405 F.2d at 740 n.2. However, certain proceedings, though civil in form, are generally considered criminal in nature for purposes of deciding whether constitutional protection should be imposed. See, e.g., Boyd v. United States, 116 U.S. 616 (1886).
searches and seizures. The court held the fourth amendment inapplicable to foreign officers and ruled that the evidence had been properly admitted since United States agents had not participated in the searches and seizures.

Under the silver platter doctrine, evidence which would have been excluded if wrongfully seized by federal officers, was freely admissible in federal courts if seized by state officers. Although the doctrine was supposedly abolished in 1960, the admission of the evidence in Stonehill plainly indicates that it is still applied when foreign officers make the wrongful searches and seizures.

Stonehill's counsel urged that the evidence should have been excluded "even if seized by foreign officers in a foreign country, because the searches and seizures were illegal by United States Constitutional standards (in violation of the Fourth Amendment)." The rationale behind this direct attack on the silver platter, as applied by the Ninth Circuit to foreigners, is that the constitutional rights of the defendant are violated when the evidence wrongfully seized is used against him in court, regardless of who performed the illegal search. It will be the purpose of the first part of this Note to demonstrate that the foreign officer silver platter doctrine, reaffirmed by the Ninth Circuit in Stonehill, is contrary to the persuasive logic and reasoning which underlies Mapp.

**Mapp: Can It Be Extended?**

A persuasive attack on the foreign officer silver platter doctrine can be mounted by use of the reasoning of the *Mapp* opinion itself, although our Constitution does not bind foreign officials and *Mapp* does not mention the problem specifically. The fifth amendment prohibits the use of coerced confessions in criminal trials and this prohibition is extended to confessions coerced by foreign officials. The fourth amendment excludes evidence obtained from illegal searches and seizures by state or federal officers. The *Mapp* decision, which ex-

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8. 405 F.2d at 740.
9. Id. at 743.
10. Id. at 746.
13. 405 F.2d at 740. The Philippine Constitution contains guarantees against unreasonable search and seizure almost identical to those in our own fourth amendment. PHILIPPINE CONST. art. III, § 1(3).
tended the federal exclusionary rule to state officials, referred\textsuperscript{16} with approval to the leading American case on unreasonable search and seizure, \textit{Boyd v. United States},\textsuperscript{17} in which the Supreme Court stated that the fourth and fifth amendments “run almost into each other”\textsuperscript{18} and that an “intimate relation” exists between them.\textsuperscript{19} The Court was “unable to perceive that the seizure of a man’s private books and papers to be used as evidence against him is substantially different from compelling him to be a witness against himself.”\textsuperscript{20} This idea, that the two amendments are closely related complements, was expressed again in \textit{Mapp}: “The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence . . . .”\textsuperscript{21}

Given this concept that the fourth and fifth amendments are intimately related complements, one would assume that the exclusionary rules arising out of the two amendments would be the same. Logically, if the fourth and fifth amendments are to have equal constitutional stature, if their judicial authority is to be the same, the rules of exclusion that arise out of each should be coextensive and should be exercised with equal vigor and thoroughness by the courts. If, in \textit{Stonehill}, the Ninth Circuit has failed to exclude evidence wrongfully seized by foreign officers, when a confession coerced by foreign officers would have been excluded, the exclusionary rule of the fourth amendment is not being exercised coextensively with that of the fifth amendment.

The modern rule excluding coerced confessions is not based on the reliability of the statement\textsuperscript{22} but arises out of the fifth amendment.\textsuperscript{23} Thus, its exercise in a criminal trial is not a rule of evidence but a constitutional right. A confession coerced by foreign officers would be excluded although the fifth amendment is not binding on foreign officers.\textsuperscript{24}

\begin{itemize}
  \item \textsuperscript{16} Id. at 646.
  \item \textsuperscript{17} 116 U.S. 616 (1886). \textit{Mapp} also refers to a modern expression of the \textit{Boyd} idea of interrelation of the two amendments. In \textit{Feldman v. United States}, 322 U.S. 487 (1944), the Supreme Court was “immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.” \textit{Id.} at 489-90.
  \item \textsuperscript{18} 116 U.S. at 630.
  \item \textsuperscript{19} Id. at 633.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} 367 U.S. at 657.
  \item \textsuperscript{22} Rogers v. Richmond, 365 U.S. 534 (1961). Whether or not a confession is admissible is a “question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.” \textit{Id.} at 544.
  \item \textsuperscript{23} See \textit{Bram v. United States}, 168 U.S. 532, 542 (1897) (fifth amendment controls involuntary confession issue).
  \item \textsuperscript{24} See \textit{Bram v. United States}, 168 U.S. 532 (1897); \textit{Brulay v. United States}, 383 F.2d 345, 348-49 & n.5 (1967).
\end{itemize}
There are, however, two views on the exclusionary rule for illegally seized evidence. By the earlier view, the rule was one of evidence, designed by the courts to prevent violations of the Constitution by law enforcement officers who should uphold it.\textsuperscript{25} Under \textit{Mapp}, however, the rule is “an essential part of both the Fourth and Fourteenth Amendments”\textsuperscript{28} and not merely a rule of evidence.\textsuperscript{27} According to the earlier view, there is no reason to exclude evidence illegally seized by foreign officers, because our courts have no duty to exercise supervisory control over them. According to the \textit{Mapp} view, however, which elevates the rule to constitutional status, it seems logical to exclude evidence wrongfully seized by anyone, even foreigners, just as a coerced confession would be excluded under the fifth amendment.

The Ninth Circuit has made a very basic differentiation between the exclusionary rules arising out of the fourth and fifth amendments when the activities of foreign officers are involved.\textsuperscript{28} The court is able to accomplish this differentiation by a dissection of the \textit{Mapp} decision. While \textit{Mapp} specifically elevates the fourth amendment exclusionary rule for domestic searches and seizures from the evidentiary to the constitutional level,\textsuperscript{29} the foreign search and seizure is not specifically brought within the ambit of the holding. The underlying reasoning of the \textit{Mapp} decision would seem to call for the exclusion of evidence illegally seized by foreign, as well as domestic, officers, but the Ninth Circuit has taken advantage of the fact that the decision concerned only domestic searches and has continued to view the rule as merely evidentiary in nature as applied to foreign officers.\textsuperscript{30}

In \textit{Brulay v. United States},\textsuperscript{31} the Ninth Circuit noted and attempted to justify this differentiation. The court therein asserted that a violation of the fifth amendment is not complete until the coerced confession is admitted into evidence. At that point in time, and not during the coercive interrogation, the defendant is forced to be a witness against himself. By admitting the coerced confession, the trial court participates in the interrogating officer’s violation of the Constitution. To avoid this participation the court must exclude any such confession, even though the coercion was by foreign officers.

On the other hand, the court stated, the fourth amendment is

\begin{itemize}
\item \textsuperscript{25} See \textit{Weeks v. United States}, 232 U.S. 383 (1914).
\item \textsuperscript{26} 367 U.S. at 657.
\item \textsuperscript{27} See \textit{id.} at 649.
\item \textsuperscript{28} \textit{Brulay v. United States}, 383 F.2d 345, 349 n.5.
\item \textsuperscript{29} See text accompanying notes 26-27.
\item \textsuperscript{30} \textit{Stonehill v. United States}, 405 F.2d 738, 743 (9th Cir. 1968); \textit{Brulay v. United States}, 383 F.2d 345, 348 (9th Cir. 1967).
\item \textsuperscript{31} 383 F.2d 345, 349 n.5 (9th Cir. 1967). In this case the Mexican police
violated completely by the officer's wrongful search and seizure. The court is not participating in the constitutional violation by admitting the evidence. The court excludes the evidence only because "it is inappropriate to sanction the previous violations of law by federal officers." The court can, however, admit evidence illegally seized by foreigners, since there is no duty to supervise their methods.

Thus, to justify a difference between the application of the fourth and fifth amendments' exclusionary rules to foreign officers, the court in Brulay was compelled to treat the fourth amendment exclusionary rule as a rule of evidence, rejecting the analysis of Mapp. In Stonehill also, the court rejected the Mapp view of the exclusionary rule and continued to consider it merely a rule of evidence not applicable to foreign police; and the attack on the foreign officer silver platter doctrine, based on the obvious unconstitutionality of the N.B.I. search, failed because the Ninth Circuit ignored Mapp.

The Participation Rule

The second ground for the motion to suppress the evidence was that United States officers had participated in the search by Philippine officers. Under the silver platter doctrine, which was developed in cases involving federal and state officers (and is applied here to the analogous case involving federal and foreign officers) evidence seized illegally by state officers could not be admitted into federal criminal trials if federal officers had participated in the wrongful state search and seizure. The crux of the strong dissent in Stonehill, by Judge Browning, was that the majority, in finding that the activities of an I.R.S. agent in Manila did not constitute a judicially cognizable partici-

obtained evidence of an attempt to violate United States narcotics laws by means of a search and seizure which violated United States constitutional principles. This evidence was turned over to American authorities.

32. Id. at 349 n.5.
33. 405 F.2d at 743. "Thus the Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids as to convert them into joint ventures between the United States and the foreign officials."
34. Id. (emphasis added).
35. 405 F.2d at 740.
36. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968). Before Elkins abolished the doctrine, it was applicable to Cuban officers. See Johnson v. United States, 207 F.2d 314, 321 (5th Cir. 1953), cert. denied, 347 U.S. 938 (1954).
37. Although the majority ultimately held that there was no participation, it will be shown that the court admitted the fact of participation, but decided that there was not enough to warrant exclusion. See text accompanying notes 67-76 infra.
pation in the search, had misapplied the silver platter doctrine. 39

The participation rule was first set down in Byars v. United States. 40 The Supreme Court extended the exclusionary rule to evidence wrongfully seized by a state and sought to be introduced in a federal trial when facts indicated that “the federal government itself, through its agents acting as such, participated in the wrongful search and seizure.” 41 The federal agent’s participation must be “under color of his federal office,” 42 and the question of participation must be decided on the facts of each case. 43

Gambino v. United States 44 extended the rule enunciated in Byars beyond actual participation by federal agents to cooperation of state officers with federal law enforcement officers. In Gambino, New York state troopers, after the repeal of the New York state prohibition act, believed they were obliged to enforce the federal act. The Court held that evidence illegally seized by them when they were acting “solely for the purpose of aiding in the federal prosecution” 45 had to be excluded from a federal trial.

The Fourth, Seventh, and Eighth circuits extended the doctrine of Gambino beyond situations in which state police were enforcing federal law to cases in which federal and state officers had a prior “understanding” that federal prosecutors would adopt cases for prosecution after seizure of evidence by state officers. 46

In 1949, on the day that the Supreme Court in Wolf v. Colorado 47 held the fourth amendment binding on the states under the due process clause of the fourteenth amendment, it also handed down the decision in Lustig v. United States, 48 which reaffirmed the silver platter doctrine and more clearly explained the participation rule of Byars. Justice Frankfurter, in Lustig, said that the “decisive factor in determining the

39. See Stonehill v. United States, 405 F.2d 738, 748 (9th Cir. 1968) (dissenting opinion). “Assuming that the ‘silver platter’ doctrine governs this case, it is misapplied by the majority.” Id.
41. Id. at 33.
42. Id.
43. Id.
44. 275 U.S. 310 (1927).
45. Id. at 315.
46. Lowrey v. United States, 128 F.2d 477 (8th Cir. 1942); Southerland v. United States, 92 F.2d 305 (4th Cir. 1937); Fowler v. United States, 62 F.2d 656 (7th Cir. 1932). The adoption of these cases for federal prosecution did not necessarily have to be automatic; it could depend on whether the case turned out to be one of “sufficient importance.” Lowrey v. United States, 128 F.2d 477, 479 (8th Cir. 1942). This rule is the broadest extension of Byars and seems to be the best one for preventing circuitous violations of the Constitution.
47. 338 U.S. 25 (1949).
The applicability of the Byars case is the actuality of a share by a federal officer in the total enterprise . . . .49 The relatively minor role played by the federal agent in Lustig (secret service agent called in by police after the illegal entry only to point out what was necessary evidence of counterfeiting to support a conviction) did not escape being considered participation since he was actually participating and he was participating as a federal officer.50 Any application of the Byars rule therefore, must be made in light of Lustig.

Federal participation is decided on the facts of each case.51 It is necessary therefore to examine the facts and language of the Stonehill decision to determine if the Ninth Circuit has followed the standard set out in the leading federal participation cases or has modified that standard to the extent that the evidence in Stonehill would be excluded under the older rule but admitted under the newer rule.

Since the Philippine officers definitely suspected Stonehill of crimes against the Philippines and hoped to deport him as an undesirable alien,52 Gambino, in which state officers acted "solely for the purpose of aiding in the federal prosecution," is not in point.53 The federal agent in Stonehill had put an informer against Stonehill in contact with the N.B.I.54 Subsequent meetings between the N.B.I. and the apprehensive informer, an American, were held in the revenue agent's home.55 At this point it would seem that the hosting of the meetings is not necessarily participation because such acts would probably not be considered acts "under color of his federal office."56

In addition to giving information, however, the federal agent in Stonehill had requested and obtained, before the raids, permission to examine and copy records seized,57 in hope of securing evidence for a federal tax case.58 It is important to note that the court, in finding that all of the facts of the case did not constitute participation, relied on two cases, Sloan v. United States59 and Shurman v. United States.60 In Sloan, the giving of information by the federal officer, which inspired the illegal state search, was described by the court as being "very close

49. Id. at 79.
50. Id. at 78-79.
52. Stonehill v. United States, 405 F.2d 738, 741 (9th Cir. 1968).
53. See text accompanying notes 44-45 supra.
54. 405 F.2d at 740-41.
55. Id. at 741.
57. 405 F.2d at 741.
58. Id. at 752-53 (dissenting opinion).
59. 47 F.2d 889 (10th Cir. 1931).
60. 219 F.2d 282 (5th Cir. 1955).
to the line." In *Shurman*, which reaffirmed *Sloan*, the giving of information, by itself, although it caused the illegal state search, was held not to be a request by the federal agent for illegal state action, in the absence of an understanding. In neither *Sloan* nor *Shurman*, however, was there a request for access to the evidence seized. In both cases, the court’s opinion was that the giving of information to state officers, by itself, was not proof that the federal agent was attempting to circumvent the fourth amendment. In *Stonehill*, on the other hand, the request for access to the evidence before the illegal search was made strongly suggests that there was such an attempt. It is apparent, therefore, that because of the officer’s request for evidence, *Sloan* and *Shurman* are not really in point as justification for his preraid activities.

In *Byars v. United States*, the Court stressed that the federal agent participated “upon the chance . . . that something would be disclosed to him as such agent.” In *Stonehill*, however, the Ninth Circuit ignores this aspect of the *Byars* standard of federal participation. Even by the majority version of the facts, the federal agent was hoping the raids would disclose evidence for an American tax case against *Stonehill*. The request for access to the documents makes it clear that the agent’s actions fall under the *Byars* standard, at least to the extent of his hopes for officially interesting disclosures.

In addition to the above damaging analogy to the *Byars* decision, there were two instances during the massive search when the federal agent seems to have actually assisted, at least in a small way, the search by the Philippine agents. First, he went to a warehouse, on request, and pointed out the records “most significant from an accounting point of view.” At another location he pointed out the record storage area to the N.B.I. agent in charge of searching a building. The agent had not been aware of the location. The Ninth Circuit emphasized that this action took only five minutes and that in cases in which exclusion had been warranted participation was “far more extensive.” Here the court seems to have put a quantitative slant on the participation question.

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61. 47 F.2d at 890.
62. 219 F.2d at 288.
63. See id. at 287; 47 F.2d at 890.
64. 273 U.S. 28 (1927); see text accompanying notes 40-43 supra.
65. 273 U.S. at 32.
66. See 405 F.2d at 740-42.
67. Id. at 747 n.4 (dissenting opinion). “Two hundred agents of the Philippine National Bureau of Investigation occupied 32 separate premises, rummaged through private and business files for more than 12 hours, and trucked away thousands of documents.” Id.
68. 405 F.2d at 742.
69. Id.
70. Id. at 743.
This quantitative standard appears more clearly in the Ninth Circuit's deceptive paraphrase of the *Byars* opinion. In *Byars*, the Supreme Court used the phrase "joint operation" in a sense that was descriptive of the search by federal and state officers in that particular case. The Court did not suggest that federal and state officers must play equal parts in the search in order that there be sufficient federal participation to merit exclusion. *Stonehill* does make such an implication under the guise of paraphrasing *Byars*: "Thus, the Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids as to convert them into joint ventures between the United States and the foreign officials."  

The question squarely presented now is whether the standard of participation is one of degree or whether it is one of any actual participation as a federal officer at all. In *Lustig v. United States*, the participation which called for the exclusion consisted of entering a room and expertly assisting in the selection of evidence of counterfeiting from material which had already been gathered by the state officers. The agent had not been in on the beginning of the illegal search. This fact situation seems clearly analogous to the selection by the agent in *Stonehill* of documents "most significant from an accounting standpoint." In *Lustig*, however, the degree of the agent's share in the illegal search was not the determining factor. The "actuality of a share by a federal official in the total enterprise" was the determining factor. That is to say, the standard developed in *Byars* and *Lustig* calls for exclusion of evidence upon a finding of any participation as a federal officer at all.

The Ninth Circuit, however, has adopted a new, quantitative standard for deciding the federal participation question, which seems to conflict with the language of the Supreme Court in *Byars* and *Lustig*. This new standard is very clearly expressed in the *Stonehill* opinion: "Whether the search does become a joint venture can be determined only by a comparison of what the Federal agent did in the search and seizure with the totality of the acts done in the search and seizure." That is to say, some participation in the search may not warrant exclusion, if the relative share in the search by the federal agent was minor.

Although the courts "have not been in complete agreement as to just how closely federal officers have to be connected with the search.

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72. 405 F.2d at 743.
73. 338 U.S. 74 (1949).
74. 405 F.2d at 742.
76. 405 F.2d at 744.
and seizure before the Fourth Amendment is violated,” most circuits seem to follow Lustig more closely than the Ninth Circuit does in Stonehill.

The Tenth Circuit in 1959 stated that the agent must not participate “in any way” in the search. Several circuits, including the Ninth in an earlier case, have clearly implied that the presence of a federal officer at a state search is synonymous with participation by him. These views seem much closer to the “actuality of a share” standard of Lustig than the view expressed in Stonehill.

In Anderson v. United States, explaining the participation question, the Ninth Circuit cited Lustig as the leading case and emphasized the “actuality of a share” standard in quotation. This earlier opinion is ignored by the majority in Stonehill. Also in Anderson the Ninth Circuit quoted with approval from Feldman v. United States, in which the Supreme Court said it “has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise.” Stonehill condones blatant participation as long as it falls within acceptable, quantitative limits—a rather nice distinction.

The Ninth Circuit has applied to the participation question of the silver platter doctrine a novel, quantitative or comparative standard. The new standard departs from the one promulgated by the Supreme Court in Byars and Lustig. Moreover, it seems that this new standard will make deciding the question more difficult for the trial courts. Predictability in these cases will decrease because of the increased subjectivity allowed by the Stonehill standard. One can foresee increased judicial arbitrariness for the same reason. Because of the increase in the exchange of witnesses and evidence by the United States and foreign

77. United States v. Moses, 234 F.2d 124, 126 (7th Cir. 1956).
79. See United States v. Stirsman, 212 F.2d 900, 903 (7th Cir. 1954) (participated in, or were present at, the search); Williams v. United States, 215 F.2d 695, 696 (9th Cir. 1954) (no federal officers present nor was the search conducted at the instigation of any federal officer); United States v. Braggs, 189 F.2d 367, 369 (10th Cir. 1951) (searches not made in the presence of, nor with the participation of federal officers); Gilbert v. United States, 163 F.2d 325, 327 (10th Cir. 1947) (acting in presence of federal officers or in cooperation with them); United States v. Butler, 156 F.2d 897, 898 (10th Cir. 1946) (or in the presence of federal officers); Miller v. United States, 50 F.2d 505, 507 (3d Cir.), cert. denied, 284 U.S. 651 (1931) (in the presence of a federal official).
80. 237 F.2d 118 (9th Cir. 1956).
81. Id. at 122.
82. 322 U.S. 487 (1944).
83. Id. at 492.
countries in criminal matters in recent years and the increased activities of United States law enforcement agents in foreign countries, the situation in Stonehill may recur with increasing frequency. It is suggested that the Ninth Circuit should return to the standard set out by the Supreme Court in deciding this question. "[C]onstitutional provisions for the security of person and property should be liberally construed." There is no reason why the federal participation rule of Byars and Lustig should be less strictly applied now against government action overseas than it was during the silver platter days at home.

Paul T. Hanson*

C. Custodial Interrogation—Lucas v. United States, 408 F.2d 835 (9th Cir. 1969); Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969); Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir.), cert denied, 396 U.S. 858 (1969).

Few decisions in Supreme Court history have attracted as much attention, both legal and political, as Miranda v. Arizona. While the controversy, and perhaps the reaction, continues, courts throughout America have been faced with the task of applying the decision's dictates. Although quite specific in Miranda about the substance of the constitutional warnings an accused must be given, the Supreme Court was much less specific in setting forth the time when a suspect must be so admonished:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law en-

84. See Police: Global Beat, TIME, June 9, 1967, at 76.
85. INTERNATIONAL CRIMINAL LAW 429 (G. Mueller & E. Wise eds. 1965).
* Member, Second Year Class.

2. In 1968, Congress passed the Omnibus Crime Control Act, 18 U.S.C. § 3501 (Supp. IV, 1969), making the absence of Miranda warnings one factor in determining the admissibility of confessions. At present, the Supreme Court has not ruled on the law's constitutionality. The appointment of two new Justices by President Nixon, however, may very well result in its being upheld.
3. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444 (1966).
forcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. 4

To this last sentence the Court appended an “obfuscating” footnote: 5 “This is what we meant in Escobedo 6 when we spoke of an investigation which had focused on an accused.” 7

Subsequent decisions by state and federal courts that have attempted to interpret Miranda’s “custodial interrogation” language are by no means harmonious; they range from a judicial finding of custody where a suspect was questioned near his car, 8 to holdings of noncustodial interrogation where the defendant was in a police station. 9

4. Id. (emphasis added).
7. 384 U.S. 436, 444 (1966). Much commentary has centered on the issue whether the Court by this footnote meant to supplement or replace Escobedo by Miranda. It would seem that Miranda with its “custody” requirement has, indeed, replaced the Escobedo focus holding. In Hoffa v. United States, 385 U.S. 293 (1966), the Government’s investigation clearly had centered on Hoffa when it sent an undercover agent to elicit incriminating facts from the Teamsters’ boss. The Court rejected Hoffa’s Escobedo-Miranda contentions, speaking of Miranda’s dictates as protection against the inherent coercion of the in-custody setting and rejecting Hoffa’s argument that, in effect, since the investigation had focused on him he had a constitutional right to be arrested and, therefore, conceivably, was entitled to his warnings. Id. at 310; see Osborn v. United States, 385 U.S. 323 (1966). In Mathis v. United States, 391 U.S. 1 (1968), the Court was faced with a different situation. The petitioner was in jail on a state charge when federal agents interrogated him as part of a routine tax investigation. In part, the Government urged the Court to uphold the conviction on the ground that the tax investigation had not focused in the sense that no criminal charges were necessarily contemplated. Id. at 4. The Court rejected this in reversing the conviction: “These differences are too minor and shadowy to justify a departure from the well-considered conclusions of Miranda with reference to warnings to be given to a person held in custody.” Id. The Ninth Circuit panel in Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969), put it more bluntly: “The Court’s decision in Miranda clearly abandoned ‘focus of investigation’ as a test to determine when rights attach in confession cases.” Id. at 1396.

Or, as Professor Kamisar put it: “[T]he test is no longer (if it ever was) how much information the police have when they approach a suspect, but how they approach him, whether he is being subjected to inherent or implicit or indirect pressure in a degree that requires the neutralizing, offsetting warnings.” Kamisar, “Custodial Interrogation” Within the Meaning of Miranda, in CRIMINAL LAW AND THE CONSTITUTION—SOURCES AND COMMENTARIES 335, 344 (1968) [hereinafter cited as Kamisar]; accord, United States v. Squeri, 398 F.2d 785 (2d Cir. 1968). See also N. SOBEL, THE NEW CONFESSION STANDARDS 45 (1966); Graham, supra note 5.

9. Freije v. United States, 408 F.2d 100 (1st Cir. 1969); Clark v. United States, 400 F.2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1036 (1969); Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967).
The recent Ninth Circuit cases of *Chavez-Martinez v. United States*, *Lowe v. United States*, and *Lucas v. United States*, well-illustrate the courts’ struggle to determine, in new contexts, the precise nature of the term “custodial interrogation” as it was so nebulously formulated in *Miranda*. This Note will examine these recent cases in an attempt to expose possible inconsistencies and to determine the better reasoned position.

Assuming that *Escobedo*, in effect, has been replaced by *Miranda*, an analysis of the rationale behind *Miranda*'s custody requirement is necessary before a proper and expansive examination of the Ninth Circuit’s holdings can be made.

While *Miranda* and its companion cases dealt with station-house questioning designed to elicit confessions, it is clear the Court intended to extend the fifth amendment protections to custodial interrogations outside the station house. Indeed, the Court made this plain in *Orozco v. Texas*, where a homicide suspect was questioned by four police officers while in his own bed. Another post-*Miranda* case, *Mathis v. United States*, held the fact of custody, not the reasons

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11. 407 F.2d 1391 (9th Cir. 1969).
12. 408 F.2d 835 (9th Cir. 1969).
13. It has been suggested that the Court purposely omitted any concrete definition of the term in order to observe the actual scope of the problem. Graham, *supra* note 5, at 63.
14. See *Escobedo*, *supra*.

As to the extent of permissible interrogation, there still exists a question of the legality or constitutionality of an officer's stopping a person on the street to ask him questions without probable cause to arrest. This problem is well beyond the scope of this Note. However, the Supreme Court in the "stop and frisk" case of *Terry v. Ohio*, 392 U.S. 1 (1968), upheld the constitutionality of the stop and frisk procedure involved in that case. However, the holding seems to have been a narrow one—involving the issue of a frisk for dangerous weapons. *Id.* at 15-16. The Ninth Circuit analyzing *Terry* in *Lowe v. United States* said: "Even though the majority opinion concerns the right of the officer to 'stop and frisk,' it is difficult to conceive how a policeman is to avail himself of the protections outlined in *Terry v. Ohio*, unless he is able to ask questions of the person he has stopped." 407 F.2d 1391, 1394 (9th Cir. 1969). The Supreme Court in *Davis v. Mississippi*, 394 U.S. 721 (1969), included a few words on the subject: "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.* at 727 n.6. See La Fave, "Street Encounters” and the Constitution: *Terry*, *Sibron*, *Peters*, and Beyond, 67 MICH. L. REV. 40 (1968). If the process of questioning suspicious persons were declared, per se, unconstitutional, then, evidently, any statements so made would be excluded on the basis of the “fruit of the poisonous tree” doctrine. *Wong Sun v. United States*, 371 U.S. 471 (1963).
therefore, determinative of when the proper warnings must be given.

These holdings find their support in *Miranda*, where the Court stated the basis for its custodial reasoning:

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains *inherently compelling* pressures which work to undermine the individual’s will to resist and to compel him to speak where he could not otherwise do so freely.\(^1\)

It is the custodial situation, then, with its “inherently compelling” pressures and its “potentiality for compulsion,”\(^2\) which threatens the suspect’s fifth amendment privilege against self-incrimination. One writer has put it rather succinctly:

\[ \text{[W]hen a suspect, who may reasonably conclude that his freedom has been significantly restrained by a police officer, is questioned about his guilt by the officer, it must be conclusively presumed that his "will to resist" has been substantially affected.} \]

The Court in *Miranda*, however, did not limit itself to a narrow definition of “custody.” It adopted, instead, a more flexible approach, perhaps in an effort to avoid the restrictive meaning inherent in “station-house restraint” and at the same time to forestall a controversy over the definition of “custody.” The Court broadened the potential application of its holding by stating that custodial interrogation exists not only when a suspect is actually present in the police station, but also when he is “otherwise deprived of his freedom of action in any significant way.”\(^3\)

The Ninth Circuit, in *Chavez-Martinez, Lowe*, and *Lucas*, which did not involve station-house interrogations, was placed in the unenviable position of having to give content to this vague phrase and develop its own standards for determining whether the appellants were deprived of their freedom of action “in any significant way.” In *Chavez-Martinez*, the Ninth Circuit panel seemed uncertain where to draw that imaginary, yet all important, line between permissible\(^4\) and custodial interrogation.

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20.  Id. at 457.
21. Kamisar, supra note 7, at 370 (author’s emphasis). “[C]onsidering the evil against which *Miranda* is directed, it is the fact of custodial interrogation rather than its cause or the accusatory nature of the questions asked which necessitates the application of *Miranda*.” People v. McFall, 259 Cal. App. 2d 172, 176, 66 Cal. Rptr. 277, 278-79 (1968) (court’s emphasis).
23. Regarding the extent of permissible interrogation, the Court in *Miranda* made the following statement: “Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforce-

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In *Lowe*, however, the court in a painstaking analysis, attempted to formulate definitive guidelines for determining what constituted custody.

**Lowe v. United States**

Arnold Lowe was convicted in the district court of interstate transportation of a stolen vehicle in violation of the Dyer Act. On appeal, Lowe's sole basis for reversal was that statements which had been obtained from him unconstitutionally, were used against him at trial. The challenged statements were made by Lowe to a deputy sheriff of Yavapai County, Arizona, who had stopped the car which Lowe had been driving in an erratic manner. The officer first asked Lowe to present his driver's license and vehicle registration. Lowe produced...
neither, but did present his Social Security card for identification. The
deputy then asked him to identify the owner of the car. Lowe replied
that it belonged to a distributor in Ohio for whom he worked and for
whom he was selling merchandise that was in the car. In response to
the deputy's question about the employer's name, Lowe replied that he
could not remember. The deputy then asked him if he had permission
to drive the car. He replied in the affirmative. The deputy then asked
Lowe where he was going and whether he had any money. To this
question he answered that he was without funds and was going to Cali-
ifornia to look for work. No more questions were put to Lowe by the
officer. Soon thereafter, an Arizona Highway Patrolman arrived on the
scene and Lowe was subsequently jailed and questioned by an agent of
the Federal Bureau of Investigation.

Lowe was not told that he was under arrest before or during any
of the above questioning, but the deputy was permitted to testify that
he intended to keep Lowe where he was, although this fact was never
communicated to Lowe. After a hearing, the trial court denied Lowe's
motion to suppress the statements made to the deputy.26

A Reasonable Man Formula

The Ninth Circuit, speaking through Circuit Judge Carter, affirmed
Lowe's conviction. First, the court recognized that the Supreme Court,
in Miranda, had abandoned “focus of investigation” as a test to deter-
mine when rights attach in self-incrimination cases.27 Carter adopted
as the correct test the reasonable man approach espoused by the Cali-
ifornia28 and New York29 courts and by Professor Yale Kamisar.30

26. The trial court did suppress the statements made to the F.B.I. agent. 407
F.2d 1391, 1392 (9th Cir. 1969). While in traditional terms, appellant's statements
to the Arizona deputy sheriff did not constitute confessions nor even admissions, the
Supreme Court in Miranda extended the privilege to include other statements: “No
distinction can be drawn between statements which are direct confessions and state-
ments which amount to “admissions” of part or all of an offense. The privilege
against self-incrimination protects the individual from being compelled to incriminate
himself in any manner; it does not distinguish degrees of incrimination. Similarly, for
precisely the same reason, no distinction may be drawn between inculpatory statements
and statements alleged to be merely “exculpatory.” If a statement made were in fact
truly exculpatory it would, of course, never be used by the prosecution. In fact,
statements merely intended to be exculpatory by the defendant are often used to
impeach his testimony at trial or to demonstrate untruths in the statement given
under interrogation and thus to prove guilt by implication.” 384 U.S. 436, 476-77
(1966).

27. 407 F.2d 1391, 1396 (9th Cir. 1969); see note 7 supra.
28. E.g., People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115
(1967).
29. E.g., People v. Rodney P., 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d
225 (1967).
Basically, this approach can be stated as follows: "The belief of the person [confronted by the authorities] as a 'reasonable man' that his freedom is significantly impaired" determines whether the person is in custody as interpreted by *Miranda.* The fifth amendment hypothesis upon which this conclusion is based, of course, is that once a person reasonably believes that his freedom of action is significantly impaired, he will then feel the compulsion inherent in the situation. As a result, the suspect's "capacity for rational judgement" is undermined as he begins to feel compelled "to speak where he would not otherwise do so freely." The *Miranda* warnings, therefore, should be given in order to allow the suspect the full benefit of his fifth amendment privilege against compulsory self-incrimination.

While it is submitted that this test is the best yet advanced, the test has certain weaknesses. One such weakness is that a suspect who still believes he has an opportunity to talk himself out of arrest is perhaps more likely to make false exculpatory statements than a suspect who realizes he is under arrest.

Undoubtedly, while such an objective reasonable man test would be relatively easy for the courts to apply, it cannot be forgotten that such a judicially created test serves the primary purpose of laying down guidelines for the police. This objective test, however, does not always assist the officer in knowing whether the suspect subjectively feels deprived of his freedom in a significant way and whether the suspect's belief is reasonable.

Whether the suspect has a reasonable belief is to be judged by the facts as they reasonably appear to him, which means that under this [objective] test the officer would have to know what the suspect thinks the officer knows in order to determine when the warnings must be given.

A Subjective Test

Another possible test advanced for determining custody, but one explicitly rejected by the Ninth Circuit in *Lowe,* is what could be called the subjective intent of the interrogator test. That is, if the confronting officer has formed an intent to arrest the suspect or to deprive him of his freedom in any significant way, then, for all intents and purposes, the thought is the fact.

31. *Id.*
33. *Id.* at 467.
Important in this regard is *Orozco v. Texas*,\(^3\) decided a month after *Lowe*, in which the Supreme Court, in reversing petitioner's homicide conviction, held the defendant's *Miranda* rights had been violated when four police officers accosted and questioned him in his bed. The Court relied, in part, on the following finding: "From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was 'under arrest.'"\(^4\)

This does not, however, seem to have been the primary basis for the Court's holding, but only a point (albeit important) on which the Court relied in order to come to its general conclusion that petitioner was "deprived of his freedom of action."\(^5\) The reasonable man test, therefore, was not repudiated by the Court in *Orozco*; indeed, a reasonable man would think his freedom significantly impaired by the presence of a quartet of policemen surrounding his bed. In addition, the situation presented in *Orozco* was certainly an example of the "police-dominated atmosphere"\(^6\) emphasized by the Court in *Miranda*. Justice Harlan, concurring in *Orozco* "[p]urely out of respect for stare decisis,"\(^7\) appeared to recognize that *Miranda* was applicable to the facts of *Orozco*.\(^8\)

39. *Id.* at 325.
40. *Id.* at 327.
41. 384 U.S. 436, 445 (1966). In the *Lowe* case, to the contrary, the interrogating officer was alone while appellant had a passenger. 407 F.2d 1391, 1392 (9th Cir. 1969).
42. 394 U.S. 324, 327, 328 (1969) (Harlan, J., concurring).
43. The dissent in *Orozco* seemed to miss the point: "The Court now extends the same [Miranda] rules to all instances of in-custody questioning outside the station house." 394 U.S. 324, 328, 329 (1969) (White, J., dissenting). It has been submitted that *Miranda* was never meant to be so limited. The dissent went on to say: "Once arrest occurs, the application of *Miranda* is automatic. The rule is simple but it ignores the purpose of *Miranda* to guard against what was thought to be the corrosive influences of practices which station house interrogation makes feasible." *Id.* If the dissent were correct in its assertion that "arrest" determines custody, then why did the Court in either *Miranda* or *Orozco* not come out and say so? See Kamisar, *supra* note 7, at 336.

If arrest were the test, courts would be faced with a determination of what constitutes an arrest. There has been great confusion in this area and perhaps the Court chose to avoid it. *See*, e.g., Henry v. United States, 361 U.S. 98 (1959), Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963); Busby v. United States, 296 F.2d 328 (9th Cir. 1961); Long v. Ansell, 69 F.2d 386 (D.C. Cir. 1934). "'Arrest' is [confusing]... not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations." United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960). Also, federal courts would have to apply state guidelines for arrests made by state officers. Miller v. United States, 357 U.S. 301 (1958); United States v. Di Re, 332 U.S. 581 (1948). *See* Mathis v. United States, 391 U.S. 1
The Ninth Circuit in *Lowe* pointed out the obvious fallacy in a subjective test that hinges on the intent of the officer:

Suppose X owes money to Y and Y determines to collect it. Y decides that when he next confronts X he will demand his money and if X refuses to pay, Y will collar him, take X forcibly to a private place and forcibly take sufficient money to pay the debt; in other words, make a false arrest to secure the money. Y stops X on the street, demands his money and gets it. Although Y's intent was to detain or "arrest" if necessary, certainly what transpired was not a detention or an "arrest." No court would so hold.44

In other words, although the officer may form a subjective intent to deprive the suspect of his freedom, if the suspect does not feel the "heat" but rather feels free to go, then he experiences none of the pressures of custodial interrogation that the *Miranda* decision sought to protect against.

Another drawback to this subjective test lies in its application. It would seem to be a difficult, if not impossible, task for a court to determine just when an officer forms such a subjective intent.45

**Chavez-Martinez v. United States—The Probable Cause Test**

Still another suggested test for determining when police investigation moves into custodial interrogation is the focus or probable cause test.46 Of course, the word "focus" is derived from *Escobedo* and, as pointed out, *Escobedo* may now lack any real judicial efficacy.47 The Ninth Circuit in *Chavez-Martinez*, however, seemed to adopt this test as controlling:

We hold that the warnings required in *Miranda* need not be given to one who is entering the United States unless and until the ques-

44. 407 F.2d 1391, 1397 (9th Cir. 1969).
45. This is not to say that this test lacks all merit. It can be argued that all police-citizen confrontations contain elements of compulsion. Most citizens when questioned by the police do respond. Few feel inclined to say "no comment." The Supreme Court in *Miranda* pointed this out: "[T]here is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." 384 U.S. 436, 468 n.37 (1966), quoting from L. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958). The guidelines that a court of law lays down relate directly to police practices. Courts, in effect, set the applicable guidelines for the police to follow in their law enforcement activities. Therefore, if the subjective intent of the interrogator test were to prevail, the individual officer would know exactly when to give the suspect his warnings—at that time he decides not to let the suspect go.
46. Kamisar, supra note 7, at 362.
47. See note 7 supra.
tioning agents have probable cause to believe that the person questioned has committed an offense, or the person questioned has been arrested, whether with or without probable cause. It is at this point, in border cases, that the investigation has “focused” in the *Miranda* sense.\(^4\)

Maria Chavez-Martinez was convicted by the district court on two counts—knowing importation of 130 ounces of heroin and 20 ounces of cocaine into the United States from Mexico and knowing concealment and facilitation of the transportation of the same narcotics.\(^4\) She assigned numerous specifications for error.\(^5\) For the purposes of this Note, however, discussion will be limited to her contention that certain statements made by her to an Inspector Knights while being detained at the customs office at the Port of Entry, Calexico, should have been suppressed by the trial court.

Defendant, alone, driving a beige 1959 Plymouth, license QXR-027, crossed the border on November 10, 1967. There were two similar license numbers on the then current “look out” list at the Port of Entry (OXR-027 and OYR-027). Noticing the similarity, a border inspector on a primary inspection line asked appellant her nationality, citizenship and whether she was bringing anything from Mexico. To the last question, she replied, “Nothing.” He then asked her to open the trunk of her car and when she did not seem to know which key to use, he asked her if she owned the car. She replied, “No, it belongs to a friend of mine in San Diego.”

This primary inspector then referred appellant to secondary inspection where Inspector Knights asked her whether she was bringing anything from Mexico. He testified that upon receiving a negative answer he ushered her into the customs office and requested the chief inspector to watch her while he searched the car. After finding nothing in his search of the car, Knights returned to the office to check the “look out,” on which he noticed a warning that heroin might be concealed in the gas tank.

On checking the car again, he noticed what appeared to be a

\(^4\) 407 F.2d 535, 539 (9th Cir. 1969). Notice that the court here may have purposely narrowed its decision by limiting its holding to border cases. It is conceivable, therefore, that the *Chavez-Martinez* panel could adopt a different test in a case which involved interrogation in a nonborder situation. The court did cite other border cases to substantiate its opinion. *Id.* at 539. However, the court also stated that *Miranda* contains the focus element. *Id.* at 538-39. It has already been submitted that *Miranda* abandoned this *Escobedo* phrase. See note 7 supra. Although flexibility might result in adopting different custodial tests in differing situations, confusion, especially at the bar, could be an undesirable end-product. It might also be asked, if the court did mean to limit this focus or probable cause test to border cases, why it chose the particular test it did.


\(^{49}\) 407 F.2d 535, 538 (9th Cir. 1969).
fresh undercoat on the gas tank and its immediate area to which some waste material and sawdust was clinging. Knights then tapped the tank; when it did not "sound right," he called a customs agent, whose office was in Calexico, to come down and look into the matter.

While waiting for the agent to arrive, Knights, having seen a temporary registration on the windshield of appellant's car, asked her who owned the car. She replied that a friend living in the Los Angeles area owned it. He then asked appellant where she had met this person, to which she replied that she had met him on the street in Tijuana the day before. In reply to further questioning, appellant stated she had come to Mexicali to visit a friend, Olga, whose last name she could not remember, and that she was crossing the border with the borrowed car to visit her mother in Los Angeles. Shortly after this questioning by Knights, the contraband was discovered by the customs agent. These statements to Knights, before the narcotics were found, were admitted at the trial to impeach appellant's testimony and establish various untruths.\textsuperscript{51} Appellant assigned their admission as error.

District Judge Crary, in delivering the opinion of the Ninth Circuit, held that appellant's detention, before the contraband was discovered, was not a significant deprivation of her freedom. The situation, therefore, did not fall within the custodial definition outlined in \textit{Miranda}. The court placed great emphasis on the statutory authority for border detentions,\textsuperscript{52} stating: "[T]o say that by reason of such 'detention' each [person crossing the border] is in custody, or that an investigation has focused upon him, would distort the \textit{Miranda} rule beyond recognition."

\textbf{Conflict within the Circuit?}

The possible conflict between \textit{Lowe} and \textit{Chavez-Martinez} arises from the \textit{Lowe} court's rejection of the focus or probable cause test.\textsuperscript{54} The court in \textit{Lowe} cited the following language in \textit{Hoffa v. United

\begin{itemize}
  \item \textsuperscript{51} Although the questions were not directly related to the later discovered offense, the Supreme Court has made it clear the relation of the questions to the prosecuted crime is irrelevant in light of the controlling issue of custody. Mathis v. United States, 391 U.S. 1 (1968). The \textit{Chavez-Martinez} court seemed to give some weight to the fact the questions there asked were not directly related to the narcotics offense. 407 F.2d 535, 539 (9th Cir. 1969).
  \item \textsuperscript{52} "[A]ll persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government ...." 19 U.S.C. § 1582 (1964).
  \item \textsuperscript{53} 407 F.2d 535, 539 (9th Cir. 1969).
  \item \textsuperscript{54} See note 48 \textit{supra}. Although, conceivably, the two cases are distinguishable because of the border situation in \textit{Chavez-Martinez}, note the strong language in \textit{Lowe} suggesting the reasonable man test should apply to all situations. 407 F.2d 1391, 1396-97 (9th Cir. 1969).
\end{itemize}
Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.\(^{66}\)

The Supreme Court in *Hoffa* and the Ninth Circuit in *Lowe* are saying that “[t]he police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect . . . ”\(^{67}\)

If the police were, therefore, to misjudge the arrival of probable cause to arrest and continue the questioning, then statements secured after probable cause existed would have to be excluded. The determination when probable cause exists would naturally rest on an appellate court’s finding based on an after-the-fact examination of the relevant circumstances. Yet, the courts in recent years have often “thrown out” arrests not based on probable cause.\(^{68}\) It would seem law enforcement officials would be placed in too complicated a situation—“too much” probable cause would, on a *Miranda* basis, invalidate a suspect’s statements, and “too little” probable cause would vitiate the arrest.\(^{69}\)

As probable cause to arrest could conceivably exist without custody, it is submitted that any test that would make probable cause to arrest the determination of when a suspect’s *Miranda* warnings must be given misses the point of *Miranda’s* custody emphasis.\(^{60}\)

This focus or probable cause test may also overlook the basis for the *Miranda* guidelines—the need to guard the suspect from overbearing police influences and to protect his privilege against self-incrimination. It is quite possible that the police may have probable cause even though the suspect himself may be unaware of the police suspicion. In such a case the compulsive atmosphere would not exist. In *Hoffa* this distinction is made clear. The investigation had “focused” on Hoffa,\(^{61}\) and the police may very well have had probable cause to arrest before the actual arrest was made, but the Supreme Court could not find any “compulsion” present that could have undermined Hoffa’s will to resist:

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56. Id. at 310.
57. Id.
60. Naturally, any time a suspect is arrested he is in custody. It does not follow, however, that if a suspect is not under arrest he is not in custody; see Mathis v. United States, 391 U.S. 1 (1968); Rosario v. Guam, 391 F.2d 869, 872 (9th Cir. 1968); People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); notes 25 & 43 supra.
61. See note 7 supra.
In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin [an undercover agent] and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case.

Lucas v. United States—Test Based on Defendant's Subjective Awareness

One final test that has been proposed—a subjective one—would find custody where the suspect believes that he is significantly deprived of his freedom. The Lowe panel flatly rejected such a test: "Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard."

A New York court has pointed out another obvious weakness in this type of subjective test as compared to a reasonable man test:

[The reasonable man test] is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.

As to this last-mentioned subjective test, the Ninth Circuit, in
Lucas v. United States, decided after Lowe and Chavez-Martinez, may have thrown a clog into the machinery of justice with respect to the custodial interrogation issue. James Lucas was convicted in the district court on two charges of passing counterfeit United States currency. Appellant allegedly paid for drinks at an Arizona night club with a counterfeit $20 bill. In response to the manager's call, a number of officers, both state and federal, went to the scene, and appellant was taken to a nearby parking lot and questioned by about a half-dozen officers. Appellant asked one of the officers if he was under arrest and was told that he was not. He was asked how he had come into possession of the $20 bill. After hesitating and remarking he was not sure that he had passed the bill, appellant told the questioning officer that he won it in a pool game that evening. These statements were admitted at appellant's trial.

On appeal, the Ninth Circuit, through District Judge Plummer, stated:

There is nothing to indicate that appellant disbelieved Deputy Felix when he told him he was not under arrest. Thereafter, there was no outward manifestation by defendant's words or conduct to suggest that he considered himself detained or in custody.

If the court in its short opinion meant to adopt this subjective-defendant test, then clearly the Ninth Circuit stands a sharply divided court, with Lowe adopting a reasonable man test, Chavez-Martinez a focus or probable cause standard, and Lucas apparently a subjective-defendant test.

It seems possible, however, to reconcile the different standards used in Lowe and Lucas. The defendant in Lucas did not in fact entertain the belief that his freedom was significantly deprived, which rendered the application of the reasonableness test unnecessary. In other words, in order to find custody within the meaning of the reasonable man standard, two prerequisites must be present: (1) The suspect must actually (subjectively) believe that his freedom is significantly deprived; and (2) his belief must be reasonably entertained. In Lucas the court stressed that the defendant evidently did not hold the subjective belief that his freedom of action was significantly decreased. Because the first prerequisite of the standard was not met, it was unnecessary to consider the existence of the second. The necessity for a

67. 408 F.2d 835, 836 (9th Cir. 1969).
68. Id. But see Windsor v. United States, 389 F.2d 530 (5th Cir. 1968), where the court found custody present although the suspect was told he was not under arrest. Could it be that a reasonable man would not always believe what he is told by an officer?
69. See text accompanying note 68 supra.
subjective belief in a significant deprivation of freedom action also
squares with the Miranda rationale of compulsory self-incrimination;
if the suspect did not feel his freedom threatened, then the fifth amend-
ment protections would not be necessary.

Viability of Lowe's Objective Approach

Granted that none of the tests for determining custody mentioned
in this Note are infallible, or crystal reflections of justice from a mirror
of perfect wisdom, a workable test must be found from the standpoint
of the courts and the police. The final choice must be either to adopt
some guidelines, or come to a conclusion such as this:

Thus, one is led to conclude either that Miranda should not apply
to street encounters at all, or else that Miranda should be applied
to all such encounters which involve questioning an individual
about his own conduct. There is no rational middle ground.\textsuperscript{70}

It is submitted that the Ninth Circuit's approach in Lowe repre-
sents the best possible balancing of all interests. The Supreme Court in
Miranda was concerned primarily with the "inherent compulsion" of an
in-custody situation. The reasonable man approach, although not al-
ways flexible enough to compensate for the vagaries of the human com-
position, does include within its breadth the typical offender. It encom-
passes the compulsory aspect of the fifth amendment privilege in that
the test recognizes the pressures that are brought to bear on the suspect,
and bases its analysis on the facts known to the suspect that would lead
a reasonable man to conclude that his liberty is significantly threatened.
Once the person so concludes, the "conclusive presumption"\textsuperscript{71} of comp-
pulsion comes into play, and the Miranda warnings must be given be-
fore any questioning begins.

The test should also show its workability in a far greater number
of instances than would any test that depended on the idiosyncrasies
of the individual suspect. Indeed, such a subjective-defendant test
would not, in effect, be a test at all, but would necessarily hinge on an
after-the-fact judicial determination of the factual state of the defend-
ant's mind at the time of his confrontation with the authorities. Un-
doubtedly, this would be an almost impossible test to apply, and would
leave the police with no guidelines whatsoever.\textsuperscript{72}

The subjective intent of the interrogator and focus or probable
cause tests fail because they do not fully recognize the "compulsion"
principle of the fifth amendment\textsuperscript{73} and, as with the subjective-defendant

\textsuperscript{70} La Fave, "Street Encounters" and the Constitution: Terry, Sibron, Peters,
\textsuperscript{71} Kamisar, supra note 7, at 370; text accompanying note 7 supra.
\textsuperscript{72} See text accompanying note 65 supra.
\textsuperscript{73} See text accompanying notes 44 & 57 supra.
test, would be difficult to apply.\textsuperscript{74}

Although even the reasonable man test does not provide crystal clear guidelines because a policeman cannot always accurately gauge the suspect's personal awareness of the weight of evidence against him, for the most part police are relatively cognizant of at least some of the relevant facts. In a case like \textit{Orozco}, for example, the officers should have realized that their surrounding the defendant in his bed in the dead of night would lead a reasonable man to believe that his freedom of action was significantly impaired.

\section*{Elements of Custody}

Some thought must be given, then, to just what indicators must be present, or rather, what in fact constitutes a significant deprivation of one's freedom of action. In \textit{Chavez-Martinez}, where the defendant was actually removed from her car and detained in the customs offices, the court nevertheless indicated that the appellant's freedom of action was not significantly deprived. The court based its conclusion, in part, on the theory that pursuant to the border detention statute\textsuperscript{75} a person must submit to such a detention. Granted that such detention is sanctioned by the statute, the court seemed to overlook the important point that it is the fact of detention, not the reason behind it, which determines custody.\textsuperscript{76} It is submitted, therefore, that the court should have directed its attention more toward a consideration of the significance of the detention rather than have placed such heavy emphasis on the detention's statutory justification. As the Ninth Circuit said in \textit{Rosario v. Guam}:\textsuperscript{77}

For one to be in custody, it is not required that he be in handcuffs or even that he be advised in express terms that he is under arrest. The custodial question before the court [in \textit{Miranda}] was whether or not, in view of all the circumstances, the appellant's freedom of movement was, at the time of any challenged interrogation, restricted in a significant way by the presence of civil authority.\textsuperscript{78}

Although the reasons for the restraint are not controlling in a de-

\textsuperscript{74}. See text accompanying notes 45, 57, & 65 \textit{supra}. While these tests, in themselves, should never be controlling in a custody determination, the subjective realization of the suspect that the investigation has begun to center on him can lead him to a reasonable belief of the deprivation of his freedom. "The \textit{awareness} of the person being questioned by an officer that he has become the 'focal point' of the investigation, or that the police already have ample cause to arrest him, may well lead him \textit{to conclude, as a reasonable person}, that he is not free to leave, that he has been significantly deprived of his freedom . . . ." Kamisar, \textit{supra} note 7, at 371 (author's emphasis).

\textsuperscript{75}. 19 U.S.C. \textsection 1582 (1964).
\textsuperscript{76}. See Mathis v. United States, 391 U.S. 1 (1968).
\textsuperscript{77}. 391 F.2d 869 (9th Cir. 1968).
\textsuperscript{78}. \textit{Id.} at 872.
termination of custody, this is not to say that the reasons for the deten-

ination are irrelevant. They can bear on the issue of whether the particular

restraint was significant. Since the test is that of a reasonable man, the

issue of the purpose of the restraint can be a factor.

In *Lowe*, the court seemed to arrive at a proper determination of

the question whether a reasonable person in appellant's position would

feel significantly deprived of his freedom of action. The defendant had

been stopped by the officer for erratic driving. Certainly, he was de-

prived of his freedom, but most citizens in their everyday walks of life

will be subject to such detentions. Often, when a citizen forgets his

driver's license or registration, the officer will make a cursory check to

see if the particular vehicle has been reported stolen. Here, the reason

for the investigation is relevant in determining whether a reasonable man

so stopped would feel his freedom of action to be significantly deprived.

The District of Columbia Circuit in *Allen v. United States*\(^79\) pointed out:

[Although] this common mishap [of citizens forgetting their per-

mits] produces incidental detention and restraint while the possi-

bility of a stolen car is checked out ... [it] does not produce the

kind of custodial situation contemplated by the *Miranda* doctrine.\(^80\)

With this in mind, it appears that the court in *Lowe* correctly held

that the detention of defendant was not significant. Of course, if the

suspect had reason to believe that the officer knew the particular vehicle

was stolen or that the suspect had committed a certain crime, then that

suspect could have reasonable grounds to believe that his freedom was

going to be significantly deprived. However, the suspect's awareness of

his own guilt, at the time he was questioned by the authorities, would

not be sufficient to satisfy the test unless he was aware that the confront-

ing officer also knew of this guilt. In *Lowe*, evidently, the converse

was true. The officer did not intend to let the defendant go, yet the

defendant was perhaps unaware of this fact since the officer had not

expressed to appellant his intention to detain.\(^81\) Without the suspect's

awareness of the limitation on his freedom, none of the evils of custodial

interrogation would seem to exist.

**Weaknesses in the Chavez-Martinez Decision**

Under the standard applied in *Lowe*, *Chavez-Martinez* appears in-
correctly decided. Defendant was not held within her car, but indeed,

was whisked into the customs office where an inspector was told to

"watch her."\(^82\) It is not clear whether she knew that the gas tank, where

\(^79\) 390 F.2d 476 (D.C. Cir. 1968).

\(^80\) Id. at 479.

\(^81\) 407 F.2d 1391, 1392 (9th Cir. 1969).

\(^82\) 407 F.2d 535, 537 (9th Cir. 1969).
the contraband was later found, appeared suspicious to the inspector. Since she was not allowed to leave the customs office, however, defendant must have realized, or been told that something was wrong.\footnote{Id.} It was during this period—after the inspector’s suspicions had been aroused and before the customs agent found the contraband—that the challenged statements were made. It is hard to believe that a reasonable man, under these circumstances, would not have believed that his freedom of action was deprived in a significant way. It is submitted that the \textit{Miranda} warnings should have been given prior to the questioning in the office for at that point the “inherent compulsion” or “potentiality for compulsion” was certainly apparent. As Chief Justice Warren said in \textit{Miranda}:

\begin{quote}
The entire thrust of police interrogation . . . was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.\footnote{384 U.S. 436, 465 (1966).}
\end{quote}

In conclusion, an apparent conflict exists within the Ninth Circuit in light of the recent cases of \textit{Chavez-Martinez}, \textit{Lowe}, and \textit{Lucas}. The court is not alone in this regard, however; there is no real uniformity within the United States on the issue of when police investigation merges into, and then becomes, custodial interrogation. The District of Columbia Circuit explained this dilemma in persuasive metaphorical terms:

\begin{quote}
Whether police have left the channel of “investigation” and run onto the shoals of “custodial interrogation” cannot be determined by reference to some chart clearly designating the various lights, bells, buoys and other channel markers.\footnote{Allen v. United States, 390 F.2d 476, 478-79 (D.C. Cir. 1968).}
\end{quote}

It is still too early to determine whether the Ninth Circuit’s decision in \textit{Lowe} will have a “lighthouse” effect; but, the court, after a rather painstaking analysis of the problem, came up with a workable and sensible, approach to a troublesome and complex problem. While its decision is certainly not infallible, it does seem to represent a fair balancing of the interests concerned. The Supreme Court in the post-\textit{Miranda} cases of \textit{Hoffa}, \textit{Mathis}, and \textit{Orozco}, while touching on the issue of custodial interrogation has not, as yet, made any definitive pronouncements on what it meant in \textit{Miranda} by a suspect being “deprived of his freedom of action in any significant way.”

Before such a ruling comes down, the Ninth Circuit, as well as the
other federal and state courts, will continue to contend, and struggle with, this crucial issue. Indeed, any issue that relates so directly to individual freedom and effective crime prevention and detection must be met head-on, and the clash of interests of individual freedom and crime prevention minimized within the framework of judicial action and official implementation.

Don R. Prigo*

D. Implied Authority and the Attorney-Client Privilege—Stegeman v. United States,¹ No. 22, 171 (9th Cir., Feb. 27, 1969).

The attorney-client privilege often prevents the admission into evidence of helpful and relevant material which may be necessary to the discovery of the truth. Nevertheless, the courts have felt that the need to insure an honest and complete disclosure by the client to his attorney, free from any fear that the facts might be made public,² outweighs the possibility that important evidence will be lost. In considering problems of waivers of this important privilege, this public policy behind its creation must be kept in mind.

Professor Wigmore has defined the attorney-client privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.³

¹ An en banc rehearing was held on November 12, 1969.
³ 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]. Compare with the often quoted definition stated by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950): “The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c)
It is well recognized that the privilege applies also to advice given by the attorney to the client. The public policy behind this extension of the privilege is simply that the attorney’s advice will often “reveal the substance of [the] client’s communication.”

One problem often arising in regard to the attorney-client privilege is that of defining the limits of the attorney’s authority to disclose confidential communications. Case law has firmly established that the privilege is the client’s, and only he can waive it. Can the attorney, then, intentionally or accidentally, destroy the privilege by disclosing such communications to an adverse party without express authority from the client? The Ninth Circuit encountered this problem in the case of Stegeman v. United States.

In Stegeman, the defendants were convicted of knowingly and fraudulently concealing assets during an involuntary bankruptcy proceeding. On appeal, they claimed that the trial court violated their attorney-client privilege by allowing a letter containing advice from their attorney to be introduced into evidence over their objection. The long-time attorney for the Stegemans, Mr. Morley, had traveled to Canada to discuss the bankruptcy action with his clients. On his return, he wrote a lengthy letter to the defendants, supplying them with re-


5. Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956); accord, Henderson v. Heinze, 349 F.2d 67, 70 (9th Cir. 1965). In addition, see Brief for Appellant at 25.


9. Defendants also claimed error in the introduction of statements taken by agents of the Federal Bureau of Investigation because of the failure of the agents to give warnings within the standards set forth in Miranda v. Arizona, 384 U.S. 434 (1966). Stegeman v. United States, No. 22,171 at 1-2 (9th Cir., Feb. 27, 1969). A third assertion of error was in the court’s failure to instruct the jury that since the defendants were in Canada, beyond the jurisdiction of the district court, they had no duty to reveal their assets, only a duty not to hide them. Id. at 6-9. The Ninth Circuit rejected both of these claims.
quested information concerning the bankruptcy proceedings. At the end of the letter, he advised them that although they had violated the bankruptcy laws by concealing assets, they could avoid criminal prosecution by sending the records of all their assets to the trustee and returning from Canada. Morley also stated in the letter that he had arranged with the trustee to postpone any criminal proceedings for a few days to give the Stegemans an opportunity to attend to the matter. He sent a copy of the letter to Mr. Pendergrass, attorney for the trustee in bankruptcy, with a "BC" notation at the end.\textsuperscript{10}

At the trial, the Stegemans claimed that they were acting on the advice of another attorney who had advised them that their actions during the bankruptcy proceeding were lawful and that therefore they had no knowledge that any of their actions were illegal. The prosecution, seeking to prove that the Stegemans knew their actions were fraudulent, introduced the copy of the letter to refute the claim that the Stegemans had been acting in good faith.

The trial court found that Morley was acting in what he considered to be the best interests of his clients and that he had authority to act in their behalf. The judge felt that the sending of the letter was within this authority and ruled that the disclosures destroyed the confidential nature of the communication. The Ninth Circuit\textsuperscript{11} approved the ruling, finding that Morley was acting in good faith in trying to save his clients from prosecution and that he had implied authority to disclose the communication. In its decision, from which Judge Byrne strongly dissented, the court relied on \textit{Himmelfarb v. United States},\textsuperscript{12} \textit{United States v. Bender},\textsuperscript{13} \textit{Banks v. United States},\textsuperscript{14} and \textit{Fratto v. New Amsterdam Fire Insurance Co.},\textsuperscript{15} in stating that "special circumstances may show that the client impliedly authorized the attorney to make disclosures to the third person," and in such circumstances the privilege does not apply."\textsuperscript{16}

\section*{Analysis of Ninth Circuit's Case Authority}

A careful analysis of these cases reveals that the majority's re-

\begin{itemize}
\item \textsuperscript{10} A "BC" notation is an abbreviation for "Blind Copy." Such a notation is put on the copy and not on the original so that the party receiving the original has no knowledge that a copy was sent to someone else.
\item \textsuperscript{11} The panel consisted of Circuit Judges Merrill and Browning and District Judge Byrne.
\item \textsuperscript{12} 175 F.2d 924 (9th Cir.), \textit{cert. denied}, 338 U.S. 860 (1949).
\item \textsuperscript{13} 218 F.2d 869 (7th Cir.), \textit{cert. denied}, 349 U.S. 920 (1955).
\item \textsuperscript{14} 204 F.2d 666 (8th Cir. 1953).
\item \textsuperscript{15} 359 F.2d 842 (3d Cir. 1966).
\end{itemize}
liance on them was misplaced and that they are, as Judge Byrne points out, distinguishable from the facts in *Stegeman*. In *Himmelfarb*, the majority’s principal authority, the disputed evidence included testimony by an accountant employed by the defendant’s lawyer. The client, speaking to his attorney in private, revealed information regarding his tax returns. The attorney later passed this information to the accountant. The defendant claimed the information was protected by the attorney-client privilege. The court there found that the defendant knew of the employment of the accountant, had himself revealed other similar information to the accountant, and had signed papers at the accountant’s request. These facts constituted the special circumstances creating the implied authority for the attorney to destroy the privileged status of the information by passing it on to a third party. Judge Byrne argued that in *Stegeman* the defendants had no knowledge that any party would have access to any of their communications to Morley, and thus there were no special circumstances giving rise to any implied authority.

In *Bender*, the disputed evidence was a worksheet used by defendant’s accountant in preparing the defendant’s tax forms. The worksheet was turned over to government officials by the defendant’s attorney in an attempt to explain discrepancies in the tax forms. The Seventh Circuit found that the attorney had the requisite authority to turn over the document. However, as Judge Byrne pointed out, the case is inapposite. In *Stegeman*, the communications were originally privileged, whereas in *Bender*, since the information was disclosed to the accountant before the attorney-client relationship began, it had never been within the attorney-client privilege.

In the third authority, *Banks*, the evidence objected to was the written answers made by the defendant to questions prepared by government representatives. The questions were given to the defendant’s lawyer who procured the answers from the defendant and returned them to the officials. The answers were supplied for “the sole purpose of giving [them] to [the special agents]” and were thus outside the

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17. 175 F.2d 924, 939 (9th Cir. 1949). There was also the question in *Himmelfarb* of whether communications made in the accountant’s presence were also within the privilege. The Ninth Circuit held that they were not, because the accountant could not be considered an indispensable party and his presence therefore destroyed the privilege. *Id. Contra*, United States v. Kovel, 296 F.2d 918, 920 (2d Cir. 1961).

18. See United States v. Kovel, 296 F.2d 918, 920 n.3 (2d Cir. 1961), where the court suggests that *Himmelfarb* is distinguishable in that there was evidence showing the client knew the information was for transmission to a third party. This would support Judge Byrne’s distinction.

19. 218 F.2d 869, 872 (7th Cir. 1955).

privilege. The Eighth Circuit found that the attorney was acting as "defendant's agent with a power of attorney" rather than as a mere attorney. In such an instance, his acts within the scope of his authority were binding upon the principal. Since neither the facts nor the holding in Banks were in point, the Ninth Circuit's reliance on it in the Stegeman case appears erroneous.

The majority's final authority, Fratto v. New Amsterdam Fire Insurance Co., involved a suit to collect on a group of insurance policies in which the insurers refused to pay the claim on the grounds that the insureds started the fire. The insurers objected to the admission into evidence of reports to them on this issue by their counsel. The Third Circuit, however, held that the privilege had been lost because the attorney had sent copies of the reports to other companies who were not defendants. Although this would seem to bring Fratto into line with the facts in Stegeman, in Fratto, the district court found as a fact that the disputed reports had originated as verbal reports made by an adjuster to the attorney which the attorney merely passed on to third parties. Although this point is not discussed in the Third Circuit's brief opinion, it would indicate, as Judge Byrne stated, that the report was never within the privilege. Communications not originally within the privilege do not become privileged merely by sending them to an attorney. Here again, the case can be distinguished from Stegeman; its use as authority seems inappropriate.

In summary, it appears that Judge Byrne's analysis was correct; the majority's holding does not in fact find support in the cases it cites as authority. The communication was not outside the privilege as in Bender and Fratto, there was no agency as in Banks, nor were there any special circumstances as in Himmelfarb. Even though the Ninth Circuit's reliance on these cases may have been wholly unjustified, the next issue to be examined is whether there were any facts in Stegeman sufficient to warrant a finding of implied authority.

Implied Authority

The Restatement of Agency has defined implied authority as authority to do an act . . . created by written or spoken words

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21. 204 F.2d 666, 670 (8th Cir. 1953).
22. Id.
23. 359 F.2d 842, 844 (3d Cir. 1966).
25. Id. at 271; San Francisco Unified Sch. Dist. v. Superior Court, 55 Cal. 2d 451, 456, 359 P.2d 925, 928, 11 Cal. Rptr. 373, 376 (1961), quoting Grand Lake Drive In v. Superior Court, 179 Cal. App. 2d 122, 127, 3 Cal. Rptr. 621, 626 (1960); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 238, 231 P.2d 26, 31 (1951).
or other conduct of the principal which reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.\textsuperscript{26}

Applying this definition, the courts have ruled that the attorney-client relationship creates a rebuttable presumption that the attorney has authority to act in procedural matters incidental to the management of the litigation.\textsuperscript{27} In addition, cases have held that there is a rebuttable presumption that an attorney has implied authority to conclude a compromise settlement.\textsuperscript{28} Nevertheless, as appellants in Stegeman claimed,\textsuperscript{29} the wiser position seems to be that an attorney has no authority to enter into negotiations unless the client instructs him to do so.\textsuperscript{30} Furthermore, the cases illustrate that "in the absence of express authority, an attorney has no power to surrender substantial rights of his client."\textsuperscript{31} Clearly the rights of the Stegemans were substantially affected by the admission of their attorney's letter into evidence; thus, specific express authority to send it should have been shown before allowing the letter to be used as evidence.

The government, nevertheless, sought in Stegeman to have the implied authority arising from the mere attorney-client relationship extended by arguing that an attorney must have great freedom to act in what he considers to be the best interests of his client, especially in criminal cases.\textsuperscript{32} Because of the serious consequences that may befall the client, however, logic seems to compel the conclusion that in criminal cases, the client should have even more control over the handling of the case. It would appear, therefore, that Judge Byrne was cor-

\begin{footnotesize}
\footnote{26. \textit{Restatement (Second) of Agency} § 26 (1957).}
\footnote{27. \textit{See} Laird v. Air Carrier Engine Serv., 263 F.2d 948, 953-54 (5th Cir. 1959); American Chem. Paint Co. v. Dow Chem. Co., 164 F.2d 208, 209 (6th Cir. 1947); Weiner v. Luscombe, 19 Cal. App. 2d 668, 66 P.2d 151 (1937); Terre Haute Brewing Co. v. Ward, 56 Ind. App. 155, 162, 102 N.E. 395, 398 (1913); King Constr. Co. v. Mary Helen Coal Corp., 194 Ky. 435, 439, 239 S.W. 799, 800 (1922); Smith v. Mulliken, 2 Minn. 319, 322 (1838).}
\footnote{28. Trope v. Kerns, 83 Cal. 553, 556, 23 P. 691, 692 (1890).}
\footnote{29. Brief for Appellant at 14.}
\footnote{32. Appellee's Reply to Appellant's Petition for Rehearing at 33, Stegeman v. United States, No. 22, 171 (9th Cir., Feb. 27, 1969).}
\end{footnotesize}
rect in arguing that unless expressly instructed to do so, the attorney should have no power to enter into negotiations.

Analysis of Wigmore's Distinction

In reaching the contrary conclusion, the Ninth Circuit relied on the first part of Professor Wigmore's distinction between privileged and nonprivileged communications. Part one states:

(1) Since the attorney has implied authority from the client . . . to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) voluntarily made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation . . . are receivable as being made under an implied waiver of privilege, giving authority to disclose the confidences when necessary in the opinion of the attorney. This is so unless it appears that the attorney has acted in bad faith toward the client. 33

The above quote clearly indicates that Wigmore's theory is fundamentally different from the Restatement definition of implied authority. In Wigmore's analysis the mere fact of the attorney-client relationship gives rise to "an implied waiver of privilege" allowing the attorney to make disclosures where he deems necessary. Wigmore would apply this broader power to situations in which the attorney was acting in negotiating a settlement or in taking adverse steps in litigation—clearly a major departure from the idea that the attorney-client relationship creates an implied authority to act in only procedural matters.

If Wigmore's theory is correct, it is evident that the Ninth Circuit accurately applied it to the facts in Stegeman. 34 If, on the other hand, the position of the Restatement is taken that the mere attorney-client relationship should not create authority to act in other than procedural matters, consideration should then be given to the problem of whether there were any "special circumstances" creating an implied authority to disclose the advice. Under Himmelfarb and the Restatement view of implied authority, it is clear that the creation of implied authority to do more than act in procedural matters requires some overt act on the part of the client; the mere act of retaining counsel should not be, and in-

33. 8 Wigmore, supra note 3, § 2325.
34. In Stegeman, the attorney was acting in trying to settle his client's bankruptcy problems and thus he would have the implied authority to make disclosures to third parties. Stegeman v. United States, No. 22,171 at 5 (9th Cir., Feb. 27, 1969). Judge Byrne's argument that negotiating a settlement is not "within an attorney's general authority to manage the litigation" and any unauthorized statements made in the course of such negotiations do not destroy the privilege is clearly at odds with Wigmore's theory. Id. at 13 (dissenting opinion); accord, Atleboro Mfg. Co. v. Frankfort Marine Ins. Co., 240 F. 573, 581 (1st Cir. 1917); Vogt Freezers, Inc. v. New York Eskimo Pie Corp., 59 F.2d 99, 106 (E.D.N.Y. 1932).
deed has been held not to be, sufficient to authorize the waiver of any substantial right. The Stegemans insisted that they gave no consent or instructions to Morley concerning the letter and Morley himself testified that he had no express authorization from the defendant's to send the trustee's attorney the portion of the letter containing his advice. Furthermore, there were no extrinsic facts, as in Himmelfarb, that can be relied on to support a finding of implied authority. In Himmelfarb, the defendant knew of the employment of the accountant, had revealed other similar information to the accountant, and had signed papers at the accountant's request. There was no such conduct on the part of the Stegemans, nor any analogous thereto which warranted the Ninth Circuit's holding that Morley was endowed with the implied authority to disclose the confidential communication in question.

It is interesting to note that the Ninth Circuit failed to discuss part two of Wigmore's distinction in its opinion. Part two states:

(2) All other voluntary disclosures are inadmissible, except so far as the special circumstances show an implied authority of disclosure from the client over and above the general authority to conduct litigation.

The use of this portion of Wigmore's theory would certainly have been more consistent with the citing of Himmelfarb, which dealt with special circumstances. The Stegeman opinion, however, clearly confuses the issue of the extent of implied authority arising from the attorney-client relationship with the issue of whether special circumstances existed. If the court was seeking to expand the implied authority arising out of the relationship, then to talk in terms of "special circumstances" was unnecessary and irrelevant. If the court desired to base its decision on "special circumstances," however, it should have relied on part two of Wigmore's theory, not part one. It seems that the Ninth Circuit was forced to use part one of Wigmore to uphold the ruling of the trial court because there were no "special circumstances" present. Thus the use of Himmelfarb can be understood only as a strained attempt by the court to find support for its reliance on a theory which had no basis in case law when Wigmore first propounded it in 1905. Wigmore's theory was merely a proposed solution he felt would help solve the problem of the extent of the attorney's implied authority to make

35. See notes 27-33 & accompanying text supra. See Sainsbury v. Pennsylvania Greyhound Lines, Inc., 183 F.2d 548, 553 (4th Cir. 1950), where the court held that no authority to impair the rights of the client would be implied merely from the attorney-client relationship.


37. 8 Wigmore, supra note 3, § 2325.

38. Only one case, Sprader v. Mueller, 265 Minn. 111, 118-19, 121 N.W.2d 176, 180 (1963), has applied Wigmore's theory.
disclosures to third parties. Judge Byrne, on the other hand, has substantial support in the cases and legal writings he cites for his position.  

It is the opinion of this author that Wigmore's theory gives the attorney too broad an authority when there exist no special circumstances creating an implied authority. Employment of this theory places too much power to waive the privilege in the hands of the attorney. If the privilege is to mean anything to the client its waiver cannot be dependent upon what the attorney considers to be proper strategy. To allow the attorney the power to destroy the privilege by his extra-judicial disclosures, other than in procedural matters, would be to undermine the client's confidence that he can confide all to his attorney, the very basis on which the privilege rests.

In the final analysis, whether Morley's advice is to be deemed privileged and inadmissible should rest on the character of the communication. If it was intended as a confidential communication between attorney and client, it should be regarded as privileged and inadmissible as evidence against the client despite any disclosure. Where, as in the Stegeman case, a substantial right is involved, any inference concerning waiver of the privilege should be drawn in favor of the client. On this basis, the Ninth Circuit, having reheard the case en banc, should reverse the trial court's ruling and reestablish the client's control over waiver of the privilege.

Gregory C. Paraskou*


The Ninth Circuit in Shorter v. United States\(^1\) reaffirmed previous decisions giving a prosecutor the right to impeach the character of the criminally accused witness with his prior felony convictions. In affirming Shorter's conviction, the court explicitly rejected the rule of Luck v. United States,\(^2\) which encourages the trial judge to exclude evidence of a defendant witness' prior felony convictions when the probative value

\(^{39}\) Stegemen v. United States, No. 22,171 at 13 (9th Cir., Feb. 27, 1969) (dissenting opinion).

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1. 412 F.2d 428 (9th Cir.), cert. denied, 90 S. Ct. 454 (1969).
2. 348 F.2d 763 (D.C. Cir. 1965).
of a conviction is thought to be outweighed by possible prejudice. Although the Ninth Circuit thereby takes a position contrary to the expressed sentiments of the vast majority of legal writers, it is suggested that the court's decision is sound, supported by ample precedent and desirable in any system of justice essentially designed to discover truth.

On June 20, 1967, Leroy Shorter, armed with a double-barrelled, sawed-off shotgun, robbed the Hibernia Bank in San Francisco. During the course of the robbery, he took more than $10,000 at gun point and threatened to kill the assistant manager of the bank. Shorter was captured on July 11, 1967, and his trial commenced on September 18, 1967. After the defendant had informed the court he intended to testify in his own behalf, the trial court ruled, over his objection, that it would admit evidence of his prior convictions, if offered. In obvious trial strategy, counsel had defendant admit to his prior convictions during direct examination. Shorter was thereafter convicted.

On appeal, he urged the Ninth Circuit to adopt the Luck rule and reverse his conviction. The court rejected Shorter's arguments and held that the Luck rule was not the law of the Ninth Circuit. It reaffirmed its support of the orthodox rule, for years the accepted practice in the vast majority of American courts, which allows the prosecutor to impeach the character of the criminally accused witness with prior felony convictions. Generally, legal critics have been extremely critical of this accepted practice; lengthy and vociferous, their arguments against the rule have run the gamut from relevancy to extreme prejudice.

3. The United States Court of Appeals for the District of Columbia Circuit stated that the prosecutor does not have an absolute right to introduce the prior felony convictions of the criminally accused witness for the purposes of impeachment. The court encouraged the trial judge to exercise discretion in deciding in the particular case whether or not "the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility." Id. at 768. If the probative relevance of the prior convictions are found to be "far outweighed" by the prejudice, the Luck rule requires that the trial judge refuse to admit the evidence of convictions. See id. at 768.

5. Shorter v. United States, 412 F.2d 428 (9th Cir. 1969).
6. Id.
7. Id.
9. E.g., Ladd, supra note 4; Spector, supra note 4.
10. One writer was so persuaded by his own arguments that he concluded that a significant reason for the continued existence of the general rule is inertia. See Spector, supra note 4, at 8.
Commonly Advanced Arguments

One argument advanced by the critics is that since evidence of crimes involving dishonesty has a stronger relevancy to credibility than does evidence of other serious crimes, all crimes not involving dishonesty should be excluded. It is similarly argued that while crimes of violence might logically tend to show that the defendant is a man of violent disposition, they have no bearing on credibility. The answer to these contentions is found in the reasoning of the continuous and nearly unanimous decisions finding prior felony convictions relevant. One such early case was *Gertz v. Fitchburg Railroad*, in which the problem was discussed by Justice Holmes. Holmes stated the basis for the determination that prior crimes are relevant to credibility is that they tend to show the witness "is of general bad character and unworthy of credit." The chain of inferences toward relevancy begins with a concession that the conviction shows a "general readiness to do evil." From this consideration, the jury may infer that the defendant would have a "readiness to lie in the particular case, and thence that he has lied in fact."

The Supreme Court of New Hampshire more recently expressed the common sense reasons behind the relevancy of prior convictions:

What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life, this is probably the first thing that they would wish to know. So it seems to us in a real sense when a defendant goes onto the stand, "he

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13. See *McCormick* § 43, at 94.
14. 137 Mass. 77 (1884). This case was an action to recover for personal injuries. The defendant railroad impeached the injured plaintiff's testimony with the plaintiff's record of prior felony convictions. The plaintiff sought to rebuild his character. The trial court apparently ruled that this form of impeachment was analogous to impeachment by prior inconsistent statements, and that a witness could not rebuild his character when he had been impeached by prior inconsistent statements. Therefore, the trial court refused to permit the plaintiff to rebuild his character after a showing of prior convictions. The Massachusetts Supreme Court reversed the trial court on the ground that introducing prior convictions was an attack on character, and therefore, the plaintiff witness was entitled to rebuild his character.
15. *Id.* at 78.
16. *Id.*
17. *Id.*
takes his character with him”.... Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey... though the violations are not concerned solely with crimes involving “dishonesty and false statement.”\(^{19}\)

In short, all prior felony convictions are relevant and therefore admissible on the issue of credibility\(^{20}\) because they tend to show the general bad character of the witness. Crimes involving dishonesty may be stronger evidence on the issue of credibility because the chain of inference is more direct, but this does not require the conclusion that crimes not involving dishonesty are irrelevant.\(^{21}\)

One writer has concluded that the introduction of prior felonies would violate the Federal Constitution.\(^{22}\) He contends that their introduction constitutes a derogation of the privilege against self-incrimination,\(^{23}\) violates due process of law,\(^{24}\) and is so prejudicial that it denies the defendant the right to a trial by an impartial jury.\(^{25}\) Chief Justice Warren answered this argument in *Spencer v. Texas*:\(^{26}\)

> In view of this uniform tradition, it is apparent that prior-convictions evidence introduced for certain specific purposes relating to the determination of guilt or innocence, other than to show a general criminal disposition, would not violate the due process clause.\(^ {27}\)

Some writers have been especially critical of admitting convictions that are remote in time on the ground that even if the prior crimes once had a bearing on credibility, they have since lost their relevance due to the interval of time between that former conviction and the present

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19. Id. at 293-94, 123 A.2d at 746.
20. Id. at 294, 123 A.2d at 746.
21. The chain of inference for crimes involving dishonesty is that the witness has been dishonest in the past, and it is likely that he will be dishonest again, and hence it is likely that he has lied in this case.
23. Id. at 179.
24. Id. at 185.
25. Id. at 174.
27. Id. at 578. In *Spencer*, the Supreme Court upheld a Texas recidivist statute which permitted the prosecutor to introduce the defendant’s criminal record to the jury as part of his case-in-chief. Chief Justice Warren dissented on the theory that it was unnecessary for the prosecutor to introduce the prior crimes evidence until after the issue of guilt had been decided. See id. at 570. He argued that evidence used only for recidivist purposes has no bearing on the guilt or innocence of the defendant in the present case, whereas evidence introduced for the purpose of impeachment does have a legitimate purpose because it tends to show that the witness' credibility “is qualified by his past record of delinquent behavior.” Id. at 577.
Chief Justice Weintraub of the New Jersey Supreme Court discussed this contention in *State v. Hawthorne*.

In a concurring opinion, he stated:

We must start with the undeniable proposition that when the possibility of prejudice is greatest, it will not so overwhelm the probative value of the conviction as to warrant its exclusion. Specifically, if the conviction is fresh and is for the same species of crime involved in the trial and thus the capacity for prejudice is at its maximum, proof of the conviction will be received.

Yet it is claimed that somehow the passage of time upsets the scale. I agree that time diminishes the probative value of a conviction, but I think it equally clear that time also reduces the risk of prejudice. I find it hard to believe that a conviction a juror finds too old to bear upon credibility will still be young enough to seduce him upon the issue of guilt.

In addition, the majority opinion noted that from a practical standpoint a prosecutor will hesitate before introducing a very old conviction for fear of an adverse reaction from the jury. These arguments are persuasive, for it is indeed difficult to imagine a jury giving undue weight to an extremely remote conviction. While a former conviction may have lost some of its probative value, it has also lost some of its prejudice. Thus, it would seem unnecessary to frame a rule to exclude former convictions merely because they are remote in time.

Several critics have asserted that it is not necessary to impeach the credibility of the defendant by evidence of prior crimes since the jury will naturally tend to regard the defendant's testimony with suspicion because of his interest in the outcome of the trial. Clearly, the jury is entitled to know if the witness is likely to lie, but it should have a stronger basis for determining credibility than an inference that the witness is likely to lie from the mere fact of his interest in the outcome of the case. Most witnesses and especially criminal defendants are interested in the outcome of the case in which they testify. The recognition of this fact is one of the rationales behind the rule prohibiting leading questions. Yet, if interest in a case were thought to be sufficient impeachment, surely the additional rules of impeachment would never have been developed. Since evidence of prior crimes is relevant to the issue of credibility, that evidence would seem a necessary method of impeachment.

29. 49 N.J. 130, 228 A.2d 682 (1967).
30. *Id.* at 145-46, 228 A.2d at 689-90.
31. *Id.* at 141, 228 A.2d at 687.
33. See Ladd, *supra* note 4, at 168.
Fear of Extreme Danger of Prejudice

Each of the foregoing arguments has been answered in turn, but it should be realized that they do not constitute the main thesis advanced by the critics for an exclusionary rule. The underlying essence of the critics’ attack upon the use of prior felony convictions is that the orthodox rule operates to the overwhelming prejudice of the accused.34 They argue that even if the evidence be relevant, the orthodox rule constitutional, and the history of admissibility long, the evidence should be excluded because it has a natural tendency to prejudice the jury against the defendant.35

The jury, they contend, might conclude from the evidence that the defendant is a bad man and, therefore, must have a propensity to commit the crime charged.36 In addition, the jury might be inclined to convict the defendant on the theory that he probably escaped full punishment for his past crimes.37 It is claimed that limiting instructions in this context serve no useful purpose38 because the jury is unable to restrict their use of the convictions solely for the purpose of impeaching the defendant’s credibility as a witness.39 Because the jury would tend to use the convictions for unauthorized purposes, and because the accused is greatly prejudiced by the unauthorized use of convictions, the critics conclude that the best rule would be to exclude evidence of prior convictions entirely. The essence of these arguments is the asserted unfairness to the accused. Since it must necessarily be the product of a value judgment, however, this argument, on further reflection, is open to the counter-argument that the opposite result might be unfair to society. The principal issue then is the validity of the value judgment.

A vital element of a trial designed to determine truth is the testimonial reliability of the witness.40 The factfinder must know if the witness is credible in order to determine how much weight to give his testimony. From a legal standpoint it would be utterly unfair to the prosecution to allow a witness having a prior record of felony convictions to appear as a person of blameless life, because the jury would then be inclined to give his testimony much more weight than it was entitled to. “The object of a trial is not solely to surround an accused

34. See id.; Spector, supra note 4; Note, 19 Hastings L.J., supra note 11; Note, 37 U. Cin. L. Rev., supra note 22.
36. See Ladd, supra note 4, at 185.
37. 1 J. Wigmore, Evidence § 194, at 650 (3d ed. 1940).
38. See Note, 19 Hastings L.J., supra note 11, at 924.
39. Justice Jackson’s famous quote in Krulewitch v. United States, 336 U.S. 440 (1949), is frequently quoted by legal critics in support of their position: “The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” Id. at 453.
40. Ladd, supra note 4, at 167.
with legal safeguards but also to discover the truth. \(^4\) Since the credibility of a witness is vital in the search for truth, clearly, the state has a legitimate interest in the introduction of the witness' prior crimes for purposes of impeachment. This interest outweighs the possibility of prejudice to the accused. \(^5\)

It is conceded that the defendant may be slightly prejudiced by the introduction of his criminal record. The basis for the general rule, however, is not that the defendant suffers no prejudice, but that, despite the fact that he might suffer some prejudice, knowledge of his credibility is more important in the search for truth. \(^6\) It is suggested that, in reality, the possibility of prejudice is slight. If it were true, as the majority of legal writers argue, that the criminally accused witness is overwhelmed with prejudice by the mere introduction of his criminal record, the present rule would surely be different. The most recent scholarly study of the American jury system has concluded that the effect of evidence of prior crimes on the judge and jury is slight since "neither the one nor the other can be said to be distinctively gullible or skeptical." \(^7\)

Should the accused, nevertheless, still believe he will be prejudiced by his prior crimes, he usually has the option to prevent the jury from hearing evidence of them. If the defendant does not testify, the prosecutor will not be permitted to introduce evidence of his prior convictions. \(^8\) Another factor that serves to negate the prejudice thought to be suffered by the accused is his option to ask the judge for limiting instructions. It is probably true that such instructions are not completely effective because of the impossibility of compartmentalizing the human mind. \(^9\) It is suggested, however, that these instructions do have some effect in lessening the possible prejudice that the accused might suffer. Members of the jury have a duty to obey the judge's instructions, \(^10\) and even if they are not completely successful in limiting the use of prior felony convictions to the issue of credibility, the fact that they are likely to try lessens the possible prejudice to the accused.

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43. See id. at 577-78.
44. H. Kalven & H. Zeisel, The American Jury, 180 (1966). This study was cited with approval by the Supreme Court in Spencer v. Texas, 385 U.S. 563, 565 n.8 (1967).
45. However, in states authorizing one stage recidivist trials the prosecutor is allowed to introduce the defendant's criminal record whether or not he takes the witness stand. Spencer v. Texas, 385 U.S. 563 (1967). Furthermore, the prosecutor may introduce prior convictions to show plan, handiworks of the accused, motive, or absence of mistake. McCormick § 157 at 328-30.
46. See United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956).
47. E.g., California Jury Instructions—Criminal (CALJIC), Instruction No. 1 (1958).
The Luck Rule: A Possible Compromise?

While critics have naturally continued to argue that the entire general rule should be eliminated, they have nevertheless been willing to accede to a compromise, since, in their opinion, a compromise would be better than the present rule. At first, it was hoped that Rule 21 of the proposed Uniform Rules of Evidence would offer a workable and more just solution to the problem. This rule would prohibit the prosecutor from impeaching the accused's character on cross-examination unless the defendant specifically put his character in issue. Rule 21 would also limit the crimes usable by the prosecution against the accused to those involving dishonesty. It soon became apparent, however, that Rule 21 was unpopular with the various American legislatures. Consequently, recent critics of the general rule have expressed hope that American courts would adopt the rule of Luck v. United States, and thereby alleviate much of the asserted prejudice inherent in the present rule.

The federal courts have traditionally afforded prosecutors the undeniable right to impeach the character of the criminally accused witness by introducing his prior felony convictions. Recently, however, the Court of Appeals for the District of Columbia has promulgated the above mentioned "Luck rule," which encourages a trial judge in criminal trials to exercise discretion in determining whether to admit prior felony convictions for the purposes of impeachment. In Luck, the District of Columbia court stated that the prosecutor does not have the absolute right to introduce prior felony convictions while cross-examining the accused. Instead, the trial judge should exercise discretion in determining whether the prejudicial effect of the evidence "far outweighs" the probative value of the prior conviction on the issue of credibility. In making this determination, the judge should consider

49. Id.
50. It has been asserted that if Rule 21 were adopted, a smart defendant could easily keep his character from becoming an issue and that the jury is not likely to make any adverse inferences against the defendant for not placing his character in issue. Note, 19 Hastings L.J., supra note 11, at 926.
51. The California and New Jersey legislatures have both specifically rejected Rule 21. The California Law Revision Commission recommended passage, but the legislature rejected the recommendation. 7 Cal. Law Revision Comm'n Reports, Recommendations & Solutions 141-44 (1965); Cal. Evid. Code § 787.
52. See Spector, supra note 4, at 21; Note, 19 Hastings L.J., supra note 11, at 929.
55. Id. at 768.
56. Id.
the following factors:

[T]he nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant’s story than to know of a prior conviction.  

The courts that have adopted the Luck rule have not denied that prior felony convictions are relevant. They argue, instead, that it is unfair to the defendant to place him in the dilemma of being afraid to testify in his own behalf for fear of having the jury hear his past record, or not testifying and have the jury infer guilt from his silence. Another argument in favor of the Luck rule is that truth might be better served by allowing the defendant to testify because the factfinder is better able to determine the truth if both sides are fully heard.

In numerous decisions, courts accepting the Luck philosophy have nevertheless held that the trial judge did not abuse his discretion by admitting the defendant witness’ criminal record for the purposes of impeachment. By admitting the convictions for impeachment purposes, they have conceded that in these cases the probative value of the convictions was sufficiently important to merit their admission.

It seems, that the dilemma argument advanced by the courts favoring the Luck rule is inconsistent. If, in fact, it is unfair to place the defendant in the dilemma of testifying and having his record exposed, or not testifying and having the jury infer guilt from his silence, this unfairness is not precluded by the Luck rule. If the trial judge, after considering the factors advanced in Luck, decided to admit defendant’s prior felony convictions into evidence, the defendant’s dilemma still exists.

**Ninth Circuit Rejection of Luck**

The Ninth Circuit’s decision to specifically reject the Luck rule

57. Id. at 769.


60. Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965). The obvious counter-argument to this contention is that allowing a liar to pose as a truthful person does nothing to enhance truth.

61. E.g., United States v. Palumbo, 401 F.2d 270 (2nd Cir. 1968); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967); Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

62. The dilemma is, in fact, not unfair to the accused; it merely poses a question of trial strategy for the criminally accused defendant. No dilemma exists for the ordinary witness.
was based in part on the traditional argument for admitting prior crimes for the purposes of impeachment—that the evidence is probative on a material issue in the case, and hence should be admitted. The court also stressed the practical considerations that make the Luck rule unappealing. For example, how is the judge to determine whether the prejudicial effect of the impeachment will outweigh the probative value of the prior crimes evidence? This question is in fact unanswerable, despite the standard suggested by the District of Columbia Circuit, because it would be impossible to determine in advance whether or to what extent the jury would be prejudiced by the introduction of the evidence of a conviction. It appears that the Luck rule compels the trial judge to weigh "things which are, in fact, not susceptible of being weighed." The Ninth Circuit also indicated that the trouble and confusion that would be caused by the adoption of the Luck rule could not be justified in terms of benefit to the defendant. Even under the Luck doctrine, the defendant will have an extremely difficult time in proving in the particular case that it is "far" more important, in the fair administration of justice, to leave the jury in ignorance of the defendant's credibility than to require the defendant to elect at his own risk whether to take the witness stand in his defense.

In addition to the above arguments, an examination of the decisions tends to indicate that defendants in jurisdictions adhering to Luck are, perhaps, not receiving the anticipated benefits of the rule. The vast majority of these decisions have held that the trial judge did not abuse his discretion by admitting the prior felony convictions. It can only be concluded that these courts, in spite, of their adherence to Luck, recognize the probative value of prior felony convictions.

The New Jersey Supreme Court has also recognized the impracticality of the Luck rule. In State v. Hawthorne, the court held that the factors suggested by Luck would inject too many extraneous matters into the trial, and concluded that even after a consideration of these extraneous factors, a rational decision would be difficult. Not only do the factors suggested by Luck insert extraneous material into the

64. Id.
65. Id.
66. Id.
68. See Burg v. United States, 406 F.2d 235, 237 (9th Cir. 1969).
70. Id. at 146-47, 228 A.2d at 690.
71. See id. at 146-47, 228 A.2d at 690.
trial, but consideration of them consumes a great deal of the court's
time. In the case of Laughlin v. United States,72 for example, the issue
of whether to admit the criminal record of the defendant for impeachment
purposes consumed an entire day and a half of valuable calendar
time.73 The possibility that a judicial determination on whether to ad-
mit a prior felony conviction could consume a day and a-half of court
time, should, of itself, render the Luck rule completely unacceptable.

The Ninth Circuit has taken the better approach to the problems
posed by the appellant in Shorter v. United States.74 Its approach comes
closer to achieving the ultimate goal of any trial, the determination of
truth. The relevancy of prior convictions to the issue of credibility has
been firmly established by American courts; in fact, not even the Luck
courts have seriously doubted the relevancy of the convictions. Since
the determination of truth is vital to any case, the legitimate interest of
the state in introducing prior felony convictions often outweighs the pos-
sibility of prejudice to the accused.

Ernest H. Tuttle III*

F. Preventing Conflict of Interest Between Codefendants
Represented by Single Counsel

Whenever two or more defendants are prosecuted at the same
trial, a potential conflict of interest exists. If such a conflict coincides
with representation of codefendants by the same attorney, the sixth
amendment right to effective assistance of counsel of one or more of
the codefendants may be infringed. Although the Ninth Circuit has
had several opportunities to consider the problem in depth,1 it has
consistently failed to take advantage of these opportunities to formulate
definitive standards to aid the district courts in preventing conflicts of
interest. A system of standards is definitely needed to deal with this
very common situation, and in the interests of efficient judicial ad-
ministration and of the constitutional rights of criminal defendants,
the Ninth Circuit should provide such a system.

72. 385 F.2d 287 (D.C. Cir. 1967).
73. Id. at 293.
74. 412 F.2d 428 (9th Cir. 1969).
* Member, Second Year Class.

1. E.g., Juvera v. United States, 378 F.2d 433 (9th Cir. 1967); see notes 26-30
& accompanying text infra.
Conflict of Interest Defined

"Conflict of interest," in the context of this Note, refers to the situation in which the best defense of one defendant necessarily involves action detrimental to the defense of the other defendant. When co-defendants in such a situation are represented by the same counsel, the simultaneous presentation of the most effective defense for each defendant is impossible. One defendant, therefore, will suffer for the benefit of the other. For this reason, courts that have considered the problem have held that a conflict of interest between codefendants which hinders the ability of counsel to best defend one of his clients will be considered prejudicial to that client. Such has been the rule

2. In Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966), the court stated that "an obvious divergence of interests exists between a defendant who denies his guilt and a codefendant who not only confesses his own complicity but also accuses the other of participation in the crime." Id. at 73. In People v. Odom, 236 Cal. App. 2d 876, 46 Cal. Rptr. 453 (1965), the court set out the following guidelines: "Conflicts of interest . . . may arise when it would profit one defendant to attack the credibility of another; when counsel would be restricted in final summation because he might injure one defendant by arguments in favor of another; when one defendant has a record of prior felony convictions and the others do not; when the defenses of codefendants are factually inconsistent . . ." Id. at 878, 46 Cal. Rptr. at 554-55 (citations omitted). In State v. Karston, 247 Iowa 32, 72 N.W.2d 463 (1955), it was found that "[O]ften the question will arise as to which [codefendant] was the planner of the crime, which took the leading part, or in many other ways each may desire to attempt to throw the onus upon the other." Id. at 37, 72 N.W.2d at 466.

3. For example, see State v. Martineau, 257 Minn. 334, 101 N.W.2d 410 (1960), wherein the court stated: "It is apparent that relator has been deprived of adequate representation because defense counsel, representing both defendants in a single trial, could make no decision of consequence without harming one or the other of the defendants." Id. at 339, 101 N.W.2d at 413. In Commonwealth v. Small, 434 Pa. 497, 254 A.2d 509 (1969) (dissenting opinion in equally divided court), the dissenting judge stated that "[When codefendants have conflicts of interest] trial counsel is placed in the anomalous posture of being able to help one client only at the expense of the best interests of the other. So when this occurs, defense counsel is forced to seek a compromise solution which will perhaps at best result in convictions of a lesser charge for each of his clients, while not completely absolving either one." Id. at —, 254 A.2d at 511.

since Glasser v. United States,\textsuperscript{5} in which the Supreme Court established that the sixth amendment right to the assistance of counsel includes the right to protection against the limitation of the effectiveness of counsel arising from a conflict of interest.\textsuperscript{6} Today, the great majority of courts require merely a showing of conflict of interest on the record to reverse the conviction of any defendant adversely affected.\textsuperscript{7} In effect, any actual conflict of interest is assumed to preclude effective assistance of counsel,\textsuperscript{8} and under Glasser, any infringement of the right to such assistance is prejudicial.

5. 315 U.S. 60 (1942).

6. Id. at 70, 76. The right to "effective and substantial aid" of counsel was first mentioned by the Supreme Court in Powell v. Alabama, 287 U.S. 45, 53 (1932), where denial was held an infringement of due process of law. Since Glasser, "effective assistance of counsel" has been held to be a fundamental right, even though it is seldom the subject of specific discussion. \textit{E.g.}, Hawk v. Olsen, 326 U.S. 271, 274 (1945); Kaplan v. United States, 375 F.2d 895, 897 (9th Cir. 1967); Lugo v. United States, 350 F.2d 858, 859 (9th Cir. 1965); Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962); McGuire v. United States, 289 F.2d 405, 409 (9th Cir. 1961); Stickney v. Ellis, 286 F.2d 755, 757 (5th Cir.), \textit{cert. denied}, 365 U.S. 888 (1961); Lott v. United States, 218 F.2d 675, 681 (5th Cir. 1955), \textit{cert. denied}, 351 U.S. 953 (1956); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954); People v. Chacon, 69 Cal. 2d 765, 774, 447 P.2d 106, 111-12, 73 Cal. Rptr. 10, 15-16 (1968).

The courts that have discussed the meaning of "effective assistance of counsel" have most often referred to it in reference to a standard of minimal competence of counsel allowable before the right to counsel can be held to have been infringed, or due process of law denied. \textit{E.g.}, Sanchez v. United States, 398 F.2d 799, 800 (9th Cir. 1968); Dalrymple v. Wilson, 366 F.2d 183, 185 (9th Cir. 1966); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), \textit{cert. denied}, 368 U.S. 877 (1961). \textit{See generally Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434 (1965); Note, Right to Counsel: Effective or Competent Representation, 20 N.Y.U. Intra. L. Rev. 259 (1964).


The apparent contrary holding in United States v. Burkeen, 355 F.2d 241, 244 (6th Cir. 1966), where the court stated: "We read this language \textit{in Glasser v. United States, 315 U.S. at 761 as requiring a showing of prejudice against the party claiming deprivation of Sixth Amendment rights}," may be reconciled since the case implies that the "prejudice" is the conflict of interest, rather than how the conflict of interest infringes upon the effective assistance of counsel.

The traditional method of protecting codefendants with shared counsel from the consequences of conflict of interest has been inquiry by the trial judge before trial to determine whether a conflict exists and whether the defendants realize the dangers involved in joint representation. The guidelines established for such inquiry are found in the admonition of Johnson v. Zerbst, as applied in the Glasser decision:

"This protecting duty [of the court concerning the right to the assistance of counsel] imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver [of the assistance of counsel] by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." 

Although the Glasser opinion uses this quotation merely as support for its analogy between the right to the assistance of counsel dealt with in Johnson and the right to the effective assistance of counsel, courts since have used "intelligent and competent" as the level of understanding required for defendants to waive their right to separate counsel. Similarly, many trial judges have substantially followed the admonition that the question of the existence of a conflict must be clearly determined by the trial court.

The prevailing attitude of the appellate courts has been that the

9. See Glasser v. United States, 315 U.S. 60 (1942), where it is stated: "The trial court should protect the right of an accused to have the assistance of counsel." Id. at 71. "Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client . . . ." Id. at 76.

Although the Court in Glasser was concerned with the narrow situation of requiring a defendant's retained counsel to represent another accused, the holding implies that it is the trial court's responsibility to guard against the possibility of conflict whenever there is shared counsel, whether it be retained or appointed. See United States v. Dardi, 330 F.2d 316, 335 (2d Cir. 1964); Lebron v. United States, 229 F.2d 16, 20 (D.C. Cir. 1955), cert. denied, 351 U.S. 974 (1956); Kennedy v. Sanford, 166 F.2d 568, 569 (5th Cir.), cert. denied, 333 U.S. 864 (1948).

10. 304 U.S. 458 (1938).


12. See, e.g., Kaplan v. United States, 375 F.2d 895, 898 (9th Cir. 1967); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954) (by implication). Appellate courts have not discussed how this standard is to be used in their respective jurisdictions. Rather, trial courts have tended to apply this broad standard informally upon the authority of Glasser. Thus, there are few cases where fault is found with a trial court's determination of the competency of this type of waiver.

13. E.g., United States v. Burkeen, 355 F.2d 241, 244 (6th Cir. 1966); United States v. Dardi, 330 F.2d 316, 335 (2d Cir. 1964); Mohler v. United States, 312 F.2d 228, 230 (7th Cir. 1963).
discretion of the trial judge, if he inquires along the general guidelines set out in Glasser, will adequately protect the codefendants’ right to effective assistance of counsel.\(^\text{14}\) Yet, the effectiveness of this approach has been haphazard at best;\(^\text{15}\) frequently, the resulting inquiries, advisements and determinations do not even appear in the trial record.\(^\text{16}\) Moreover, the lack of any specific delineation of the duties of the trial judge has left unclear the proper extent of judicial inquiry.\(^\text{17}\) Adding to this confusion, some courts have placed importance upon whether the defendants objected to joint representation or brought any existing conflict of interest to the attention of the judge.\(^\text{18}\) Other courts

\(\text{14}\) This may safely be assumed from the complete absence before 1965 of any standards or instructions directed by appellate courts to trial judges to better insure their discretion would adequately protect the rights of codefendants. See Kennedy v. Sanford, 166 F.2d 568, 569 (5th Cir. 1948). Also, this statement is implied from the general holding that joint representation, per se, is not prejudicial since this necessarily means the decision whether codefendants will be jointly represented rests with the trial judge and will only be reversed when a conflict—i.e., an obvious error in discretion—appears to have been in effect during trial. See cases cited note 4 supra.


\(\text{17}\) Compare Kaplan v. United States, 375 F.2d 895, 897-98 (9th Cir. 1967), with United States v. Armone, 363 F.2d 385, 406 (2d Cir. 1966). Compare Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), with United States v. Paz-Sierra, 367 F.2d 930, 932-33 (2d Cir. 1966), and Campbell v. United States, 352 F.2d 359, 360-61 (D.C. Cir. 1965).

have emphasized that the ethics of the Bar will prompt attorneys not to represent more than one client at a time when a conflict of interest would hamper defense efforts. Nevertheless, the practice of leaving the extent of the pretrial inquiry to the discretion of the individual trial judge is still widespread.

In this atmosphere of confusion, the traditional system of preventing the infringement of the right to effective assistance of counsel caused by conflicting interests can easily fail to supply meaningful protection to the accused at the trial level. This necessarily means that too often the protection of this right must be seen to by the appellate courts. The attendant undesirable consequences are obvious. Unneeded expense and a crowding of appellate dockets come to mind at once. More important is that with merely a printed record to rely on, an appellate court will never be in a position to protect a codefendant to the degree that is possible before and during trial. If the trial court, through lack of diligence, does not discover a conflict between the interests of the defendants, the appellant will be saved from unjust conviction.

The holdings contra are to be preferred. The possible existence of a conflict of interest should be considered by the appellate court solely in regard to the danger presented to a fair trial. It is not reasonable to expect a defendant to object to joint representation on the grounds of a conflict of interest, or to require a defendant to bring a conflict to the attention of the judge. A layman cannot be assumed to know the legal significance of a conflict brought about by joint representation. It would also not be reasonable to preclude the defendant from asserting prejudice merely because his attorney failed to notice a conflict of interest, even if the attorney’s error was merely an oversight. See Wynn v. United States, 275 F.2d 648, 649 (D.C. Cir. 1960); United States v. Harris, 155 F. Supp. 17, 20 (S.D. Cal. 1957); People v. Chacon, 69 Cal. 2d 765, 774, 447 P.2d 106, 112, 73 Cal. Rptr. 10, 16 (1968), disapproving People v. Byrd, 228 Cal. App. 2d 646, 39 Cal. Rptr. 644 (1964); Lord v. District of Columbia, 235 A.2d 322, 323 (D.C. Mun. Ct. App. 1967); cf. Carnley v. Cochran, 369 U.S. 506, 513-17 (1962).


20. Federal courts of appeals maintaining the traditional view include: the Fifth Circuit—White v. United States, 396 F.2d 822, 824 (5th Cir. 1968); the Sixth Circuit—United States v. Burkeen, 355 F.2d 241, 244 (6th Cir. 1966); the Seventh Circuit—Curry v. Burke, 404 F.2d 65, 67 (7th Cir. 1968); the Ninth Circuit—Kruchten v. Eyman, 406 F.2d 304, 312-13 (9th Cir. 1969); and the Tenth Circuit—Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968).

21. Evidence of this appears in the great number of cases where obvious conflicts were not recognized by the trial court. See cases cited note 15 supra.


23. See cases cited note 15 supra.
only if the conflict can be gleaned by the appellate court from the record of the trial itself. For example, the appellate court may never be able to discern from the record what defenses or strategies may have been discarded or modified by counsel for the benefit of one defendant to the prejudice of the other.\(^{24}\) It is clear that conscientious protection of the right to the effective assistance of counsel should require that more precise standards be applied by the trial judge in order to ascertain more effectively the existence of a conflict of interest.

Although Congress recognized the problems inherent in conflict of interest cases when it passed the Criminal Justice Act of 1964, it failed to outline what specific actions a trial judge should take to determine if there are any conflicts of interest. Section 2(b) of the Act merely re-states the principle of the *Glasser* decision:

> The court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown.\(^{25}\)

As a consequence, the Act does not attack the main weakness of the traditional method of protecting codefendants from the harm of conflict of interest.

The Ninth Circuit

The Ninth Circuit exemplifies a jurisdiction which adheres to the traditional method of preventing conflict of interest. While this circuit consistently states that it believes a conflict of interest between codefendants with the same attorney will deprive the accused of the effective assistance of counsel,\(^{26}\) it has never suggested that a trial judge should do more to protect the codefendants than *Glasser* requires.\(^{27}\) The standard procedure applied by the Ninth Circuit is to reverse only when a conflict of interest is pointed out by the appellant or is seen in the court's own review of the record.\(^{28}\) In a recent case before the

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24. See Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968).
26. E.g., Peek v. United States, 321 F.2d 934 (9th Cir. 1963). “It is well recognized . . . that the existence of a conflict of interest on the part of counsel representing two different defendants deprives the accused of the effective assistance of counsel . . . .” Id. at 944.
27. The Ninth Circuit has not even attempted to clarify the procedure required by section 2(b) of the Criminal Justice Act. The Second Circuit, on the other hand, has stated “extreme care” should be taken before the appointment of joint counsel and even suggests separate counsel be appointed “where there is any possibility of a conflict of interest, except . . . where with full knowledge of the facts the defendants themselves request to be represented by the same counsel.” Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968).
28. Kaplan v. United States, 375 F.2d 895 (9th Cir. 1967); Lugo v. United States, 350 F.2d 858 (9th Cir. 1965); Peek v. United States, 321 F.2d 934 (9th Cir. 1963); Chavira Gonzales v. United States, 314 F.2d 750 (9th Cir. 1963). Note the
court, the appellant suggested that before trial the judge should discuss with the defendants the problems relating to the representation of several defendants by one counsel, and point out, in particular, the possible disadvantages that might arise should any conflicting interests develop. The Ninth Circuit, with little comment, rejected this argument as without merit.

The District of Columbia Circuit

Rather than leave the method of preventing conflict of interest to the discretion of the individual trial judge, with the questionable results already discussed, the District of Columbia Circuit has met the conflict of interest problem head-on. The Glasser decision and the Criminal Justice Act have been implemented with specific instructions and standards. Recent decisions in this circuit have attacked the most common factor depriving codefendants of the effective assistance of counsel—inadequate inquiry by the trial judge.

In 1965, in a case where joint counsel was retained, this circuit held that the trial court has a duty to ascertain whether each defendant is aware of the potential risk of joint representation and nevertheless has knowingly chosen to share counsel. It was suggested that an "affirmative determination" be made by the trial judge that the defendants intelligently chose to be represented by the same attorney and that the decision was not governed by poverty or by ignorance of the availability of assigned counsel. The court noted:

[Retention of single counsel] does not relieve the trial judge of his responsibilities to inform the defendants of their right to have [separate] counsel appointed, to inquire into the facts to determine the desirability of having separate counsel, and to appoint

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29. Juvera v. United States, 378 F.2d 433, 437 (9th Cir. 1967).
30. Id. The court rejects the argument "for the reasons recently noted by us in Lugo v. United States, [350 F.2d 858 (1965)]." 378 F.2d at 437 (citations omitted). The Lugo case, however, never mentioned this argument. The Ninth Circuit has thus ruled on the issue while it has avoided discussing it in depth. The recent case of Kruchten v. Eyman, 406 F.2d 304, 311 (9th Cir. 1969), perpetuates the erroneous statement in Juvera that the suggestion had been reasoned to be without merit in Lugo. Oddly enough, the stand that the trial judge need not discuss the possibilities and dangers of conflict of interest with the defendants appears to be reaching the status of policy in the Ninth Circuit, and yet has never been even superficially analyzed.
31. See cases cited note 15 supra & accompanying text.
33. Id.
[separate] counsel under appropriate circumstances. 34

In March of 1967, the District of Columbia Circuit established new standards concerning the placing on the record of the judge's in-
quiries, determinations and advisements. 35 It was held that when the record did not indicate whether the judge advised the defendants of the possible risks involved in joint representation or of their rights under the Criminal Justice Act to separate appointed counsel if their interests were in conflict, the burden was placed upon the Government on appeal to show beyond a reasonable doubt that the defendants were not prejudiced as a result of joint representation. 36

In its next case in the area of conflict of interest, 37 the District of Columbia Circuit made extensive changes in its procedure that solved the entire problem. Rather than continue the development of clearer and more encompassing standards for the trial court to apply, the court instituted a procedure requiring initial appointment of separate counsel in every case. 38 While the circuit has not stated the effect of noncompliance with this instruction, subsequent cases in the District of Columbia Municipal Court of Appeals have concluded that non-compliance is “error.” 39 On appeal, the Government will have to prove beyond a reasonable doubt that such error was not prejudicial. At present, this is the only circuit which requires separate counsel initially in all cases. 40

While the appointment of separate counsel would end any possibility of conflicts of interest resulting in infringement of the effectiveness or representation, it is extremely doubtful such a basic change would be seriously considered by the Ninth Circuit. Its longstanding dependence upon the general directions of the Glasser decision 41 indicates a strong desire to leave maximum discretion with the trial judge in each case.

34. Id. at 361 n.2.
36. Id. at 247.
38. Id. at 125-26.
40. This procedure has been suggested by the Second Circuit in Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968). See note 27 supra. Also suggesting separate counsel initially are Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968); People v. Odom, 236 Cal. App. 2d 876, 879-80, 46 Cal. Rptr. 453, 455 (1965); State v. Robinson, 271 Minn. 477, 481, 136 N.W.2d 401, 405, cert. denied, 382 U.S. 948 (1965); Maye v. Commonwealth, 386 S.W.2d 731, 733 (Ky. 1965).
41. See notes 26-30 supra & accompanying text.
A Needed Change in the Ninth Circuit

In view of the general confusion about conflict of interest\footnote{42} and of the innovative procedures developed by the District of Columbia Circuit,\footnote{43} it is clear some comprehensive standards should be adopted by the Ninth Circuit.\footnote{44} Conflicts between the interests of codefendants are so common\footnote{45} it can hardly be denied that close inquiry and discussion of possible dangers by the trial judge should be mandatory whenever codefendants are represented by joint counsel. Failure to maintain a standard procedure may allow conflicts to go unseen throughout trial.\footnote{46} This results in a difficult problem for the appellate court: Was there truly prejudice resulting from a hidden conflict, or is the appeal frivolous? It is suggested that the Ninth Circuit establish the following procedure or its equivalent to be used as a guide by district courts within its jurisdiction:

(1) The judge must discuss with the codefendants their rights under section 2(b) of the Criminal Justice Act. This discussion should appear on the record.\footnote{47}

(2) If joint counsel is retained rather than appointed, the judge must determine for the record by diligent inquiry:

(a) that all codefendants are aware of their right to retain separate counsel,\footnote{48}

(b) that all codefendants intelligently waive their right to retain separate counsel if they choose to proceed with retained joint counsel,

(c) in cases where a defendant does not desire to share his retained counsel, that his codefendant is aware of his right to have separate counsel appointed if he is financially unable to retain his own counsel,\footnote{49} and

(d) that after questioning defendants, defense counsel and the prosecution, no conflict of interest exists or is likely to arise.\footnote{50} If it is

\footnotesize{\textsuperscript{42}} See note 17 and cases cited in notes 18 & 19 supra.
\footnotesize{\textsuperscript{43}} See text accompanying notes 31-36 supra.
\footnotesize{\textsuperscript{44}} See text accompanying notes 21-24 supra.
\footnotesize{\textsuperscript{45}} See Maye v. Commonwealth, 386 S.W.2d 731, 733 (Ky. 1965); State v. Montgomery, 182 Neb. 737, 739, 157 N.W.2d 196, 198 (1968).
\footnotesize{\textsuperscript{46}} See cases cited note 15 supra.
\footnotesize{\textsuperscript{47}} See text accompanying notes 10-11 & 25 supra.
\footnotesize{\textsuperscript{48}} Glasser v. United States, 315 U.S. 60, 75 (1942). The Court states in part: "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected." Id. See also People v. Robinson, 42 Cal. 2d 741, 747-48, 269 P.2d 6, 10 (1954).
\footnotesize{\textsuperscript{49}} See Glasser v. United States, 315 U.S. 60 (1942); 18 U.S.C. § 3006A (b) (Supp. IV, 1969); Fed. R. Crim. P. 44.
\footnotesize{\textsuperscript{50}} Any information gained by the judge probing the defenses or admissions of the defendants, if self-incriminating, would probably not be admissible at trial. See \textit{Criminal Law and Procedure} March 1970, 987.
apparent a conflict, actual or potential, exists, the court must insure that the defendants realize the danger it presents to effective assistance of counsel. Furthermore, even though the defendants waive their rights under this procedure, the court, to prevent prejudice, may exercise, in its discretion, its power to sever defendants from a joint trial.

(3) If defendants are financially unable to retain counsel, the judge on the basis of his determinations in 2(a)-(d) above shall:

(a) appoint separate counsel if it is apparent some conflict of interest may exist, or
(b) appoint joint counsel if it is clear no conflict of interest exists.

(4) A previously unseen conflict that comes to light during the trial shall result in immediate declaration of a mistrial as to any codefendants affected.

Simmons v. United States, 390 U.S. 377 (1968), where the Court held that testimony by a defendant in support of a pre-trial motion to suppress evidence under the fourth amendment is not admissible against him at trial on the issue of guilt unless he makes no objection. The Court found it intolerable for a defendant to have to surrender one constitutional right in order to assert another. Id. at 393-94. This holding probably lays to rest the reasoning in United States v. Paz-Sierra, 367 F.2d 930, 932-33 (2d Cir. 1966), which the Second Circuit uses to attack the suggestion of the Campbell case that the trial judge must make an "affirmative determination" that the codefendants have chosen to be represented by the same counsel. See text accompanying notes 32-34 supra. A short but lucid discussion of the Simmons case in relation to a closely analogous matter appears in Hodge v. United States, 414 F.2d 1040, 1050 (9th Cir. 1969) (Ely, J., dissenting).

51. See Carnley v. Cochran, 369 U.S. 506, 515-16 (1962), where the Court states that presuming a waiver of fundamental rights from a silent record is impermissible.

52. Fed. R. CRIM. P. 14 states: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in any indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires . . . ."

Granting severance is at the discretion of the judge, and may only be attacked on appeal on the ground of abuse of discretion. United States v. Jackson, 409 F.2d 8, 9 (6th Cir. 1969); Flores v. United States, 379 F.2d 905, 908-09 (5th Cir. 1967); United States v. Vida, 370 F.2d 759, 765 (6th Cir. 1966); Barton v. United States, 263 F.2d 894, 897 (5th Cir. 1959).

While it is true that mere severance will not cure ineffective representation caused by one attorney remaining as counsel in the face of a conflict of interest, it is hard to believe that if such action was indeed warranted counsel would not grasp the situation. The ethics of the Bar would require an attorney to refuse to serve codefendants jointly when it was clear a conflict of interest would prevent him from adequately representing one or both of them. This is also the reason it is doubtful any greater action than severance would ever be needed. See cases cited note 19 supra.

53. See Lewin, A Tale of Two Districts, 14 WAYNE L. REV. 528, 551 (1968).

54. This suggestion contains the same safeguards for codefendants whether they have retained or appointed counsel. Although a court which appoints counsel appears
It is suggested that this procedure is sufficiently specific to insure that the rights of the accused are protected both before and during trial and yet flexible enough for the judge to tailor his specific actions to the situation. Since the use of joint counsel is not per se prejudicial,\(^5\) reversal on appeal should not result from the mere failure to follow the suggested procedure. It would be appropriate to consider such a failure to be error, but not necessarily prejudicial error.\(^6\) Where the procedure is not followed, a requirement similar to that established by the District of Columbia Circuit in *Lollar v. United States*\(^7\) should be imposed. The Government should bear the burden of proving beyond a reasonable doubt that the failure to follow the procedure did not lead to a prejudicial diminution in the effectiveness of any defendant's representation. Although this allocation of the burden of proof should rarely result in reversal where a defendant was not actually prejudiced, it is sufficiently rigorous to prompt the Government to insist that the suggested procedure be followed before trial.

This procedure draws strong support through analogies to the federal requirements for a valid waiver of counsel and a valid plea of guilty. The standards applicable to the procedures for a proper surrender of these rights are similar in that they both require the record to reflect the judge's determination that the defendant realizes the consequences of his action.

The basic standards a judge must meet to insure a valid waiver of counsel are stated in Rule 44 of the Federal Rules of Criminal Procedure\(^8\) and the Supreme Court decision in *Johnson v. Zerbst*.\(^9\) Rule...
44 requires the judge to inform the accused of his right to counsel and to assign counsel unless the accused waives this right. Johnson imposes upon the judge the responsibility of "determining whether there is an intelligent and competent waiver of this right by the accused," and suggests that the determination appear on the record. In Von Moltke v. Gillies, the Supreme Court expanded the requirements for a valid waiver by stating that the accused must have an apprehension of what is involved in an effective defense. At present, therefore, the federal courts require for a valid waiver that an accused must be aware of his right to counsel and of the problems inherent in defending himself.

The procedure suggested for the Ninth Circuit in cases of codefendants with single counsel is designed to determine whether a conflict of interest exists and to insure that the defendants have an apprehension of the possible dangers inherent in joint representation. In addition, the record must show that the defendants were, in fact, aware of their right to separate counsel yet, comprehending the dangers, knowingly waived their right. The similarity to the requirements for a valid waiver of counsel is clear. If the federal courts require such determinations to prevent an incompetent waiver of counsel, there would seem to be a need for similar determinations to prevent an inadvertent loss of effectiveness of counsel. This result should follow even though denial of the sixth amendment right to counsel requires reversal in any case, while denial of the right to separate counsel requires reversal only where prejudice is shown to have resulted.

The federal requirements for a valid guilty plea are set out in Rule 11 of the Federal Rules of Criminal Procedure, recently construed by the Supreme Court in McCarthy v. United States. Rule 11 requires that a judge not accept a plea of guilty without first addressing the

counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner ... unless he waives such appointment." Fed. R. Crim. P. 44.

59. 304 U.S. 458 (1948); see text accompanying notes 10-11 supra.
60. 304 U.S. at 464-65.
61. Id. at 465.
63. Id. at 724.
65. "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. ... The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Fed. R. Crim. P. 11.
defendant personally to determine whether the plea is made voluntarily and with an understanding of the nature of the charge and the consequences of the plea. Prior to the *McCarthy* decision, these requirements were loosely construed by the various federal courts. In that case, however, the Supreme Court required strict adherence to Rule 11 in order to fulfill its purposes of assisting the judge “in making the constitutionally required determination that a defendant’s guilty plea is truly voluntary,” and insuring a competent record of the factors relevant to the determination.

The analogy that can be drawn between the procedures for determining the competence of guilty pleas and the suggested procedure for determining the existence of a conflict of interest, like the first analogy, derives its strength from the requirement in both procedures of a determination for the record by the trial judge that the defendant possessed a certain state of awareness of his position and the prospects to be expected from following a contemplated course of action. Both procedures, if closely followed, not only would protect rights of the accused and create a record of the proceedings, but also would “discourage . . . the numerous and often frivolous post-conviction attacks on the constitutional validity” of the judge’s action. While both procedures are sufficiently encompassing to insure justice in all situations, they are not overly restrictive. Both leave the method and specific content of the individual inquiry to the judge. They merely require an end result that may safely be assumed to be valid in all cases. Inasmuch as the standards for determining whether or not a guilty plea is competent are well-settled in federal procedure, no reason can be seen why comparable standards should not be applied to the similar determination of whether a conflict of interest exists and whether proceeding with joint counsel is done with a knowledge of the risks.

This second analogy can be taken one step further. Under Rule 11, if a trial judge is not satisfied that there is a factual basis for a guilty plea, he will not accept it. Likewise, if the inquiries of the trial judge reveal a conflict of interest between the codefendants, the judge should not have to proceed with trial in the face of a conflict, but should have the option either to appoint separate counsel or to sever the trials.

67. *Id.* at 468-69. An exception was the Ninth Circuit in *Heiden v. United States*, 353 F.2d 53 (9th Cir. 1965).
68. 394 U.S. at 465.
71. See note 65 *supra*. 
even if the codefendants for some reason should desire otherwise. In both cases, the judge's discretion is used to prevent anything less than a fair proceeding for the accused.

It is obvious from recent decisions that the Ninth Circuit still considers it more appropriate for a trial judge to use his own discretion on whether a waiver of rights is made "intelligently," than for the Ninth Circuit to establish a set of standards for the trial court to apply. The procedure employed by the Ninth Circuit to protect codefendants from the effects of conflicts of interest, however, has been shown to be confusing and often lacking in significant protection for defendants at the trial level. This Note has suggested a different procedure. On the basis of its similarity to the procedures developed by the Supreme Court in Rules 11 and 44 of the Federal Rules of Criminal Procedure to handle the analogous problems of guilty pleas and waiver of counsel, this procedure, while still leaving a great deal to the discretion of the trial judge, should avoid the defects in the present approach to the conflict of interest problem. A concern for the rights of the accused in the first instance, and the more efficient administration of justice in the second,

72. See note 52 supra. The Supreme Court in Schaffer v. United States, 362 U.S. 511 (1960), said: "We do emphasize . . . that, in [a joint trial], the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Id. at 516. The Seventh Circuit in United States v. Gougis, 374 F.2d 758 (7th Cir. 1967), said: "The wording of [Rule 14] would indicate a continuing duty during the trial on the part of the court to avoid prejudice as a result of joinder." Id. at 762.

While most cases dealing with Rule 14 are concerned with prejudice arising from out-of-court statements of one codefendant incriminating another defendant, Rule 14 could be properly invoked in the situation where prejudice arises from a conflict of interest between defendants with shared counsel.

73. Kruchten v. Eyman, 406 F.2d 304 (9th Cir. 1969). See note 30 supra. For an analogous case which illustrates the Ninth Circuit's attitude toward waiver of counsel, see Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969). In the original opinion in this case, No. 20,517 (9th Cir., Mar. 5, 1968), quoted in Hodge v. United States, 414 F.2d 1040, 1053 (9th Cir. 1969) (dissenting opinion), a three-judge panel appeared to establish stricter standards for the Ninth Circuit in the area of waiver of counsel when it stated that the trial judge must insure that an accused understands the consequences of his waiver, something more than was required by the Von Moltke decision. See 414 F.2d at 1053; see text accompanying note 62 supra. When the case was reheard en banc, however, the court rejected the holding of the first opinion, and reaffirmed the Ninth Circuit's previous position that the proper standard was whether the defendant's assertion of his right of self-representation was "intelligent," as this word was used in the Johnson decision. The court stated: "The question [before the trial judge] was simply whether the defendant understood the charges against him and was fully aware of the fact that he would be on his own in a complex area where experience and professional training are greatly to be desired." 414 F.2d at 1043. See generally 21 HASTINGS L.J. 1002 (1970); 20 HASTINGS L.J. 965 (1969). The approach to protecting the defendant from an improper waiver in the Hodge decision is quite similar to the court's traditional approach to protecting against conflicts of interest between codefendants represented by the same attorney.
should move the Ninth Circuit at least to consider this more structured procedure for preventing prejudice arising from conflicting interests.

Clark A. Miller*

G. Waiver of Trial Objections—Curry v. Wilson,
405 F.2d 110 (9th Cir. 1968).

On October 6, 1959, George Albert Curry killed a police officer during a shooting spree. When he was arrested immediately after the shooting, it was obvious that he was extremely intoxicated. While Curry was in this condition, the police taperecorded his confession. At his trial for first degree murder in 1960, the prosecution introduced the tape recording into evidence without objection from Curry’s attorney, who, on the contrary, stated, “I want them [the jury] to hear it.” Defense counsel then argued that the tapes showed Curry was so befuddled and confused from intoxication that he could not have had the “intent necessary to sustain a conviction of first degree or second degree murder or of voluntary manslaughter.” Curry was thereafter convicted of second degree murder. On appeal to the California Court of Appeal, counsel claimed that Curry had been denied due process because he was convicted on the basis of an involuntary confession. In the course of the appellate court’s ruling on the merits of this constitutional claim, in which the emphasis of the court was on the issue of coercion, the court additionally stated that intoxication affected only the weight the confession might be accorded by the jury and not its admissibility. Curry later petitioned for a writ of habeas corpus to the federal district court, which held that even if Curry had had a valid constitutional objection to the introduction of his confession at the trial, it was now precluded from consideration because his attorney had deliberately bypassed California’s procedural rule for raising such an objection. The district court’s holding was based on Fay v. Noia, wherein the Supreme Court had stated:

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1. Curry v. Wilson, 405 F.2d 110, 112 (9th Cir. 1968).
2. Id.
4. Id. at 670, 13 Cal. Rptr. at 600.
6. Curry v. Wilson, 405 F.2d 110, 111 (9th Cir. 1968). A state appellate court will not rule upon the admissibility of evidence which was received in the trial court without objection. Perry v. McLaughlin, 212 Cal. 1, 6, 297 P. 554, 557 (1931); In re Chapman’s Estate, 198 Cal. 145, 148, 243 P. 675, 676 (1926); Western Pipe &
The federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.\footnote{8}

Curry did not appeal this decision, but later petitioned the same federal district court on identical grounds.\footnote{9} The court refused to consider the claim because of its prior denial of the writ. Cases decided after Curry's trial and appeal, however, had made it increasingly clear that extreme intoxication would have been a sufficient basis for exclusion of the taped confession at the trial.\footnote{10} In consequence thereof, Curry appealed the district court's denial to the Ninth Circuit claiming that his trial counsel "may well not have been aware, in 1960, of the relevance of Curry's intoxication to the voluntariness of his statements."\footnote{11} It is the Ninth Circuit's affirmance of the district court's decision that comprises the topic of discussion for the remainder of this Note.\footnote{12}

Deliberate Bypass v. Waiver: A Distinction Without A Difference

The Ninth Circuit in \textit{Curry} observed that the deliberate bypass rule can, in an appropriate case, be a proper ground for denial of a writ of habeas corpus.\footnote{13} It pointed out, however, that in this case the California Court of Appeal, by ruling on the merits of the constitutional claim,\footnote{14} had failed to enforce California's procedural rule which requires that for any issue of the admissibility of evidence to be considered on appeal, an objection thereto must be raised at the trial.\footnote{15} Because the California court had failed to enforce its own procedural rule, the Ninth Circuit concluded that the deliberate bypass rule was inapplicable to Curry's petition for habeas corpus. It cited as authority for this position \textit{Warden, Maryland Penitentiary v. Hayden},\footnote{10} wherein

\begin{enumerate}
\item 372 U.S. 391 (1963).
\item Id. at 438.
\item Curry v. Wilson, 269 F. Supp. 9 (N.D. Cal. 1967).
\item \textit{See}, \textit{e.g.}, Townsend v. Sain, 372 U.S. 293 (1963), where the court held it was a deprivation of constitutional rights to admit a confession adduced by police questioning while petitioner's will was overborne by a drug having the properties of a truth serum. In \textit{Reck v. Pate}, 367 U.S. 433 (1961), the court held that a confession given while petitioner was sick and faint from lack of food and persistent interrogation was unconstitutionally coerced.
\item Opening Brief for Appellant at 25, Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968).
\item Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968).
\item Id. at 111.
\item \textit{See} text accompanying note 4 \textit{supra}.
\item \textit{See} note 6 \textit{supra}.
\item 387 U.S. 294 (1967).
\end{enumerate}
the Supreme Court stated:

The deliberate by-pass rule is applicable only "to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies"... 17

In Hayden, when the Court used the term "forfeited," it was describing a defendant who, in fact, was unable to obtain a state appellate ruling on his claim. Consequently, any defendant who was able to obtain a ruling on the merits, notwithstanding the procedural impropriety, would not have forfeited his state court remedies.

Even though it had disposed of the deliberate bypass rule, the Ninth Circuit, nevertheless, was still unwilling to rule on the voluntariness of Curry's confession. The court was certain that the trial attorney would not have excluded the confession even if he could have done so because the tapes, as circumstantial evidence of Curry's mental state during the shooting, were the only real defense that Curry had. 18 Counsel, by relying heavily on that defense, had defeated at least the first degree murder charge. The court therefore stated:

What counsel did was not a mere by-passing of a contemporaneous objection rule. It was an affirmative decision to waive the objections that he might have raised. That waiver is binding on Curry. 19

This holding reaches the anomalous result that although the deliberate bypass rule did not preclude the consideration of the question of the voluntariness of the confession, the theory of waiver did. The clear implication of this argument is that waiver and bypass are two different things and, as such, may be independent grounds for a denial of relief.

This distinction between waiver and bypass, however, is inconsistent with the view expressed by the Supreme Court in Fay v. Noia, 20 the case establishing the deliberate bypass rule:

We... hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in Johnson v. Zerbst...—"an intentional relinquishment or abandonment of a known right or privilege"—furnishes the

17. Id. at 297 n.3, quoting Fay v. Noia, 372 U.S. 391, 438 (1963) (emphasis supplied by the Court).
18. Curry v. Wilson, 405 F.2d 110, 113 (9th Cir. 1968).
19. Id. at 112.
controlling standard.  

This juxtaposition of the terms “waiver” and “bypass” indicates that the Supreme Court regarded bypass and waiver as identical concepts. Moreover, the federal courts in decisions subsequent to *Fay v. Noia* apparently have made no distinction between the two terms in cases similar to *Curry*. In such cases, where the supposed waiver has been manifested only by a failure to raise the constitutional claim at the proper time, the federal courts have used the terms interchangeably.  

It is apparent from the Supreme Court opinion in *Fay v. Noia* that the Ninth Circuit has introduced a distinction between the concepts of waiver and deliberate bypass where none exists. Furthermore, the Ninth Circuit in *Curry* was unable to cite any persuasive authority to justify the distinction. The two cases cited by the court as ostensibly supporting its holding were clearly and most persuasively distinguished in the dissenting opinion of Judge Browning.  

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21. *Id.* at 438-39. The Court continued: “If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant’s default. *Id.* at 439.  

22. In Pope v. Swenson, 395 F.2d 321 (8th Cir. 1968), trial counsel failed to file a pretrial motion to suppress certain evidence and also failed to object to its admission at the trial. The facts clearly showed that counsel intentionally relinquished the right to exclude the tainted evidence because he felt he could make good use of it on the behalf of his client. This relinquishment ultimately was held binding on petitioner under the circumstances. Yet, in referring to counsel’s deliberate failure to act and petitioner’s acquiescence in this strategy the court stated: “[T]he question [is] whether there was a deliberate by-pass by petitioner of his right to have illegally seized evidence excluded from consideration at his trial. Unless the record is clear as to such waiver, there must also be an evidentiary hearing on this issue.” *Id.* at 323 (emphasis added). Clearly the Eighth Circuit in *Pope* was not distinguishing the two terms. Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1967), is a similar example where an arguably involuntary statement was admitted into evidence without objection by trial counsel. The facts showed that trial counsel’s strategy was to have the statements admitted and to relinquish the right to exclude them. The court stated: “We think this a case of ‘deliberate by-passing’ by counsel of the contemporaneous objection rule as a part of trial strategy’ which bars subsequent assertion of the federal ground. . . .”  

23. *Id.* at 323 (emphasis added). The clear indication here is that the Fourth Circuit also makes no distinction between bypass and waiver.  

24. *Id.* at 438-39. The Court continued: “If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant’s default. *Id.* at 439.
It seems upon a close reading of Curry that an impelling motive for the court's attempt to distinguish between waiver and deliberate bypass was that Curry's defense counsel had based what the court considered his most effective argument on the evidence later objected to. The irrelevance of this factor, however, can be seen from an examination of the very case upon which the Ninth Circuit relied in finding the deliberate bypass rule inapplicable: Warden, Maryland Penitentiary v. Hayden.\textsuperscript{25} In that case, the Supreme Court held that although the evidence clearly showed a deliberate bypass by defendant's trial counsel, the deliberate bypass rule was inapplicable for substantially the same reasons as in Curry. At no time did the Court suggest that conduct by trial counsel, which proved that there was, in fact, a deliberate bypass, could prove something more, and thereby provide the basis for finding a waiver of the right to object to inadmissible evidence even though the bypass rule was inapplicable on technical procedural grounds.\textsuperscript{26}

This problem is not likely to occur frequently.\textsuperscript{27} It arises only where the state appellate court fails to enforce its own procedural rule.

the Ninth Circuit feels that the bypass rule is actually two rules in one. First is a "mere bypass" rule which might be characterized as a procedural rule very similar to the adequate state ground doctrine. That is, where there is a state procedure open to the defendant, the Ninth Circuit would apparently deny habeas corpus, even in the absence of any intentional bypass. See Nelson v. California, 346 F.2d 73, 82 (9th Cir. 1965); Kuhl v. United-States, 370 F.2d 20, 26 (9th Cir. 1966). Second is the "deliberate bypass" rule which the Ninth Circuit seems to agree is a rule of waiver affecting the underlying constitutional right. See Nelson v. California, 346 F.2d 73, 82 (9th Cir. 1965). The Ninth Circuit evidently regards Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967), as affecting only the applicability of the so-called "mere bypass" rule. See text accompanying note 19 supra. However, the Supreme Court in Fay v. Noia did not lay down a "mere bypass" rule but rather a deliberate bypass rule. See Fay v. Noia, 372 U.S. 391, 438-39 (1963). A mere bypass is no grounds for a denial of relief on federal habeas corpus at all. As is aptly pointed out by Judge Browning, "Deliberate bypass included bypass for strategic or tactical reasons... and thus includes the kind of affirmative decision which the majority attempts to distinguish from a 'mere' bypass." 405 F.2d at 116 n.4. Furthermore, the Supreme Court in Fay v. Noia went to great lengths to explain that the adequate state ground doctrine is not applicable to federal habeas corpus. The discussion in Fay v. Noia leaves no doubt that the Ninth Circuit's "mere bypass" rule would be disapproved for the same reasons as was the adequate state ground doctrine. See Fay v. Noia, 372 U.S. 391, 398-99, 426-34 (1963).

\begin{itemize}
  \item 25. 387 U.S. 294 (1967).
  \item 26. See id. at 297 n.3.
  \item 27. The only cases which have involved the possibility of waiver upon a holding that the bypass rule is inapplicable are Hayden and Curry. Nelson v. California, 346 F.2d 73 (9th Cir. 1965), discussed in note 24 supra, really did not involve this issue because the Ninth Circuit held that the by-pass rule was applicable, even though the state court had not enforced its procedural rules. Nelson, however, was apparently overruled on this point by Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 297 n.3 (1967).
\end{itemize}
Nevertheless, since cases do arise which require holding the bypass rule inapplicable on this ground, there must be a clear understanding of the import of the Ninth Circuit's approach to Curry. If bypass and waiver are the same, justice is not served by enforcing the latter when the former is inapplicable. If there is a valid distinction between the two terms—though logic seems to belie any such possibility—then justice demands that it be defined and clarified, especially since the United States Supreme Court has delineated no such distinction. The Ninth Circuit in Curry, however, makes no satisfactory attempt to give substance to the purported distinction it makes.

Waiver of An Unknown Right

Even assuming arguendo that the Ninth Circuit was justified in making a distinction between deliberate bypass and waiver, it seems that the refusal of the court to hear the issue of the voluntariness of Curry's confession was nevertheless in error.

At the time of his trial in 1960, the California rule was that mere intoxication did not deprive a confession of its voluntariness; it went only to the weight the confession should be given by the jury.28 Although Curry's counsel might have deduced from the existing federal cases that extreme intoxication would, in the future, be held a sufficient basis for a claim of involuntariness,29 the major development of the intoxication issue in the federal courts came after Curry's trial.30 The culmination was the Ninth Circuit case of Gladden v. Unsworth,31 where it was held that a

conviction, predicated in part on testimony describing incriminating oral statements made by [the accused] while he was in a state of gross intoxication, carries with it such a potential for invasion of constitutional rights that it [could] not stand unless vindicated by further inquiry.32

Curry argued in the Ninth Circuit proceeding that in 1960 it had not been clear that his intoxication rendered the confession involuntary. Since a knowing waiver necessarily depends upon knowledge, trial counsel could not have waived the involuntariness claim. The court replied with the argument that trial counsel obviously wanted the jury to hear the tapes, and that

[t]he trial record makes counsel's strategy so clear that to hold a

30. See note 10 supra.
31. 396 F.2d 373 (9th Cir. 1968).
32. Id. at 381.
hearing on the question of what his strategy was would be an exercise in futility.\textsuperscript{33}

Since "waiver ordinarily is the intentional relinquishment or abandonment of a known right or privilege,"\textsuperscript{34} the Ninth Circuit's holding is open to only two possible interpretations: (1) that counsel did in fact know, or should have known, the confession was excludable, or (2) that it is irrelevant whether counsel knew the confession was excludable because his trial strategy shows he would not have objected even if he had known.

The recent case of \textit{Smith v. Yeager}\textsuperscript{35} has ruled out the possibility of a presumption that counsel did in fact know the confession was excludable. That case involved a 1961 petition for federal habeas corpus by a state prisoner. Petitioner's attorney told the federal district court that he thought his client was entitled to an evidentiary hearing on his constitutional claims, but stated he did not think it was necessary.\textsuperscript{38} Later, when the case of \textit{Townsend v. Sain}\textsuperscript{37} expanded the right of federal habeas corpus applicants to evidentiary hearings, the petitioner reapplied. On certiorari, the Supreme Court held:

> Whatever counsel's reasons for this obscure gesture of \textit{noblesse oblige}, we cannot now examine the state of his mind, or presume that he intentionally relinquished a known right or privilege . . . when the right or privilege was of doubtful existence at the time of the supposed waiver.\textsuperscript{38}

Likewise, it can be shown that courts are not free to say that counsel should have known of the right which he presumably waived. Even though a subsequent case changes the law only infinitesimally, counsel is not held to "Delphic anticipation"\textsuperscript{39} of its effect on his cases. The Fifth Circuit case of \textit{Doby v. Beto}\textsuperscript{40} is a good example. At the time of Doby's trial, there was no case in point, but guidelines existed by which defense counsel could have deduced that the search warrant in his case would have been held invalidly issued because it was based upon a constitutionally insufficient affidavit. Counsel, however, failed to object to the warrant. The affidavit in \textit{Doby} recited:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the

\begin{enumerate}
  \item \textit{405 F.2d} at 113 n.2.
  \item \textit{372 U.S.} 293 (1963).
  \item \textit{371 F.2d} 111 (5th Cir. 1967).
\end{enumerate}
provisions of the law.\textsuperscript{41}

The law at the time of the trial had been expressed in \textit{Ker v. California},\textsuperscript{42} in which the Supreme Court had stated:

\textit{[The Fourth] Amendment’s proscriptions are enforced against the States through the Fourteenth Amendment. [T]he standard of reasonableness [with respect to searches and seizures] is the same under the Fourth and Fourteenth Amendments . . . .} \textsuperscript{43}

The Court in \textit{Giordenello v. United States},\textsuperscript{44} when considering a similar affidavit, stated:

\textit{[T]he inferences from the facts which lead to the complaint “[must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime” . . . . The commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant’s mere conclusion . . . .} \textsuperscript{45}

It is certainly arguable that from these cases Doby’s counsel could have deduced that the affidavit was constitutionally insufficient since it contained no indication of personal knowledge. And subsequent to \textit{Doby}, in \textit{Aguilar v. Texas},\textsuperscript{46} the Supreme Court held an affidavit identical to the one in \textit{Doby} insufficient for precisely the same reason.\textsuperscript{47} Notwithstanding all these indicia, the Fifth Circuit stated in \textit{Doby}: “Appellant and his counsel . . . cannot be charged with failure to anticipate the \textit{Aguilar} decision.”\textsuperscript{48}

The basis for the \textit{Doby} decision was the Supreme Court decision of \textit{O’Connor v. Ohio},\textsuperscript{49} in which it was held that counsel’s failure to object to a practice which Ohio had long allowed could not strip a petitioner of his right to attack that practice following its invalidation by the Supreme Court.\textsuperscript{50} \textit{O’Connor} coupled with \textit{Doby} might very well indicate that a holding similar to that in \textit{Doby} is necessary in cases like \textit{Curry} where subsequent decisions of the courts either retroactively or prospectively have the effect of creating new rights or broadening those already established. These decisions make it clear, therefore, that although counsel might have been \textit{able} to anticipate the subsequent decision and on the basis of it make an argument beforehand on behalf

\begin{itemize}
  \item \textsuperscript{41} Id. at 111 n.1.
  \item \textsuperscript{42} 374 U.S. 23 (1963).
  \item \textsuperscript{43} Id. at 33.
  \item \textsuperscript{44} 357 U.S. 480 (1958).
  \item \textsuperscript{45} Id. at 486.
  \item \textsuperscript{46} 378 U.S. 108 (1964).
  \item \textsuperscript{47} Id. at 114.
  \item \textsuperscript{48} Doby v. Beto, 371 F.2d 111, 113 (5th Cir. 1967).
  \item \textsuperscript{49} 385 U.S. 92 (1966).
  \item \textsuperscript{50} Id. at 93.
\end{itemize}
of his client, the courts will not insist that he do so.\(^5\)

Attention is now focused on the final possible interpretation of the court's holding in *Curry*—the rationalization that somehow counsel's trial strategy transcends the fact that the right was unknown. This statement has an appealing sound, but if true, it asserts that the court feels competent to predict what counsel would have done had the right been known.

The Fourth Circuit in *Ledbetter v. Warden, Maryland Penitentiary*,\(^5\) was also faced with this problem, but rejected the Ninth Circuit's rationalization. Like *Curry*, *Ledbetter* involved not only the failure of trial counsel to object to the admission of a confession, but additionally his election to use the confession as the basis for a defense argument. The court ruled that at the time of the trial there was no basis upon which a trial attorney could reasonably have objected.\(^6\) Counsel's strategy may have been quite clear because of the active use he made of the confession, yet the court stated:

> [The waiver principle delineated in *Fay v. Noia* ... is inapplicable where, as here, there existed no known ground on which the trial attorney could have based an objection at trial. In the context of this case there was ... no "strategic choice" to be made, and none can be supplied by the fact that when the confession was admitted in evidence—as it inevitably would have been in 1960—the lawyer made an argument based on it.]\(^6\)

Keeping in mind the standard set down in *Johnson v. Zerbst*,\(^5\) that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights,"\(^5\) clearly, the reasoning of the *Ledbetter* decision is sounder and more persuasive than the Ninth Circuit's. It is only natural that a trial attorney will try to make the best of any evidence against his client. The fact that he does so does not mean that he would not object to the evidence if he thought it were excludable. The courts, therefore, should not be allowed to base their decisions on their speculation of what defense strategy would have been had the facts been different.

Thus, the decision in *Curry* is subject to attack on two grounds. After finding that Curry's constitutional claim could not be barred by

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\(^5\) It is important here to distinguish the question of waiver from the question whether a case is applied retroactively. In *Ledbetter v. Warden, Md. Penitentiary*, 368 F.2d 490 (4th Cir. 1966), the court discussed these two questions independently, recognizing that where rights are delineated in decisions subsequent to the petitioner's trial there must be a finding of both nonwaiver and retroactive application of the decision. The discussion here concerns only the question of waiver.

\(^52\) 368 F.2d 490 (4th Cir. 1966).

\(^53\) *Id.* at 494.

\(^54\) *Id.*

\(^55\) 304 U.S. 458 (1938).

\(^56\) *Id.* at 464.
the bypass rule, it was only by an unjustifiable exercise of semantic hair-splitting that the Ninth Circuit nevertheless barred the claim by labelling the same conduct a waiver. In any event, since it is doubtful whether the confession could have been excluded at Curry's trial in 1960, it is apparent that counsel could not have waived an unknown right. Because of the uncertainty created by Curry, the Ninth Circuit should reconsider whether it believes any real substantive distinction between waiver and bypass to exist. Furthermore, since it is clear in the abstract that unknown rights cannot be waived, the Ninth Circuit is encouraged to clarify its position on waiver based on counsel’s trial strategy. If defense counsel’s strategy can somehow transcend the dictates of Johnson v. Zerbst, then clearly some delineation is in order.

Robert R. Millsap, Jr.*

H. Waiver of Right to Counsel—Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969).

In recent years, the sixth amendment right to counsel has been vastly expanded. In light of the judicial recognition of the crucial importance of this right, any attempt to waive counsel should be viewed with great suspicion. In Hodge v. United States, however, the Ninth Circuit took a step in the opposite direction by limiting the extent to which the validity of a waiver of counsel must be rigorously investigated.

In the Hodge case, the defendant was charged with and convicted of transportation of a stolen motor vehicle in foreign commerce. At the time of the trial, Hodge’s court-appointed counsel made a motion to be relieved, explaining to the court that because of a “difference of opinion,” Hodge had decided to represent himself. While addressing the Court, Hodge stated that “because of a witness or two that’s supposed to appear against me ... [I] feel that I have a better chance ... than an attorney that don’t know the circumstances of the witnesses.” The court acceded to Hodge’s request to represent himself, but warned him that he would be at a “distinct disadvantage” in acting

57. 304 U.S. 458 (1938).
* Member, Second Year Class.

4. 414 F.2d at 1042 n.3.
5. Id.
as his own attorney. The court-appointed counsel was relieved from all further responsibility other than remaining in attendance during the trial to aid in procedural matters. Hodge was convicted.

In 1968, a panel of the Ninth Circuit reversed the appellant's conviction and pronounced what appeared to be new and more stringent requirements for a valid waiver of counsel. The court concluded that the appellant did not "intelligently," and "with eyes open," waive his constitutional right to assistance of counsel. The court further indicated that in certain circumstances, prior consultation between an attorney and the defendant may be necessary before a finding of a valid waiver of counsel can be made.

In 1969, the case was reheard by the Ninth Circuit and the court, sitting en banc, rejected the stringent requirements for a valid waiver of counsel established in the earlier Hodge decision, and held that a waiver of counsel was intelligently made and therefore valid, if the accused was "sufficiently informed of the consequences of his choice." The test was met, according to the majority, if the defendant understood the charges against him and was fully aware of the fact that he would be on his own in a complex area where experience and professional training are greatly to be desired.

Using this test, the court found that Hodge's waiver was valid and affirmed his conviction.

In deciding the issue of waiver before trial, the court relied upon the vague requirement established by the 1938 Supreme Court decision in Johnson v. Zerbst that a waiver of counsel to be valid must be "intelligent and competent." Whether there is a proper waiver," said the Supreme Court, "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon

6. Id.
7. Id.
8. Id. at 1041.
12. "Moreover, insofar as it may be practicable to do so, by the appointment of counsel for a limited purpose or otherwise, the court must satisfy itself that the accused, in order to appreciate the risk, possesses reasonable understanding of the bare elements of the offense and choices of pleas and defenses which might be available." Id. at 8 (emphasis added).
14. Id. at 1042.
15. Id. at 1043.
17. Id. at 465.
the record."\textsuperscript{18} This vague "intelligent and competent" guideline, however, left many questions unanswered. For eight years, it was unclear whether there existed any specific duty on the part of the trial judge to inform the defendant of his right to counsel in order to find a valid waiver of that right.\textsuperscript{19} In 1946, Rule 44 of the Federal Rules of Criminal Procedure settled the question by requiring that the trial court advise the defendant of his right to counsel and assign counsel if the defendant desired but could not afford one.\textsuperscript{20}

In 1948, the Supreme Court decided \textit{Von Moltke v. Gillies},\textsuperscript{21} a case in which the defendant had waived his right to counsel before entering a guilty plea. The Court, recognizing the strong presumption against waiver of the constitutional right to counsel, outlined a more stringent standard for testing the validity of a waiver than the "intelligent and competent" standard previously established in \textit{Johnson}:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.\textsuperscript{22}

The \textit{Von Moltke} guidelines have been given varying interpretations. Although some courts appear to have adopted them as the proper procedure for testing the validity of all waivers of counsel,\textsuperscript{23} the Ninth Circuit, on

\begin{enumerate}
  \item Id.
  \item The 1946 version read as follows: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Fed. R. Crim. P. 44, 327 U.S. 866 (1945). As amended July 1, 1966, Rule 44 now reads: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceeding from his initial appearance before the commissioner . . . unless he waives such appointment."
  \item 332 U.S. 708 (1948).
  \item Id. at 724.
  \item \textit{See} United States \textit{ex rel.} Ackerman v. Russell, 388 F.2d 21 (3d Cir. 1968); Cranford v. Rodriguez, 373 F.2d 22 (10th Cir. 1967); Shawan v. Cox, 350 F.2d 909 (10th Cir. 1965). It should be noted, however, that although the language in these cases seems to indicate that the \textit{Von Moltke} guidelines should be used even if the defendant does not intend to plead guilty, all the cases did involve guilty pleas.
\end{enumerate}
rehearing, refused to adhere to the clear directions embodied in *Von Moltke* and ruled that the *Von Moltke* requirements were applicable only where a waiver of counsel was made contemporaneously with a plea of guilty.24 According to the majority, "[s]uch a colloquy has no place in a case where guilt is denied and an offer of counsel is rejected."25 The court further indicated that to apply the *Von Moltke* requirements in a case where the waiver is followed by an innocent plea "would seem to subject the defendant to a questionable pretrial probing of his defenses."26

The Ninth Circuit's discussion is open to criticism on several grounds. First, the court reasoned that the *Von Moltke* requirements are applicable only to those waivers made contemporaneously with guilty pleas; yet, the *Von Moltke* directions do not make an explicit distinction between waivers of counsel generally and waivers of counsel made contemporaneously with guilty pleas. In any event, the Ninth Circuit's narrow construction of *Von Moltke* would seem to conflict with the rationale of the Supreme Court's decision. As one writer has pointed out:

> [A]t a criminal trial the validity of a waiver of counsel is a preliminary issue which must be determined at the time of an alleged waiver on the basis of the evidence existing at that time. Thus, whether the defendant pleads guilty or presents a valid defense is of no significance to the decision as to the validity of the waiver.27

Second, as the dissent points out, even though a strict adherence to the *Von Moltke* directions may result in the exposure of possible defenses and other matters about which the accused might properly remain silent during trial, this information would be totally excluded from the ultimate determination of guilt or innocence.28

The analogous problem of the acceptance of guilty pleas and its treatment by the Federal Rules of Criminal Procedure provides another strong argument in favor of the view that use of the *Von Moltke* guidelines should not be limited to cases where the defendant intends to plead guilty. Rule 11 states in part that

> [t]he court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant per-

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24. 414 F.2d at 1044.
25. Id.
26. Id.
28. 414 F.2d at 1050. *See* Simmons v. United States, 390 U.S. 377 (1968) where the Supreme Court held that in order to protect his fifth amendment rights, certain pretrial testimony given by defendant in support of a motion to suppress evidence on fourth amendment grounds could not thereafter be admitted against him at trial on the issue of guilt unless he made no objection. Objectionable information which might be elicited from a defendant while protecting his sixth amendment rights would likewise most probably be excluded.
sonally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.  

In a recent decision, *McCarthy v. United States*, the Supreme Court ruled that failure to follow Rule 11 automatically entitles the defendant to a new trial, regardless of whether the record shows prejudice:

> [P]rejudice inheres in a failure to comply with Rule 11, for non-compliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding . . . not only will insure that every accused is afforded those procedural safeguards, but will also help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.

By requiring strict compliance with Rule 11, the Supreme Court sought to safeguard the rights of defendants and to reduce the number of appeals encouraged by inadequate trial records. These objectives would be equally advanced by requiring that the *Von Moltke* guidelines be used in all cases where the defendant attempts to waive his right to counsel. Such a standardized procedure, taking only a few moments of the court's time, would discourage frivolous appeals and insure that only those waivers made with "eyes wide open" would be accepted. Moreover, it seems that "the crucial rights of one insisting upon his innocence" should be given protections equal to those afforded "the rights of one who seeks to confess a crime by a plea of guilty."

It has been suggested that perhaps even "greater safeguards should be placed on a waiver of counsel than on a guilty plea since a guilty plea has the additional safeguard that the court is not bound to accept it." It is unfortunate that the Ninth Circuit, sitting en banc, was not persuaded by the logic of its former holding. The *Von Moltke* guidelines are equally appropriate where the defendant intends to waive counsel and plead innocent. By following them and patterning its procedure after that required by Rule 11, the trial court could, by appropriate inquiries, simply and clearly establish in the record that the defendant's waiver of counsel was really an intelligent and understanding one.

Hodge's second contention was that even assuming he had waived his right to counsel at trial, he was nevertheless entitled to be repre-

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31. *Id.* at 471-72.
32. Hodge *v.* United States, 414 F.2d 1040, 1054 n.5 (9th Cir. 1969) (dissenting opinion).
sented by counsel at the time of sentencing. The majority opinion rather abruptly dismissed this contention, stating that "[i]n the absence of any indication to the contrary . . . the court was entitled to assume that the waiver was still in effect." The court further reasoned that since advisory counsel was present and available if the defendant wanted advice, the appellant's "failure to utilize him, with full knowledge of his right to do so, amounted to waiver."

The dissent argued that such an assumption is generally unsupported and clearly erroneous when dealing with the facts involved in the Hodge case.

It was not until two years after Hodge was sentenced that the Supreme Court first held that the sixth amendment conferred the right to counsel at the time of sentencing. In *Mempa v. Rhay* the Court stated that "the necessity for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting the defendant to present his case as to sentence is apparent." This holding was later given retroactive effect by the decision in *McConnell v. Rhay*.

An examination of the record reveals that not only did the court fail to advise Hodge of his right to counsel during the sentencing proceedings, but it also failed to explain the importance of utilizing counsel at that crucial stage of the proceedings. Because Hodge neither knew of his right to counsel during sentencing, nor of the importance of that right, it is difficult to see how the majority could assume that there was an intelligent waiver of that right. "To engage in such an assumption is to nullify the strong opposing presumption which the Supreme Court has consistently directed [the courts] to apply when considering an issue involving the claimed waiver of significant constitutional rights."

The right to be represented by counsel at every stage of the proceedings is a fundamental constitutional right. In waiving that right, an accused seriously prejudices his chances of presenting a competent defense. In order to safeguard an accused's right to counsel and reduce the number of frivolous appeals encouraged by inadequate trial records, the trial judge should be required to make every attempt to establish in the record that the accused was sufficiently knowledgeable

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34. 414 F.2d at 1044.
35. *Id.* (emphasis added).
36. *Id.*
37. *Id.* at 1045-47.
39. *Id.* at 135.
40. 393 U.S. 2 (1968).
41. 414 F.2d at 1046 (dissenting opinion).
42. *Id.*
of his fundamental right and of the gravity of the risk that he would encounter by its waiver. By applying the Von Moltke guidelines in a manner similar to the simple procedure of Rule 11, a trial judge can extend to the criminal defendant the opportunity to enjoy the full protection of the sixth amendment and at the same time be sure that the validity of any waiver by the defendant of that protection will be clearly established in the record. The Ninth Circuit's failure to require this approach is at odds, not only with current constitutional doctrine, but also with the efficient administration of criminal justice.\textsuperscript{43}

\textit{Kenneth N. Schlossberg}\textsuperscript{*}

\section*{I. Denial of Probation—Whitfield v. United States, 401 F.2d 480 (9th Cir. 1968).}

In \textit{Whitfield v. United States}\textsuperscript{1} the defendant was convicted on two counts of federal income tax evasion. She was sentenced to one year's imprisonment on each count, the sentences to run concurrently. Her request for probation was denied and she appealed from the judgment of conviction, contending that the government's evidence was insufficient to support her conviction and that she was not advised of her right to counsel when she was interviewed by an agent of the Internal Revenue Service. The Ninth Circuit rejected both of these allegations and affirmed the conviction.\textsuperscript{2} It is important to note that Mrs. Whitfield did not raise the issue of denial of probation in her first appeal to the Ninth Circuit. However, on the day the Ninth Circuit's mandate issued, she filed in the district court a motion, purportedly under Rule 35 of the Federal Rules of Criminal Procedure, to correct or reduce the sentence. The district court denied the motion and defendant appealed.\textsuperscript{3} After stating that "there are expressions in past decisions of this court indicating that an appeal will not lie from the denial of probation"\textsuperscript{4} and that the denial of probation issue should have been raised on the defendant's first appeal, the Ninth Circuit "elect[ed] to disregard these possible barriers to a determination of the probation issue on

\textsuperscript{43} Although the dissent is clearly the preferred position, the Ninth Circuit's decision in \textit{Hodge} unfortunately will not be heard because a petition for writ of certiorari was never filed.

\textsuperscript{*} Member, Second Year Class.

\begin{itemize}
\item[1.] 401 F.2d 480 (9th Cir. 1968), \textit{cert. denied}, 393 U.S. 1026 (1969).
\item[2.] Whitfield v. United States, 383 F.2d 142 (9th Cir. 1967).
\item[3.] Whitfield v. United States, 401 F.2d 480, 481 (9th Cir. 1968).
\item[4.] \textit{Id. at 482}.
\end{itemize}
the merits" and again affirmed the decision of the district court.

In this second appeal to the Ninth Circuit, Mrs. Whitfield attacked her denial of probation alleging that it was unlawful because her sentence was imposed by the court under the erroneous and illegal assumption of law that the defendant who pleads not guilty is not as entitled to probation as one who pleads guilty. Further, she contended "that probation was denied not only because she had pleaded not guilty, but also because, after conviction, she would not admit guilt, nor waive her right to appeal from the judgment of conviction." The Ninth Circuit held that two of these three allegations were without merit: "[P]robation was [not] denied [to] Mrs. Whitfield because she pleaded not guilty or because she did not waive her right to appeal the judgment of conviction." However, after stating that appellate review of denial of probation is strictly limited to determining whether or not there was an abuse of discretion by the district judge, the court went on to say:

At least where an admission of guilt cannot jeopardize a prospective appeal . . . it is not an abuse of discretion for a district judge to deny probation to a person who, after conviction, will not admit wrongdoing.

The district judge, at the hearing for the defendant's Rule 35 motion, stated that a person who refused to admit his guilt after conviction could not be rehabilitated. In the judge's mind, apparently, rehabilitation was the only purpose served by probation; hence, he denied defendant's motion. The Ninth Circuit expressly approved the reasoning of the district judge, without examining either its logic or its possible implications.

With this cursory summary of the Whitfield case in mind, this Note will examine the following salient characteristics and implications of the case: first, the scope and purpose of the Federal Probation Act; second, the standards to be applied in determining whether to grant or deny the defendant probation; and third, the extent of federal appellate review of decisions of the district courts in denying probation.

5. Id.
6. Whitfield v. United States, 401 F.2d 480, 481 (9th Cir. 1968).
7. Id.
8. Id. at 482.
9. Id.
10. Id. at 483 (emphasis added).
11. "[W]here she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything [the probation officer] can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation." Id. at 482 n.3.
12. Id. at 482-83.
The Scope and Purposes of the Federal Probation Act

The Federal Probation Act was enacted in 1925[^13] in response to a Supreme Court decision[^14] denying the federal district courts the power to grant probation to, or suspend the sentences of, those convicted of crimes in the federal courts. The Court in that decision held the past practice of many of the district courts of granting probation and suspending the execution or imposition of sentences unconstitutional. If a system of probation was to be established in the federal courts it was a matter requiring congressional action, not judicial fiat.

The Probation Act authorizes the federal trial court to “suspend the imposition or execution of sentence and place the defendant on probation” when the court is “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby.”[^5] The Act further provides that “such terms and conditions as the court deems best” may be imposed by the trial judge in granting probation and that he “may revoke or modify any condition of probation, or may change the period of probation.”[^16] From the above, it is apparent that the scope of the Act is very broad; the power of the court to grant or deny probation is restricted only by the single legislative mandate that probation cannot be granted where the offense involved is “punishable by death or life imprisonment.”[^17]

The widespread discretionary powers granted to the federal trial courts by the Probation Act reflect the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[^18]

[^16]: Id.
[^17]: Id. “[T]he Congress has given the courts virtually a blank check in carrying out the sentencing function . . . .” Bennett, Individualizing the Sentencing Function, 27 F.R.D. 359 (1961).
[^18]: Williams v. New York, 337 U.S. 241, 247-48 (1949) (citations omitted). As stated in Whitfield v. United States, 401 F.2d 480 (9th Cir. 1968): “Probation is intended to be a means of restoring to society offenders who are good social risks; to afford the unfortunate another opportunity by clemency . . . . It is designed to aid the rehabilitation of a ‘penitent offender’; to take advantage of an opportunity for ‘reformation’ which active service of the suspended sentence might make less probable.” Id. at 483 (citations omitted).
The purposes of probation are many. The one most often enunciated in legal literature is rehabilitation or reformation of the offender.\textsuperscript{19} This, apparently, was the only objective considered by the district judge in denying probation in \textit{Whitfield}.\textsuperscript{20} In addition to rehabilitation, the following important objectives are also served by probation: (1) It fosters a penal system which tailors the punishment to fit the individual instead of the crime,\textsuperscript{21} and humanizes the law\textsuperscript{22} by taking into account the individual's personality and personal characteristics, including his recidivist tendencies if any. As stated by Mr. Justice Frankfurter:

The device of probation grew out of a realization that to make the punishment fit the criminal requires wisdom seldom available immediately after conviction. Imposition of sentence at that time is much too often an obligation to exercise caprice, and to make convicted persons serve such a sentence is apt to make law a collaborator in new anti-social consequences. . . . Thus the probation system is in effect a reliance on the future to reveal treatment appropriate to the probationer.\textsuperscript{23}

(2) The indelible taint of being an ex-convict, and the hardships appurtenant thereto, does not stain the reputation of one who has been granted probation.\textsuperscript{24} This no doubt gives the probationer a psychological advantage over the person committed to prison in his efforts to conform to the laws and mores of the society. Correspondingly, the probationer is not exposed to and unfavorably influenced by the "hardened criminals" confined in our nation's prisons. (3) The probation system provides a substantial financial savings to the taxpayer for the cost of providing for a criminal offender in a correctional institution is many times greater than the cost of administering a program of probation for him.\textsuperscript{25} Also, while on probation the offender will be gainfully em-
ployed and able to support a family that might otherwise be the recipients of government welfare.26

Criteria Applied in Determining Whether to Grant or Deny Probation

The only judicial guideline set down by the Federal Probation Act is that the court “may suspend the imposition or execution of sentence and place the defendant on probation” when it is “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby . . . .”27 The probation rule, Rule 32(c) of the Federal Rules of Criminal Procedure, provides no guidelines whatever.28 The remainder of the Probation Act deals with the mechanics of administering the probation system.29 The only guideline in the area of probation is Federal Rule of Criminal Procedure 32(c) which provides:

(1) The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant pleaded guilty or has been found guilty.

(2) The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

But even Rule 32(c) does not establish any definite standards for the court’s use in determining whether or not it will grant probation; it merely provides information for the court’s consideration, “unless the court otherwise directs.” It grants the court the use of the probation service as a factfinder and lists some factors that Congress thought should be given consideration by the court.

The Model Penal Code30 suggests a more comprehensive set of

26. The most common condition imposed by the judge in granting probation is to “provide for the probationer’s family.” COHEN, supra note 22, at 31.
28. FED. R. CRIM. P. 32(e) reads in full as follows: “After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.”
30. MODEL PENAL CODE § 7.01 (Proposed Official Draft 1962) provides: “(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
   (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
criteria to be considered by the trial court in probation proceedings, listing 11 "grounds [that] shall be accorded weight in favor of withholding sentence of imprisonment."\(^2\) In light of the difficulty involved in trying to apply a single standard to every case—indeed, the difficulty involved in even trying to formulate such a standard—such criteria are extremely useful.

As summarized by District Judge William B. Herlands, the defendant should be granted probation "[i]f, in the court's informed judgment, there is a reasonable probability that the defendant will remain at supervised liberty without violating the laws and that the defendant's continued presence in the community is not incompatible with public policy and public safety . . . ."\(^3\) Judge Herlands, after stating that "[t]he desiderata of a sentence are public protection, deterrence, and correction of the offender" and that "[t]ribution . . . has generally ceased to be

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

"(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:
(a) the defendant's criminal conduct neither caused nor threatened serious harm;
(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
(c) the defendant acted under a strong provocation;
(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
(e) the victim of the defendant's criminal conduct induced or facilitated its commission;
(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
(g) the defendant has no history of prior delinquency or criminal activity or has a law-abiding life for a substantial period of time before the commission of the present crime;
(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;
(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
(j) the defendant is particularly likely to respond affirmatively to probationary treatment;
(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

“(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the Court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide.”


a major function of the sentencing process," further says that

 probation, like any other form of sentence, expresses a judgment in which the court has reconciled and balanced the following three interests in light of the individual circumstances of the case:

 (1) the paramount interest of protecting the public against criminal acts by the defendant and others who may be potential violators of the same laws;

 (2) the interest of the public and the defendant in his rehabilitation in order that he may become or be restored as an asset to himself, his family and the community; and

 (3) the objective of achieving other ends of justice, such as, vindicating and enforcing the public policy underlying the particular statute that was violated.

 Obviously, the sentencing judge must make a qualitative analysis of all of the factors in each case in order to impose a sentence tailored to fit that case.84

 It is clear, then, that any standards applied in the determination of the probation question are judicially self-imposed. More specifically, because sentencing by a trial judge is seldom questioned by an appellate court85 these standards will be determined by the trial judge himself. And as probation proceedings in the federal district courts are not reported and seldom reviewed by the federal appellate courts, there is little information available on the standards actually used. The cases say only that the granting of probation is left to the discretion of the trial judge and, absent an abuse of that discretion, his decision will not be questioned.87

 In Whitfield, the court repeated this doctrine:

 Probation cannot be demanded as of right; it is a privilege which may be granted or withheld within the discretion of the district court. . . . It follows that if any appellate review of the denial of probation is permissible, the sole issue is whether there was an abuse of discretion.88

 And, as was recently stated by another Ninth Circuit case,89 the "only

33. Id. at 492; see Williams v. New York, 337 U.S. 241, 248 (1948).
34. Herlands, supra note 31, at 493.
36. In speaking of judicial discretion generally, an early California case said: "The discretion intended, however, is not a capricious or arbitrary discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422 (1866).
37. See, e.g., United States v. Birnbaum, 402 F.2d 24, 30 (2d Cir. 1968), cert. denied, 394 U.S. 914 (1969); Trueblood Longknife v. United States, 381 F.2d 17, 19 (9th Cir. 1967); United States v. Wiley, 278 F.2d 500, 502 (7th Cir. 1960); Dodd v United States, 213 F.2d 854, 855 (10th Cir. 1954).
38. 401 F.2d at 482.
39. Trueblood Longknife v. United States, 381 F.2d 17 (9th Cir. 1967).
limit" on the district judge's exercise of discretion "is that he must be satisfied that his action will subserve the ends of justice and the best interests of both the public and the defendant."\(^40\)

In summary, probation is a question left solely to the discretion of the trial judge and his decision will not be questioned unless the defendant clearly proves that the judge abused his discretion in denying probation.

What Constitutes Abuse of Discretion by the Trial Judge

Quite commonly an abuse of discretion is defined by the cases as an arbitrary or capricious decision made by the trial judge.\(^41\) Thus, if the judge denies the defendant a hearing on the merits of his application for probation\(^42\) because, for example, of a policy of the court never to grant probation to one who has pleaded not guilty and has gone to trial,\(^43\) there obviously has been an abuse of discretion.\(^44\) This was the holding of the Seventh Circuit in Wiley v. United States,\(^45\) relied upon by the defendant in Whitfield.\(^46\)

In Wiley, the court held that the district judge's "standing policy [not to] consider an application for probation by a defendant who pleads not guilty and stands trial"\(^47\) was in violation of the plain mean-


\(^{41}\) E.g., Jordan v. United States, 370 F.2d 126, 129 (10th Cir. 1966); see Burns v. United States, 287 U.S. 216, 223 (1932) ("whim or caprice"); Whitfield v. United States, 401 F.2d 480, 482 (9th Cir. 1968) ("arbitrary reason wholly unrelated to the statutory standard"); United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960) ("arbitrarily"); Tincher v. United States, 11 F.2d 18, 21 (4th Cir. 1926) ("gross or palpable abuse").


\(^{44}\) See cases cited in notes 42 & 43 supra.

\(^{45}\) 267 F.2d 453 (7th Cir. 1959).

\(^{46}\) Whitfield v. United States, 401 F.2d 480 (9th Cir. 1968).

\(^{47}\) Wiley v. United States, 267 F.2d 453, 455 (7th Cir. 1959). "Only the most naïve can believe that a significant number of these guilty pleas result from pangs of conscience, indicate the first step toward repentance, or show a willingness to assume responsibility for one's conduct. Guilty pleas, by and large, are the result of bargaining sessions where the plea is offered in return for charging and sentencing concessions. Indeed, many more criminal cases are 'tried'—and 'convictions' and
ing of the Federal Probation Act. The case was remanded to the dis-
trict court “for consideration of the defendant’s application of proba-
tion,”48 the Seventh Circuit saying that “the [Probation] Act extends to
all defendants (with certain exceptions not here relevant) against
whom a judgment of conviction is entered.”49

In Whitfield, the Ninth Circuit followed Wiley in at least one re-
spect by disclaiming the notion that the defendant was denied probation
because she pleaded not guilty. The court also held that the defendant’s
refusal to waive her right to appeal her conviction also played no part
in the district court’s decision not to grant her application for proba-
tion.50 But, as noted above, the Ninth Circuit went on to say that
“it is not an abuse of discretion for a district judge to deny probation to
a person who, after conviction, will not admit wrongdoing.”51 This
standard seems to be equally as arbitrary and capricious as one that
never allows probation to a defendant who chooses to plead not guilty
and exercise his constitutional right to trial by jury. Since it does
not weigh the merits and does not consider any of the important criteria
suggested above,52 such a summary disposition of the application for
probation is surely an abuse of discretion that completely overlooks the
very purposes of a probation statute. Such a uniform standard applied
to all cases alike completely ignores one of probation’s most widely ac-
claimed attributes, the individualization of sentences. Application of
this standard also overlooks the possibility that the defendant might in
fact be innocent of the crime for which he was convicted.

A probation hearing is properly brought after the judgment of
conviction is rendered. If, at this time, the defendant was forced to
“admit guilt” or summarily be denied probation, what effect would this
decision have on the defendant’s right to appeal from the judgment of
conviction? Although this was not the case in Whitfield53 and the
Ninth Circuit did not extend its “admit guilt or no probation” decision
this far, the detrimental effect of such an admission to a prospective
appeal is obvious.

If, as was said by the Supreme Court, “[p]robation is concerned
with rehabilitation, not with the determination of guilt . . . . [and the]

48. 267 F.2d at 456.
49. Id. (emphasis added). “Within the area defined by Congress, a district
judge is required to act upon applications for probation made by persons convicted
of crime (except those punishable by death or life imprisonment). However, he has
no authority to either expand or reduce that area.” Id.
50. See text accompanying note 8 supra.
51. 401 F.2d at 483; see text accompany notes 9-11 supra.
52. See notes 30-31 supra.
53. See text accompanying note 10 supra.
considerations it involves are entirely apart from any reexamination of the merits of the litigation, why should the court allow a post-conviction admission of guilt to be the determinative factor in denying probation? In probation proceedings guilt has already been established and a subsequent admission thereof serves no useful purpose. The reasoning behind the “admit guilt or no probation” standard seems to be based upon the ecclesiastical notion that confession is good for the soul and cleanses the conscience, that unless the defendant is penitent he cannot be saved, i.e., he cannot be rehabilitated. Furthermore, if in probation proceedings “[i]t is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender,” how do we reconcile this laudable statement with a policy that summarily denies probation to anyone who will not admit guilt after conviction? Clearly such a policy is repugnant to the modern objective of penology to individualize each case and not impose an identical sentence on all who are convicted of the same crime.

In 1960, the Circuit Conference of the Ninth Judicial Circuit adopted a set of Policies and Standards for Sentencing. It is stated therein that

[s]entences which are merely mathematically identical for violations of the same statute are improper, unfair and undesirable. Indeed, mathematically identical sentences may be themselves disparate. Each defendant's case must be considered upon its highly individualized basis and a sentence imposed which is tailored to fit that case. Sentencing judges must in all instances consider all of the factors in each case, giving appropriate weight to each factor, and impose a sentence which is just to the defendant and just to the community.

Equal justice in sentencing is achieved by an experienced, objective consideration by the sentencing judge of all of the individual factors in each case weighed in relation to the sentences imposed by other experienced and objective judges in cases which are similar in respect to the nature of the violation of law and the background of the individual defendant.

These statements reflect an apparent commitment to one of the basic tenets of our Constitution, equal justice under the law. In Whitfield, a “mathematically identical” sentencing procedure was followed that certainly was anything but an “objective consideration by the sentencing judge of all of the individual factors.” Thus, the Whitfield standard seems to be an obvious denial of equal justice under the law. While superficially at least it might appear that the imposition of identical

57. Id. at 390-91.
sentences for all identical crimes fosters equal justice under the law, such an outlook fails to recognize the extenuating or aggravating circumstances accompanying most, if not all, criminal convictions. And, if justice is to be served at all, such circumstances must be considered in probation and sentencing proceedings. Equal justice, then, is not merely matching the punishment with the crime; it is the equalization of punishment to match the crime and the circumstances surrounding its commission.

Furthermore, the Probation Act applies to all defendants convicted of offenses not punishable by death or life imprisonment. While it is true that no defendant has a right to be granted probation, all defendants so limited have a right to have the judge make a fair determination on the merits in the exercise of his discretionary power. Again, as stated in the Ninth Circuit's Policies and Standards for Sentencing:

A proper sentence is a composite of many factors, including the nature of the offense, the circumstances—extenuating or aggravating—of the offense, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of a return of the offender to a normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the current community need, if any, for such a deterrent in respect to the particular type of offense involved.

That probation should be left to the discretion of the trial judge cannot be denied. He has the benefit both of his familiarity with the case and of the presentence report prepared by the probation service. With this information at his fingertips he is able to make a just determination, in light of all of the circumstances surrounding a specific defendant, whether or not to suspend the execution or imposition of the sentence and place the defendant on probation. Such a determination, however, should be on the merits of the application. It should be directed at promoting the basic principles sought to be achieved by the Probation Act. Any predetermined standard that automatically denies a defendant probation given a specific fact seems not only to be an invidious denial of the defendant's right to a hearing on the merits of his

58. See note 49 & accompanying text supra.
59. Whitfield v. United States, 401 F.2d 480, 482 (9th Cir. 1968).
60. 27 F.R.D. 293 (1961).
61. Id. at 390.
62. "[T]he grace and the discretion [of the trial judge] mean that the possibility [of probation] shall be considered and that the consideration shall be made in accord with the philosophy and purpose of the statute." S. Rubin, The Law of Criminal Correction § 10, at 190 (1963).
application but is repugnant to the basic principles of the Probation Act as well. Such a standard should not be sanctioned by the federal appellate courts; rather, it should be struck down as an abuse of discretion. What decision could be more arbitrary and superficial than one based upon the trial judge's policy never to grant probation if the defendant has refused to admit guilt after his conviction?

In conclusion, the *Whitfield* standard, or any other standard that summarily denies the defendant a fair hearing on the merits of his application for probation, is a denial of equal protection under the law, violates the basic purposes of the Probation Act and reflects an adherence by the trial court to the now unpopular theory of penology, retribution, which overlooks the modern concepts of individualization of punishment and rehabilitation of the offender. Such a standard should not go unquestioned by appellate review under the cloak of so nebulous a concept as judicial discretion. Rather, the appellate courts should hasten to strike down any standard such as this under the auspices of their supervisory powers of review, as an abuse of judicial discretion, or as a denial of a substantive right to the defendant—the denial of equal protection of the law.

Floyd H. Shebley*

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63. "Where an individual is eligible for probation, the trial court must hear and determine his application for probation on the merits... Failure to do so constitutes a denial of a substantial right." People v. Hollis, 176 Cal. App. 2d 92, 98-99, 1 Cal. Rptr. 293, 297 (1959) (citations omitted).

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