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Immunity Through Confession?

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Mr. Spanogle discusses several recent United States Supreme Court decisions which establish new tests for the admission of criminal confessions into evidence. He examines the present and probable future effects of the new tests and concludes the new tests will not themselves abolish interrogation, and will serve to reduce the abuses of that investigative tool. He also concludes that the tests stated in two cases are substantially different, and that if these differenoes are not noticed, the new rules are capable of being extended so as not only to abolish interrogation but also to provide opportunities for a defendant to achieve immunity from prosecution through a well-timed confession.

> And if I had to give advice to anyone, I would say: "If you are caught, immediately say to the arresting officer: you got me, I done it, I'll tell you all" knowing full well that no conviction would stand as a result. . . .[1]

Does this advice from Judge Leonard P. Moore sound fanciful? Could it ever profit a criminal to confess his guilt? The advisability of such action may not be as improbable as it sounds. In order to determine whether it is fanciful or not it is necessary to review several cases decided by the United States Supreme Court, which this article will undertake to do. To further examine some of the problems, it will also review the following hypothetical case.

On January 1, 1965, Jane Doe was found murdered in her home. The murderer left no clues except the fatal bullet. Attention of the police centered upon Jane's husband John, for he had a motive for murder and no alibi. They kept him under surveillance for two days and broadcast appeals for anyone who had been in the neighborhood to contact them. After two days, they decided to question John Doe. They knocked at his door and announced that they wished to question him about his wife's death, and he immediately confessed all. He also told them that the murder weapon had been thrown into the river at a particular place, and described to them a passerby who could identify him as having been in the neighborhood of his home at the time of the murder. Doe revealed all of this information on the advice of his attorney, who was not present at the time of the confession.

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1. Moore, *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 382, 430-31 (1964).

The police then arrested Doe and took him before a magistrate. They were already dragging the river, a routine step in any investigation, and later found the gun, which proved to be the murder weapon and still had Doe's fingerprints on it. Use of Doe's description in newspaper stories and TV reports finally prompted the passerby-witness to contact the police, and he placed Doe at the scene of the murder. All of this information was then taken to the local prosecuting attorney.

At this point one would assume that the prosecutor would thank the police for their efficient work, and welcome the sight of a fairly easy case to present. For two hundred years it has been well settled that, although an involuntary confession must be excluded from evidence, a voluntary confession was admissible.[2] In 1964 the Court reaffirmed the principle that the voluntariness of a confession depends upon the accused's state of mind at the time he confesses—a "subjective" test[3] requiring a consideration of all the circumstances surrounding the confession, including both the effect of the police conduct on the accused and his probable powers of resistance. Under such a test this confession appears voluntary and admissible.

But our hypothetical prosecutor may no longer terminate his analysis of this confession's admissibility by concluding that it is voluntary. In 1964 the Court also created "objective" tests[4] to operate independently in this area—tests which consider only one factor in determining admissibility and ignore the accused's state of mind. These new objective tests are based on the sixth amendment right to counsel and will, in some cases, bypass traditional analysis by excluding voluntary confessions. Further, they are capable of being so extended as to destroy the ability of the police to interrogate effectively at all, or even to provide immunity from prosecution to the criminal who babbles all to the police at a time when his attorney is opportunely absent. It should be emphasized that the new rules announced by the Court in 1964 do not abolish effective interrogation, nor do they grant immunity to the well-timed

2. The King v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

3. In this article, as has been done in other articles in the field, see authorities cited in note 10 *infra*, I shall use "objective" to refer to tests which judge the police conduct without regard to its effect on the state of mind of the accused. I shall use "subjective" to refer to tests which relate to either the actual or the probable state of mind of the accused at the time he confesses. Even "subjective" tests which consider probable states of mind are still primarily concerned with the effect of the interrogation on the accused and his probable ability to resist the interrogator. Thus, "subjective," as used in this field does not necessarily correspond to its usage in other fields. I have discussed this principle, and its application to coerced confession rules, in much greater detail in Spanogle, *The Use of Coerced Confessions in State Courts*, 17 VAND. L. REV. 421 (1964).

4. See note 3 *supra*.

confessor. Only through further extension would they do so, but the Court's language is capable of such extension.

For example, consider the introductory hypothetical case. The prosecutor must now worry about the fact that the defendant's attorney was not present when the confession was obtained. This single fact may now make a confession inadmissible, even though voluntary. He must also worry about the fact that Doe was not warned before he confessed, which might also require exclusion of the confession. Further, both the gun and the witness are fruits of the confession unless the police can prove that they have been obtained volition, instead of being identified by the police from Doe's description, the fact that neither was found in the first two days of searching could indicate that Doe's words had aided in their obtainment.

If so, Doe would be immune from prosecution *because* he had confessed.

This article will examine the new tests to determine their present and probable future effects. Thus we must first examine the cases to determine the present rules regarding the admissibility of voluntary confessions. After that, we must consider the possible and probable expansions of these rules, and the practical effect of each on the interrogation procedures of the police. Only after outlining such background information can we profitably discuss the policy questions which will be decisive in this field.

The primary policy question is under what circumstances may confessions, including those obtained by interrogation, be fairly and wisely used consistent with our concepts of due process. Answering this question involves balancing the societal interest in effective law enforcement and the individual's interest in protection of his right not to be compelled to incriminate himself. This article will suggest that there are different roles which counsel can play in the interrogation situation, and that the effect of the new right to counsel tests on the ability of the police to interrogate will depend upon which of these roles requires constitutional protection. Counsel can play an informational role by warning the accused of his right to remain silent. He can also play a supportive role—offering psychological support to the accused who does not wish to cooperate in order to help him withstand any police pressure tactics. Promotion of these roles will protect against compelled incrimination, and will not necessarily destroy the ability of the police to interrogate.

On the other hand, counsel can also play a persuasive role during interrogation by inducing the accused who is willing to cooperate with the police not to do so. Promotion of this role will not enhance the protection of the individual's constitutional rights; and will abolish

interrogation for all practical purposes, for the police would first have to persuade defense counsel to cooperate in making his own job harder. Further, a failure to distinguish between these different roles of counsel will not only needlessly abolish interrogation, but will also provide opportunities for immunity through confession.

I. THE 1964 CASES

In 1964 the Supreme Court decided three cases, each of which gave new direction to the laws relating to interrogation. Technically, none of them was a "coerced confession" case, but each will affect the admissibility of confessions in future trials. *Malloy v. Hogan*[5] decided that the fifth amendment privilege against self-incrimination applied to the states. In so doing, it used the coerced confession cases to support its holding and restated and clarified the definition of "voluntariness." *Massiah v. United States*[6] and *Escobedo v. Illinois*[7] both dealt with the admissibility of confessions. Neither case, however, determined whether the confession was voluntary, but excluded it on the ground that the defendant's right to counsel had been violated. Thus these two cases introduce a new and independent test of admissibility for confessions.

The present due process rule concerning the standard to be applied in determining the "voluntariness" of a confession was indicated in *Malloy*. That case presented the issue of whether the fifth amendment privilege against self-incrimination applied to the states through the fourteenth amendment. In holding that the privilege did so apply, the Court consulted the coerced confession cases to show that the privilege itself, or some analogous principle, had been applied to the states in the past to exclude the use of coerced confessions.[8] The Court thus reaffirmed its earlier indications that

5. 378 U.S. 1 (1964).
6. 377 U.S. 201 (1964).
7. 378 U.S. 478 (1964).
8. It is not clear whether the Court found the coerced confession cases to be based on the privilege itself, or some analogous principle. Their quotation from Bram v. United States, 168 U.S. 532, 542 (1897), that the issue of coercion "is controlled by" the fifth amendment privilege, would indicate that the former basis was accepted. 378 U.S. at 7. Yet this would be very strange in view of the fact that both Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947), were on the books when all of the Court's coerced confession cases were decided. Their holdings are rather explicit and were not questioned in any confession case. The Court had also expressly stated that the privilege itself was not being used to exclude coerced confessions. See, *e.g.*, Gallegos v. Colorado, 370 U.S. 49, 51-52 (1962), quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936). Thus it is more likely that the Court was indicating the kinship of principle of these two protections, and that they are both derived from the basic premises of the accusatorial system. "The shift [in decisions in coerced confession cases] reflects recognition that the American

the constitutional test of voluntariness depends upon the state of mind of the defendant at the time he confesses, "not whether the conduct of state officers in obtaining the confession is shocking . . . ."[9] It therefore rejected the suggestions of many commentators[10] that it was using an "objective" test, in which the conduct of the police was to be judged against some ideal or "civilized" standard.[11] The voluntariness of a confession depends upon whether the accused was compelled to make it, a "subjective" test,[12] which requires a consideration of the effect of the interrogation tactics of the police on the individual accused and his probable powers of resistance.

Yet within the same month that the Court laid to rest the objective test for determining voluntariness, in two other cases it seemingly created another objective test, or series of tests, to be used in determining the admissibility of confessions. These tests are based on the right to counsel of the sixth amendment, and are to be applied independently of voluntariness criteria.[13] Thus a confession may be

system of criminal prosecution is accusatorial, not inquisatorial, and that the Fifth Amendment is its essential mainstay." 378 U.S. at 7. For further discussion, see Spanogle, *supra* note 3, at 435-36. For a discussion of the advantages and disadvantages of the direct use of the fifth amendment in the coereed confession area, see Note, 5 STAN. L. REV. 459 (1953).

9. 378 U.S. at 7. For further discussion of my views on this point, see Spanogle, *supra* note 3.

10. See, *e.g.*, Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM (Sowle ed. 1962); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1956); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77 (1957); Leibowitz, *Safeguards in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 86 (1957); Maguire, *Involuntary Confessions*, 31 TUL. L. REV. 125 (1956); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962). This analysis was used both by authors seeking more protection for the accused, and by those seeking to reduce the Court's restrictions on police interrogation. See Leibowitz, *supra*; Weisberg, *supra*.

11. The "uncivilized" standard was derived from McNabb v. United States, 318 U.S. 332 (1943), which termed illegal detention of an arrestee by federal officers to be "uncivilized," and excluded the resulting confession. It was therefore assumed that, if the federal police could not obtain an admissible confession by violating federal statutory law, state police could not violate due process by "outrageous" conduct and use the resulting confession. See Ritz, *supra* note 10, at 42-43, 57; Paulseu, *supra* note 10, at 431.

12. For a discussion of the meaning of "subjective" and "objective" in this context, see note 3 *supra*.

13. Escobedo v. Illinois, *supra* note 7. Defense counsel attempted to bring the case within the decision of Spano v. New York, 360 U.S. 315 (1958), by arguing that defendant and one interrogator had grown up together. 378 U.S. at 482. The Court also noted the facts that the defendant was a 22-year-old of Mexican extraction, was handcuffed, and was "agitated" because of lack of sleep. *Ibid.* All of these are facts which the Court normally considers in determining whether a confession is voluntary. But the Court did not again mention these factors when it required exclusion in this case, with one exception. That exception concerned only the effect of the police denial of defendant's request to consult counsel. Then, the Court distinguished

voluntary, but still inadmissible, because the accused's right to counsel was violated when the confession was obtained.[14]

The first of these cases was *Massiah v. United States*,[15] where a confederate of the defendant dope peddler "decided to cooperate with government agents in the continuing investigation of the narcotics activities" of defendant and others.[16] This cooperation included engaging defendant in conversation about his activities under conditions whereby these conversations were broadcast to an agent who was some distance away. The conversation included incriminating statements by defendant, and these were used as evidence at his trial. Such use was held to be reversible error. There was no claim that defendant had been coerced into confessing, or that the statements were in any sense involuntary. But the defendant had been indicted before the conversation took place, and his attorney was not present during it. Since he had previously retained an attorney, there was no failure to furnish, or denial of access to, an attorney; but his attorney was absent when he confessed to his confederate.

Thus the Court seemingly laid down the strict rule, which certainly applies in both federal and state trials,[17] that the prosecution may not use any statements which have been deliberately elicited from a defendant after he has been indicted, unless his attorney was present when the statements were made. This rule makes two radical departures from the prior law as it had been understood to be. First, it moves forward the time at which the right to counsel begins. Previously, the right applied to the pre-trial period only to the extent

Escobedo from Crooker v. California, 357 U.S. 433 (1957), on the ground that Crooker had been "a well-educated man." 378 U.S. at 491-92. This aspect will be discussed further in the text accompanying notes 88-104, *infra*.

14. Neither the confession in *Massiah*, nor the one in *Escobedo*, were ever termed "involuntary" by the Court, yet both were excluded. In fact, "involuntariness" was not discussed in either case. See note 13 *supra*.

15. *Supra* note 6.

16. 377 U.S. at 202.

17. *Escobedo* involved a state court conviction and the new rules were used therein. Further, the new rules were applied as a part of the *Massiah* doctrine. 378 U.S. at 484-86. And, in spite of Mr. Justice Stewart's language in *Massiah*: "Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the sixth amendment directly applies," 377 U.S. at 204, the Court has too often stated that the sixth amendment is "to be enforced against the states under the fourteenth amendment according to the same standards that protect those personal rights against federal encroachment," for any such stated limitation to be relied upon seriously. Malloy v. Hogan, *supra* note 5, at 10, citing Gideon v. Wainwright, 372 U.S. 335 (1963). The Court in *Massiah* speaks only of protecting the defendant's basic rights, not of using its supervisory powers over the administration of federal justice. *Cf.* McNabb v. United States, *supra* note 11. Further, Mr. Justice Stewart, the author of the opinion, first stated his belief in the enunciated doctrine in a state court case, Spano v. New York, *supra* note 13, and all of the cases cited in *Massiah* in building up the new rule arose from state court convictions.

necessary for preparation of the defendant's case for the trial, or at arraignment proceedings in which some defenses must be raised by special motion or were forever lost.[18] *Massiah* makes the right to counsel applicable to all periods following the indictment. The second departure is far more important, however, and changes the nature of the right to counsel. Previously, the right concerned primarily the use of the lawyer's technical skills in the courtroom. Attempts had also been made to have the right encompass an opportunity to consult counsel during interrogation, but even this limited expansion had not gained the Court's approval.[19] In *Massiah*, opportunity to consult and actual prior consultations with an attorney were both deemed irrelevant; only physical presence of counsel at the time of speaking would suffice.

Before any further clarification of the "physical presence of counsel" rule was forthcoming, however, the Court handed down a second right to counsel case, *Escobedo v. Illinois*.[20] In this case, after the murder of his brother-in-law, Escobedo had been arrested, interrogated, and released pursuant to a writ of habeas corpus. At this first interrogation, defendant made no statement. After the release, defendant and his attorney discussed what he should do if interrogated again. Ten days later, after an accomplice had implicated him, defendant was arrested and interrogated again. This time he confessed. He was not warned of his right to remain silent; and he was denied an opportunity to consult his lawyer, although he requested such an opportunity, and his attorney was present in the station-house. The use of the confession was held to be reversible error.

The Court stated its holding twice, and each statement is different. The first statement is that an arrestee under interrogation must be allowed to consult counsel if he so demands *or* must be warned by the police of his right to remain silent, otherwise all admissions are inadmissible.[21] The second statement is that, when the investigation "has focused" on the accused and he is questioned, he must be permitted, *"under the circumstances here,"* to consult an attorney before admissible statements can be obtained.[22]

Both statements of the holding move forward to the pre-indictment stage of the proceedings the time when the right to counsel applies, thus advancing its application to an earlier stage than did

18. Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932). For further discussion of this point, see text at note 61-65 *infra*.
19. Crooker v. California, *supra* note 13; Cicenia v. LaGay, 357 U.S. 504 (1958).
20. *Supra* note 7.
21. 378 U.S. at 490-91.
22. *Id.* at 492.

Massiah. *Escobedo* therefore holds that the right to counsel applies before the accused reaches a courtroom for the first time. The second statement makes it apply at all times after a suspect has been taken into custody; the first may make it apply even before arrest if the investigation has "begun to focus on a particular suspect."

On the other hand, neither statement requires the physical presence of counsel at the interrogation, but both do find that the right to counsel provisions have some role in interrogation proceedings. One statement requires only that the accused be given an effective warning of his right to remain silent, which could be given by the police as well as by his attorney. According to this statement, an accused has a constitutional right to be informed of his other constitutional rights, and any interrogation without such warning violates the right to counsel. The second statement, however, does not appear so limited. It provides that "under the circumstances here" a suspect must be allowed to consult his attorney, implying that a warning could be insufficient in some situations. If the "circumstances" referred to in this second statement include the lack of warning by the police, it goes no further than the first. If he is not warned by the police, the accused must be allowed to see his attorney so as to be warned by him. This would be a natural corollary of the first statement of the holding. But, it is also possible that these "circumstances" include only the demand for and availability of counsel. If so, the second statement of the *Escobedo* holding concerns an entirely separate rule—that in some situations the accused must be permitted to see his attorney, even though he has previously been fully and effectively warned.

Thus, the Court has laid down two, and possibly three, rules concerning the right to counsel during interrogation.[23] (1) After he has

23. There is one other possible explanation for the *Massiah* and *Escobedo* decisions, which would not necessarily lead to the foregoing rules and analysis. In both cases the Court felt that the police had been guilty of misconduct. In *Massiah* the Court stated that the nature of the questioning by defendant's confederate "more seriously imposed upon" him than the usual station-house interrogation, "because he did not even know that he was under interrogation." 377 U.S. at 206. Thus, eliciting confessions by using stoolies seems to be regarded as "dirty business;" compare Olmstead v. United States, 277 U.S. 438 (1928) (dissenting opinion), although the Court does not explain why. Compare United States v. Beno, 333 F.2d 669 (2d Cir.), *cert. den.* 379 U.S. 880 (1964). In *Escobedo*, the police denied the defendant an opportunity to consult his attorney, after he had requested one; and "falsely" accused him of firing the fatal shots. 378 U.S. at 485 n.5. The opinion continually stresses these facts, and limits its holding to "the circumstances here." *Id.* at 492. Thus it would be possible to argue that the decisions lay down only rules that confessions procured by misconduct must be excluded, and do not go beyond this.

There are several dangers in any such analysis. First, "police misconduct" is an infinitely expansible concept. If surreptitious interrogation is "dirty business," why is not almost all interrogation? Consider the use of false sympathy, use of the "good guy-bad guy" routine, use of an undercover agent, or even not volunteering, before

been arrested, a suspect may not be interrogated unless he has been fully and effectively warned of his right to remain silent. (2) After he has been indicted, an accused may not be interrogated unless his counsel is physically present. And possibly, (3) after he has demanded to see his attorney, if his attorney is immediately available, an arrestcd suspect may not be interrogated unless some sort of consultation is allowed.

The effect of each of these rules commences at a different point in the processing of the accused: After arrest, after demand for consultation, and after indictment. More important, however, each rule protccts a different one of the roles which counsel may play during interrogation. There are at least three such roles. First, counsel can give the accused information about his constitutional rights. This informational role can also be performed by others.[24] Second, he can give the accused psychological and moral support to withstand any interrogation if he should desire not to confess—a supportive role.[25] And third, he can persuade the accused to remain silent even when the accused may desire to confess—a persuasive role. The requirement of a warning protects the informational role, and any rules requiring consultation after a demand to see an attorney seek to protect the supportive role. Any absolute requirement of counsel's presence seems adapted to neither of those roles, however, but would only seek to protect the persuasive role of counsel.

Which of these roles are being protected by the sixth amendment rules at any point in the proceedings will be crucial in determining whether the police will have any effective ability to interrogate at that time. In many cases the accused wants to confess, and it is possible for the police, without using coercion, to persuade the accused to cooperate, and these possibilities are not necessarily elimi-

questioning him, all facts known about the suspect from background investigation. If keeping an arrestce from his retained attorney is misconduct, what about failure to provide the indigent arrestee with an attorney in the squad room immediately after arrest? See tcxt at note 106 *infra*. Secondly, the Court based its decisions on the constitutional right to counsel ground, not on a moralistic endeavor to supervise police conduct. Massiah "was clearly entitled to a lawyer's help" after indictment, 377 U.S. at 204. Escobedo had a "right . . . to be advised by his lawyer of his privilege against self-incrimination." 378 U.S. at 488. Thirdly, any such rule would require a complete return to the "objective" test for determining the voluntariness of confessions, and this was expressly disowned in *Malloy*. See text at notes 8-12 *supra*.

For discussion of the possibility that the confessious were excluded on the ground that they were involuntary, see note 13 *supra*.

24. "[A]nd the police have not effectively warned him of his absolute constitutional right to remain silent." 378 U.S. at 491.

25. The request for counsel, and the need for support indicated thereby, are perhaps more important than the dissenters believed. 378 U.S. at 495 (dissenting opinion). See text at note 86 *infra*.

nated by effectively warning him that he need not cooperate.[26] The warning will aid in eliminating instances of questionable voluntary cooperation, and reduce the pressure on the accused from the fact that he is in custody.

On the other hand, a request to consult counsel, followed by a police refusal to take any steps to comply, greatly reduces the likelihood that the police can obtain a voluntary confession anyway. Such a request indicates one of two possible effects. Either the accused wants further information about the alternatives facing him, more information than he thinks the magistrate or police can or will give him; or, he wants to speak to someone on his side of the struggle, rather than a hostile or impartial person. In either case, the accused is not completely satisfied with having the police or a magistrate perform the informational role of counsel. A refusal of his request will affect his state of mind and render any resulting confession suspect, although not necessarily involuntary.

Thus, neither a requirement of a warning, nor rules requiring the police to honor a request to consult counsel, will necessarily destroy the ability of the police to procure voluntary confessions. However, any absolute requirement of physical presence of counsel, or consultation with him without demand, will effectively preclude all interrogation. It will be virtually impossible for the police to persuade defense counsel to cooperate, thereby making his job harder, even if the accused is willing to do so.[27] Further, such rules would not only eliminate interrogation, but could also, as will be shown below, interfere with any investigative efforts of the police which utilize questioning of persons involved or implicated in a crime. Such interference also creates the possibility of immunity through confession.

The foregoing analysis does not imply that the cases from the 1963-64 term abolish interrogation. *Massiah* seems to do so, but only after indictment. The more practical problems for police investigation, and the greater likelihood of immunity through confession, arise in the pre-indictment situation. Thus the primary problem facing the police is whether the physical presence of counsel rule of *Massiah* will be extended to that situation. Although the Court expressly limited its holding in *Massiah* to post-indictment interro-

26. REIK, THE COMPULSION TO CONFESS (1959).

27. "To bring in a lawyer [during interrogation] means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in snch a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal proeedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

gation,[28] there are grounds for questioning the permanence of this limitation.[29] One such ground is the reference to *Massiah* in *Escobedo*, a case which involved pre-indictment interrogation. The Court referred to the *Massiah* holding and then said: "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference."[30] This language seems to indicate a lack of awareness of the differences in the rules pronounced in the two cases, and of the great differences in their practical effects. A second ground is the experience of a New York rule similar to that in *Massiah*. The New York courts

28. "[T]he confession had been deliberately elicited by the police after the defendant had been indicted, and *therefore* at a time when he was clearly entitled to a lawyer's help. . . . [T]he most elemental concepts of due process of law contemplate that an indictment be followed by a trial. . . . [A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an *indicated* defendant under interrogation . . . ." 377 U.S. at 204, discussing the dissenting opinions in Spano v. New York, 360 U.S. 315 (1958). (Emphasis added.)

Although the limitation to post-indictment interrogation is emphasized, a rationale for such a limitation is not clearly stated. If one wishes to distinguish between pre- and post-indictment questioning, is it important that the indictment is the "first pleading by the prosecution?" People v. Di Biasi, 7 N.Y.2d 544, 200 N.Y.S.2d 21, 166 N.E.2d 825 (1960); or that this is the time when "the suspect" becomes "the accused"? LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331 (1962). Does the prosecution, by seeking an indictment, indicate that it then possesses sufficient evidence to obtain conviction, so that its needs for further investigation are reduced? This was the rationale originally suggested in Di Biasi, *supra*, but the New York courts did not limit themselves by it. See authorities cited in note 32 *infra*.

On the other hand, if one wishes to apply the rule at an earlier time, is not the first appearance before a magistrate a "proceeding in court," and is not the defendant entitled to an attorney "at every stage of the proceeding." People v. Meyer, 11 N.Y.2d 162, 227 N.Y.S.2d 427, 182 N.E.2d 102 (1962). Is there little distinction between the "arraignment" and the first appearance before a magistrate? The Court has used both terms interchangeably in discussing the *McNabb-Mallory* rule. See, *e.g.*, Goldsmith v. United States, 277 F.2d 335, 338-39 n.2a (D.C. Cir. 1960). Is it significant that the Court cited the present New York rule with approval, and that rule now applies to all events following the first appearance? See authorities cited in notes 32, 33 *infra*.

And, if one wishes to extend the rule further, he need only interpret the concept that an absolute right to counsel attaches as soon as the accused can show a "need" for such services. Spano v. New York, 360 U.S. 315, 446 (1958) (dissenting opinion), quoting CHAFFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS Pamphlets 1-3, at 541 (1951-52). See also text at notes 61-65 *infra*. Does he need such services when he hides evidence, or commits the crime, or plans the crime? 377 U.S. at 208 (dissenting opinion); 378 U.S. at 497 (dissenting opinion). Or is this more properly a clergyman's realm? In order to speak meaningfully of needs and constitutional requirements, is it not necessary first to distinguish between types of needs and their underlying purposes? But not even Mr. Justice Stewart's dissenting opinion in *Escobedo*, 378 U.S. at 493-95, undertakes this type of analysis.

29. For a comment on the historical tendency of the Court to carry its concern with a particular problem "beyond the point of a viable accommodation of interests," and later "retreat," see Freund, *Justice Was Done for One and All*, N.Y. Times, June 21, 1964, § 7 (Book Review), p. 1, col. 14.

30. 378 U.S. at 485.

first formulated a rule requiring the physical presence of counsel during any interrogation following indictment,[31] but this rule has now been extended to apply in the pre-indictment situation.[32] Further, *Massiah* cites with approval the cases which lay down the *present* New York rule, and *Escobedo* approved their reasoning.[33]

If the *Massiah* and *Escobedo* rules should be combined, they create the possibility of immunity from prosecution through confession at an opportune time. *Massiah's* requirement of counsel's presence would begin, under *Escobedo,* as soon as "the investigation . . . has *begun to focus* on a particular suspect"[34] (or, I presume, suspects, if the crime could have involved accomplices). Actual arrest may not be necessary. In *Escobedo* the Court stated: "When petitioner requested and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of an unsolved crime."[35] Thus the investigation had "focused" on Escobedo at least by the time his request to consult counsel was denied. But "focus" is certainly not limited to this one circumstance. Had not the confession of his confederate and his arrest established "focus" as of a previous time? Is this a concept which may prove impossible to define in actual cases without pushing its commencement ever forward? Has not the investigation "focused" when one person is singled out and placed under surveillance, as in the introductory hypothetical case? If so, why is it not equally arguable that it has "begun to focus" as soon as the police investigate a suspect's background?[36]

Once this right to counsel's presence has attached, it would provide immunity from the use of any statement made in answer to police questions whose "purpose is to elicit a confession."[37] Yet such a

31. People v. Di Biasi, *supra* note 28.

32. See People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841 (1963); People v. Davis, 13 N.Y.2d 690, 241 N.Y.S.2d 172, 191 N.E.2d 674 (1963); People v. Rodriquez, 11 N.Y.2d 279, 229, N.Y.S.2d 353, 183 N.E.2d 651 (1962); People v. Meyer, 11 N.Y.2d 162, 227, N.Y.S.2d 427, 182 N.E.2d 103 (1962); People v. Wallace, 17 App. Div. 2d 981, 234 N.Y.S.2d 579 (1962). See also, People v. Swanson, 18 App. Div. 2d 832, 237 N.Y.S.2d 400 (1963); People v. Price, 18 App. Div. 2d 739, 235 N.Y.S.2d 300 (1962); People v. Karmel, 17 App. Div. 2d 659, 230 N.Y.S.2d 413 (1962); People v. Robinson, 16 App. Div. 2d 184, 224 N.Y.S.2d 705 (4th Dept. 1962).

33. 377 U.S. at 205; 378 U.S. at 486-87.

34. 378 U.S. at 490. (Emphasis added.) It is always possible for a crime to involve accessories and co-conspirators.

35. 378 U.S. at 485.

36. Compare the difficulties the English have encountered in applying the Judges' Rules governing police interrogation. See, *e.g.,* Williams, *Police Interrogation Privilege and Limitations Under Foreign Law: England,* 52 J. CRIM. L., C. & P.S. 50, 50-52 (1960); *Letter from English Policeman on Use of Judges' Rules,* in SELECTED WRITINGS ON THE LAW OF EVIDENCE & TRIAL, 845-46 (Fryer ed. 1957); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 31-62 (1958).

37. 378 U.S. at 492.

purpose could be found in any questioning of such a person. The interrogator who asks "Did you do it?" is of course seeking a confession, but so is the interrogator who seeks to know a suspect's alibi, especially if he tries to break it down. Any questioning about a crime seeks, as one of its purposes, to elicit a confession, if there is any possibility that the person interrogated could be guilty. Thus, unless the Court puts an unusual and restricted meaning upon the phrase, "purpose is to elicit a confession," any questioning of a person not known to be innocent might be prohibited. The probability of the Court's adopting a restricted meaning is decreased by its obvious regard for the present New York rule, which does exclude completely unsolicited statements.[38] The resultant effect of the combination of *Massiah* and *Escobedo* would therefore be to prevent any investigation through questioning of those *implicated* in the crime, whether the police actually believe them to be innocent or not, if the police had previously sought any information about these persons' backgrounds, motives, or whereabouts at the time of the crime. Such a limitation would hardly enhance the ideal system, envisaged by the Court, "which depends on extrinsic evidence independently secured through skillful investigation."[39]

Not only must the actual statements of the accused in such a situation be excluded, but also any fruits of the statements are probably inadmissible as well.[40] Thus a well-timed and well-drafted statement by the accused may not have a neutral effect on the use of "extrinsic evidence independently secured through skillful investigation."[41] It may in fact completely disable the police from making such an investigation, for in the introductory hypothetical case how can the police ever prove that they would have dragged the river at all, or in that place in particular, to find the gun? Or how can they prove that the eye-wituess was "independently secured"? And if they cannot use any evidence of Doe's guilt, has he not become

38. People v. Meyer, *supra* note 32.

39. 378 U.S. at 489.

40. The Court has not yet decided the particular question of whether derivative use may be made of inadmissible confessions. *Cf.* Massiah v. U.S., *supra* note 6 (dissenting opinion). At the common law, such use was permissible. See authorities cited in 3 WIGMORE, EVIDENCE § 858 (3d ed. 1940). But since these decisions excluded confessions only on grounds of testimonial untrustworthiness, they would seem inapposite to a consideration of due process requirements which depend on other factors as well. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). See also the consecutive confession cases, *e.g.*, Leyra v. Denno, 347 U.S. 556 (1954).

41. 378 U.S. at 489.

immune to prosecution, and has he not achieved this by confessing, all courtesy of the "presence of counsel" rule?

II. IS INTERROGATION PERMISSIBLE?

Thus there seem to be a number of present and possible rules based on the right to counsel, each of which affects interrogation. The amount of limitation on police conduct ranges across a spectrum from a requirement only that a suspect be warned of his right to remain silent to a requirement that counsel be physically present during any questioning. The least limiting of these rules applies early in any investigation, the more limiting apply progressively later in the processing of a defendant. The most important problem is which of these rules applies in the pre-indictment situation. If there is to be an absolute requirement that counsel be physically present during any post-arrest interrogation, or even a requirement that a suspect must consult counsel before being questioned, police interrogation is abolished for most practical purposes. On the other hand, if a suspect may be interrogated after being warned, and counsel need not be procured unless requested, effective interrogation is still possible.

It is not difficult to find language in the opinions which favors each of these positions to the exclusion of the others,[42] but an examination of such technical arguments is probably unprofitable. Instead, the problem should and will be solved by policy considerations rather than metaphysical arguments of linguistics. The fundamental policy question is under what circumstances may confessions be fairly and wisely used, consistent with our basic ideas of fairness implicit in the due process clause. Included in this question is a further one of whether effective police interrogation is consonant with such concepts of due process. This decision should be made before any further *ad hoc* opinions in confession cases are handed down, because the Court is perilously close to pronouncing technical rules which will require the abolition of interrogation, simply because there will be no way of rationally limiting those rules so as to permit use of confessions obtained in response to police questions.

In making this policy decision, the Court should recognize that a balancing of interests is involved, as it is in the protection of most other individual rights under the fourteenth amendment. The individual's interest in maintaining his own freedom of action must be balanced with his communal interest in maintaining peace and order

42. See, *e.g.*, the arguments presented in note 28 *supra*, and in text at notes 28-38 *supra*.

within his society.[43] This fact is overlooked by those who insist that the Constitution requires absolute freedom from any police interference, at least until after the police have an ironclad case. Individuals also have a communal right to be safe in their homes and on the streets, and this right is enhanced by the apprehension and conviction of criminals. An individual's freedom can be abridged as easily by passing control of the streets to hoodlums as by permitting the police to be over-assertive.

A year ago, one could have said with some assurance that this weighing process favored the use of interrogation; the Court referring to it as "an essential tool" of the police in their effort to maintain peace and order in the community.[44] Now one cannot be so certain. The majority of the Court may have experienced a change of mind in the last year, for their language in describing interrogation has altered. From its status as "an *essential* tool," it has now become "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses."[45] The latter language does not necessarily mean that interrogation is now regarded as either unnecessary or evil, although explanation of the words "depend on" would be useful. Does it mean "rely upon at all," or "rely upon too much"? If the former, the decision as to the permissibility of interrogation has already been made.

Assuming that the question is still open,[46] this writer would suggest that there are persuasive arguments for retaining interrogation, properly limited, as an effective tool for police use. Certainly claims that the abolition of interrogation will destroy law inforcement are overdrawn;[47] but so are claims that the effectiveness of law enforcement will not be harmed, because the police have so many scientific

43. Spano v. New York, *supra* note 13, at 315. The primary examples of the use of such a weighing process are the decisions involving the protection of first amendment rights. See Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 63.

44. Haynes v. Washington, 373 U.S. 503, 515 (1963). See also language quoted in note 62 *infra.* The arguments for the necessity of interrogation are well-stated in Inbau, *Restrictions in the Law of Interrogation and Confessions,* 52 NW. U.L. REV. 77 (1957). See also text at notes 47-54 *infra.*

45. 378 U.S. at 488-89.

46. The decision on this point may have already been made. Four Justices have indicated that they would not hesitate to abolish interrogation. See the language of the dissenting opinions in Crooker v. California, 357 U.S. 433, 441-48 (1958); Cicenia v. LaGay, 357 U.S. 504, 511-12 (1958). There are also four Justices who would at least allow limited interrogation. See dissenting opinions in *Massiah* and *Escobedo.* This leaves the decision almost entirely in the hands of Mr. Justice Goldberg, the author of both Haynes, *supra* note 44 (interrogation is "an essential tool") and Escobedo, *supra* note 6 ("less reliable" system, "more subject to abuses.")

47. See, *e.g.,* 378 U.S. at 499 (dissenting opinion).

devices to aid in investigation.[48]

Regardless of such claims, it would seem that the following arguments can be made for the need for interrogation. First, there are some crimes which can be solved only by interrogating suspects. One may argue about the number of such cases or their importance, but not about the fact that they exist. For instance, Inbau relates a typical example of a murder where the criminal left no clues. The police suspected several persons, but had no evidence of anyone's guilt. They solved the crime only by interrogating the victim's brother-in-law, who confessed. No sufficient extrinsic evidence of his guilt was available to convict without this confession.[49] A corollary to this fact is that in some cases the state will arrest and prosecute the wrong man if not allowed to interrogate. Whether he is convicted or not, a shadow will be cast upon his reputation as long as the police do not solve the crime. For instance, in the example above, the police first suspected the victim's husband, but were satisfied of his innocence after interrogating him. If interrogation had not been possible, this suspicion probably would have continued, ruining his reputation.[50]

Further, even where crimes can be solved by other methods, if the police may not interrogate, it will be more difficult to solve many crimes and take more police time to solve each crime. Unless the police forces are significantly increased, this fact will mean a reduction in the number of crimes solved, and thereby a reduction in the protection afforded to society.[51] The Court has, of course,

48. The FBI must operate under the *McNabb-Mallory* anti-interrogation rules, and continues to be effective. Elkins v. United States, 364 U.S., 206, 218 (1960). But claims based on the FBI's performance overlook the differences between their problems and those of local police. Local police discover many crimes through chance encounters or pleas for emergency assistance, and must take some action on the spot or lose their opportunity to assemble evidence, or even effectuate an arrest, in many cases due to the ease of interstate travel. ADLOW, POLICEMEN AND PEOPLE (1947). In contrast, federal officers usually undertake a deliberate investigation of a lesser number of greater crimes, and have facilities for investigation and apprehension throughout the country. MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT (1937); Comment, 50 J. CRIM. L., C. & P.S. 144 (1959). The federal anti-interrogation rules also limit the operations of one municipal police department—that of Washington, D.C.—and has not made them entirely ineffective. But the current unsafety of Washington, D.C., streets is hardly a *recommendation* for abolishing interrogation. See Knebel, *Washington, D.C.: Portrait of a Sick City,* Look, June 4, 1963, pp. 16, 18; *The Blight in the Nation's Capitol,* U.S. News & World Report, Feb. 18, 1963, p. 37. But *cf.* Kanisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts,* 49 CORNELL L. Q. 436, 469-71 (1964).

49. Inbau, *supra* note 44, at 80-81. Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962), appears to be another example of this type of case. See also Inbau, Popular Misconceptions Regarding Police Interrogations of Criminal Suspects, 14 BUFFALO L. REV. 274 (1964).

50. Inbau, *supra* note 44, at 80-81.

51. See note 48 *supra.*

faced such problems before, such as in the illegal search and seizure cases, and has found the societal interests insufficient.[52] But any abolition of interrogation would probably have a greater effect on the safety of the average citizen than have the Court's prior rulings on illegally seized evidence. The latter rulings primarily affect the ability of the police to combat "vice crimes," but abolition of interrogation would affect their ability to solve all types of crimes, including those where the "victims" are not participating voluntarily.[53]

Finally, if the police are prohibited from making effective post-crime investigation, their only alternative will be to intensify pre-crime investigation. This pre-crime investigation would have to take the form of surveillance, and in particular of indiscriminate and pervasive surveillance of the general populace.[54] This is a chilling thought, and the police would be severely castigated if they undertook it, but they would be unfaithful to their oath of office if they did not do so. Thus the Court, in deciding whether to abolish interrogation, is not choosing between a police state and a utopian society, but is choosing between two forms of police presence in the community—one which is more intensive when applied but less widespread, and a second which is less intensive but all pervasive. Each is capable of developing into a police state, but neither has to. And, although such surveillance would be less intensive than incommunicado detention and interrogation, it may easily be more oppressive to the average law-abiding citizen than the present tactics. At least he is now usually not affected by them, and if affected, only for a short time. If primary reliance must be placed on surveillance, it would affect everyone for most of the time. It would thus seem that, if the present tactics are subject to meaningful control by the courts, they would be preferable.[55]

52. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

53. "Search and seizure problems arise almost exclusively in vice cases (most often narcotics and, to a lesser extent, bookmaking), where there is no complaining witness and where the defendant may have possession or control of the only competent evidence of commission of the offense." CAL. CONTINUING EDUCATION OF THE BAR, CAL. CRIMINAL LAW PRACTICE § 3.27 (1964).

54. Even post-crime surveillance will have to be kept indiscriminate, or else the police could be found to have "begun to focus" their investigation on a particular suspect, with all that that entails. See text at note 34 *supra*. Some of the means of general surveillance are available now—the remote TV camera or microphone, the informer or undercover agent. Others could be developed. Those now known are being employed, but only to a limited extent, not on every street corner and public hallway. If they should be employed to their full capacity, every individual's sense of privacy would be destroyed, at least whenever he left the four walls of his own private home. This would seem at least as damaging to individual rights as the possibility of a trip to the station-house.

55. Would the courts be able to supervise such surveillance tactics in any meaningful way? Does the fourth amendment's right of privacy protect the individual

The Court's objections to interrogation seem to be based on two distinct grounds: (1) that it cannot exercise meaningful control over interrogation practices through the "subjective" involuntary confession rule, so that use of "objective" and mechanical rules is required;[56] and (2) that the constitutional right to counsel is given insufficient protection if interrogation is permitted. As to the first ground, the Court may be mistaken in its appraisal of the effectiveness of the involuntary confession rule. The major problem with its use has been that it has not been understood, and this fact is at least in part attributable to the Court's lack of a clear explanation of the purpose and foundation of the rule until recently.[57] The objective test theories were explicitly rejected only this year.[58] Although the 1964 right to counsel cases are certain[59] to add confusion, there are indications that the Court's standard is at last being understood.[60] Thus, if the Court's objections to interrogation are based on this ground, it should defer any decision until the state courts have had a more reasonable opportunity to comprehend and follow its present standard.

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when he is in public? The cases have indicated that it does not. But certainly the individual's *sense* of privacy is infringed by any such tactics, and to that extent, concepts common to the right to privacy are involved at least indirectly. Does this mean that the Court in reality must also balance the individual's fourth amendment right of privacy with his fifth amendment privilege against self-incrimination?

56. This is one rationale proposed by the dissenting Justices: "[The *Escobedo* rule] is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere." 378 U.S. at 498-99 (dissenting opinion). Jackson v. Denno, 378 U.S. 368 (1964), illustrates an analogous point.

57. Although the Court in *Malloy* speaks of the relationship between involuntary confessions and the fifth amendment privilege as though it had been well-known for 67 years, since Bram v. United States, *supra* note 8, the Court itself had not referred to any such relationship until only two years previously in Gallegos v. Colorado, *supra* note 8. Further, in *Gallegos*, the Court expressly refused to apply the privilege directly to the exclusion of coerced confessions and did not state the nature of any analogy it may have adopted. For further discussion of this point, see note 8 *supra*. Thus the Court had done little to clarify its present standard until 1962. Before then the objective tests had gained great support among commentators, see authorities cited in note 10 *supra*, so the state courts can hardly be castigated, or distrusted either, for not following a standard based on fifth amendment principles. Perhaps the best example, however, of the Court's failure to make itself understood is the surprise with which a Pennsylvania Superior Court discovered, in 1962, that the common law untrustworthiness standard was no longer sufficient. Commonwealth v. Williams, 197 Pa. Super. 184, 176 A.2d 911 (1962). This discovery was made thirteen years after the Supreme Court decision in Watts v. Indiana, *supra* note 27. I have discussed this point further in Spanogle, *supra* note 3.

58. Malloy v. Hogan, *supra* note 5, at 7.

59. Massiah v. United States, *supra* note 6; Escobedo v. Illinois, *supra* note 7.

60. See, *e.g.*, Kasinger v. State, 234 Ark. 788, 354 S.W.2d 718 (1962); State v. Traub, 150 Conn. 169, 187 A.2d 230 (1962); People v. Melquist, 20 Ill. App. 2d 22, 185 N.E.2d 825 (1962); State v. Fauntleroy, 36 N.J. 379, 177 A.2d 762 (1961). See also Hollman v. State, 361 S.W.2d 633 (Ark. 1962); Ebert v. State, 140 So. 2d 63

Concerning the second ground, much depends upon how the Court defines "right to counsel," and what role it believes counsel is constitutionally required to perform. Until *Massiah* and *Escobedo*, as late as *Hamilton* and *White*,[61] the purpose in providing a right to counsel had been to protect the accused from losing his opportunity to present his case through technical procedural and evidentiary rules, not to impede the investigation of crimes.[62] All extensions of the right to counsel to the pre-trial period had been made to protect this purpose: from *Powell*, which cited the necessity of "consultation, thoroughgoing investigation, and preparation" for the trial,[63] to *Hamilton*, which concerned the necessity to raise the defense of insanity at arraignment or lose it at trial. Thus, all could seem to agree with the *language* of Mr. Justice Douglas in *Crooker*, quoting from a law review note: "Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial."[64]

The author of that note was concerned with the loss of "legitimate defenses." As examples of his concern, he listed the preparation of the defense and the making of strategic decisions, examining and evaluating the testimony of both friendly and hostile witnesses, examining the indictment for flaws, and making necessary pre-trial pleas.[65] He did not list as a legitimate defense the necessity of persuading the defendant to refuse to cooperate with the police. But Mr. Justice Douglas viewed the language differently, finding that the accused is constitutionally entitled to counsel's protection during an interrogation also.

The traditional argument, that the purpose of counsel is essentially to protect the accused from the intricacies of the law and to present his side of the case effectively, seems no longer acceptable

(Fla. 1962); State v. Archer, 244 Iowa 1045, 58 N.W.2d 44 (1953); State v. Floyd, 223 S.C. 413, 76 S.E.2d 291 (1953).

Even the commentators have begun to show signs of comprehension, although as usual they differ as to what the Court is really saying. Stephens, *The Fourteenth Amendment and Confessions of Guilt: Role of the Supreme Court*, 15 MERCER L. REV. 309 (1964); Spanogle, *supra* note 3; Comment, 31 U. CHI. L. REV. 313 (1964).

61. Hamilton v. Alabama, *supra* note 18; White v. Maryland, 373 U.S. 59 (1963).

62. Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287 (1959). "[I]t would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process . . . demands no such rule," Crooker v. California, 357 U.S. 433, 441 (1958). "Even in *federal* prosecutions this Court has refrained from laying down any such *inflexible* rule." Cicenia v. LaGay, 357 U.S. 504, 509 (1958). (Emphasis added.)

63. 287 U.S. at 57.

64. Crooker v. California, 357 U.S. at 445-46, quoting Note, 44 Ky. L.J. 103-04 (1955).

65. *Id.* at 104.

to the present Court. It was not followed in either *Massiah* or *Escobedo*.[66] It is apparent that the sixth amendment right to counsel is now regarded as having some role in protecting an accused during interrogation. Any confession must pass some sort of right to counsel test, as well as a voluntariness test, before it may be admitted into evidence.

The fact that the Court has diverged from the traditional views is not necessarily, however, an argument against their present position. The great changes in the investigation of crimes and pre-trial processing of suspects may require changes in the role of counsel before trial.[67] But the fact that new rules are being introduced should constrain the Court not to bring in wholesale the rules from a different setting. Thus, applying the traditional right to counsel rules of the trial period to the pre-trial situation, merely because there is now some confrontation between police and accused before trial, would seem misdirected. A completely new analysis of the competing interests of society and the individual in this different context is required, and this analysis must consider anew the desirability of each facet of the traditional rules in this different context.

Further, the fact that the Court has diverged from the traditional views does not necessarily mean that interrogation has been abolished. The right to counsel test may be stated either in a form which in fact abolishes interrogation, or in a form which merely restricts its abuses. The determination as to which form the test will take will depend upon what role the Court believes counsel is constitutionally required to perform in the pre-trial situation.

The choice seems to depend upon whether it is necessary to protect the persuasive role of counsel. If contact with counsel is mandatory, he will probably regard it as his duty to persuade his client not to answer questions or cooperate in any way with the police, regardless of the client's willingness to cooperate, even after warning. It is this writer's contention that protecting the persuasive role (1) does not further the protection of the individual's constitutional rights, and (2) also needlessly hampers the protection of society. Thus it is not the most effective resolution of the competing individual and societal interests.

The Court has indicated that the primary purpose of guaranteeing a right to counsel in the pre-trial period is to protect the accused's

66. It is ironic that the author of the opinion in *Massiah*, which destroyed the traditional view of the role of defense counsel before trial, was forced to dissent in *Escobedo* on the ground that the traditional view must be followed before indictment. See note 28 *supra*.

67. See Comment, 73 Yale L.J. 1000, 1034, 1042 (1964).

fifth amendment privilege against self-incrimination.[68] Does that amendment provide the accused with a right to have all his statements excluded from evidence? If so, then mandatory contact with counsel, not merely a warning, is required to assure that no statements are made. There is language in *Escobedo* which may indicate that the Court would pronounce such a right.[69] But the privilege is usually regarded as one which protects the accused from being "*compelled* to incriminate himself," and the Court has so stated.[70] It would be a strange definition of compulsion which would preclude the accused from making any admissible incriminating statements at all, however voluntary. If the purpose of the right to counsel is to protect against compelled self-incrimination, that purpose does not require that counsel be given an opportunity to persuade his client not to cooperate. Such a requirement would only promote the "gamesmanship" atmosphere already too prevalent in our criminal trials.

On the other hand, promotion of the persuasive role will both damage recognized societal interests by abolishing interrogation, and create opportunities for abuses to our judicial system from immunity through confession. Any "physical presence of counsel" rule will effectively abolish interrogation.[71] So also will any rule which absolutely requires that the accused consult counsel before making an admissible confession. Yet, as is shown above,[72] abolition of interrogation will damage, at least to some extent, the ability of the police to solve crimes successfully, and thereby reduce the protection of the individual citizen. Also, their necessary response will probably be indiscriminate and pervasive surveillance of the general populace, which would be more damaging to the individual's sense of privacy and freedom than the possibility of a trip to the station-house.[73] Thus

68. Escobedo v. Illinois, *supra* note 7, at 485, 400-91; Crooker v. California, *supra* note 62, at 443-45 (dissenting opinion); Spano v. New York, *supra* note 13, at 325-27 (dissenting opinions). "The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. [cites] The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. . . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. 378 U.S. at 488.

69. See, *e.g.*, "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." 378 U.S. at 486. "[T]he Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial." *Id.* at 496 (dissenting opinion).

70. Malloy v. Hogan, *supra* note 5, at 7, quoting Bram v. United States, *supra* note 8, at 542.

71. See discussion in text at note 27 *supra*. The point was tacitly recognized in *Escobedo*. 378 U.S. at 488-89.

72. See text at notes 49-55 *supra*.

73. See note 54 *supra* and accompanying text.

there are arguments for retaining interrogation which go beyond the convenience of individual policemen.[74] These arguments could create close questions for the Court in determining whether to abolish interrogation if that were necessary to protect the privilege against self-incrimination. But since that privilege is not protected by promoting the persuasive role of counsel, there any absolute requirement of contact with counsel would seem completely unwarranted.

Any rule requiring the physical presence of, or a mandatory consultation with, counsel would also create periods during which no admissible confession could be obtained. Further, under the "fruits" rule,[75] confessions made during this period would be able to immunize extrinsic evidence from use by the prosecution. This would place a great power in the hands of the accused, and it would be extremely easy for a criminal to abuse this power and gain immunity from prosecution by deliberately confessing when his attorney is opportunely unavailable. Although the Court has excluded only "deliberately elicited" confessions, this limitation does not seem capable of eliminating the abuse in many situations.[76] Further, it is doubtful that the Court will grant certiorari in sufficient numbers of cases to establish a definition which can distinguish between the myriad of fact situations.[77] But this is a problem which is inherent in any objective test because it considers only one factor and not the total fact situation. Under an objective test, a confession may be excluded because the police violated the words of a mechanical rule, rather than the spirit of fairness implicit in the concept of due process. Thus it would seem that primary reliance in protecting individual rights should not be placed upon an objective test, and especially so where that test is both easily abused to defeat important societal interests and serves no recognized purpose itself.

III. PRACTICAL APPLICATIONS

The problem is to limit interrogation wisely so as to abolish its *abuses,* while not abolishing interrogation itself, but seeking to retain its use wherever the due process rights of the individual are not substantially threatened. The procedures should seek to protect the informational and supportive roles of counsel, but not necessarily the persuasive role. The question then arises as to how this may be accomplished.

74. *Cf.* Haynes v. Washington, 373 U.S. 503, 519 (1963).
75. See note 40 *supra.*
76. See discussion in text at notes 37-38 *supra.*
77. *Cf.* Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief,* 50 CALIF. L. REV. 421, 429-30 (1962); Comment, 73 YALE L.J. 1000, 1051-55 (1964). See also note 29 *supra.*

What steps should a policeman take, when questioning suspects *before indictment*, not only to guard the admissibility of any resulting confessions, but also to be fair to the suspect? Should there be any difference in the answer to these two questions? In other words, should confessions be excluded in all cases where the policeman should have acted differently, or should the courts be given some discretion as to whether to exclude confessions where the policeman's conduct has not caused substantial harm to the defendant's rights? If so, are there then two standards: one set of rules of police conduct which must be met in all cases or use of resulting confessions is precluded; and one which should be met, but failure to meet which will not in all cases require exclusion? And finally, can the individual's right to counsel be fully and effectively protected by non-automatic rules?

The traditional answer to the first question was that the policeman must avoid using so much pressure that the resulting confession was involuntary. That requirement must still be met, but it is now supplemented by additional requirements. One new requirement is that the policeman should warn any suspect of his right to remain silent before he is questioned.[78] But is it necessary to exclude all confessions where the suspect has not been warned? For example, is there any reason for excluding the confession in the introductory hypothetical case simply because John Doe was not warned before he spoke? If the policeman had also asked, while at the front door, "Did you do it?," should the answer change? Does that question significantly increase any peril to Doe's privilege against self-incrimination or his need for an attorney? Should a court therefore look at the context of the questioning before applying the lack of warning rule to exclude confessions? Certainly there is some difference between a casual encounter and a formal grilling at the station-house, even in regard to the need for a warning.

Although *Escobedo* indicates that a suspect should be warned during any questioning after arrest or after "beginning of focus,"[79] it does not necessarily require exclusion of all confessions procured under such circumstances. The Court emphasized that Escobedo, during the interrogation, had sought to consult counsel, and still was not warned of his right to remain silent.[80] Although the warning requirement obviously cannot be limited to that fact, it still may show that lack of warning does not require exclusion in all cases. The same result

78. Escobedo v. Illinois, *supra* note 7. The requirement applies to most suspects. It applies to all who are under arrest, 378 U.S. at 490-91, and to all others upon whom the investigation "has begun to focus." *Ibid.*

79. *Ibid.* See previous discussion of this point at notes 23, 24 and 34 *supra.*

80. 378 U.S. at 485.

may be indicated in the Court's denial of certiorari in *Ramey v. United States*,[81] which upheld the admission of a confession made immediately after arrest, even though the arrestee had not then been warned of his right to remain silent.

Although one may argue as to when an investigation "begins to focus" on a suspect, an arrest is a fairly definite event, and the *Escobedo* Court seemed to draw a definite conclusion that post-arrest proceedings were "accusatorial," not "investigative." Yet, if *Ramey* has any meaning, the exclusionary rule may not be required when a policeman does not pronounce a formal warning during an informal encounter. Thus, if the courts are allowed discretion in this area, Doe's confession need not be excluded for lack of warning, even if the policeman asked, "Did you do it?" If this analysis is sound, there are two standards concerning warnings. The police should warn primary suspects before questioning them. But failure to warn will not always require automatic exclusion of subsequent confessions, even when the suspect is in custody—that will depend upon the context of the questioning.

The *Escobedo* Court spoke only of warning a suspect of his right to remain silent.[82] This seems insufficient. If the police are here performing the informational role of counsel, they should also warn the suspect of his right to counsel. Each right is equally important to him; and, since the police are giving substitute performance, they should inform the suspect both of this fact and of his ability to seek information directly from counsel. A warning of the right to counsel also allow a meaningful distinction to be drawn between whether the suspect requests consultation with an attorney or not. Why, therefore, should not a policeman warn a suspect of this right also? But, on the other hand, should the courts exclude every confession where such a warning has not been given, or should the courts have some discretion to determine whether the lack of warning substantially affected his rights?

If a suspect should be warned of his rights to remain silent and to counsel and he does not request counsel, should the policeman refrain from questioning until counsel is present? Or until the suspect has actually conferred with counsel? For example, should the policemen at Doe's door wait if there is no attorney there? Should the machinery for law enforcement stop in its tracks because of the attorney's absence? Whatever are the proper answers to these questions, and either side may be persuasively argued, *must* any pre-

81. 33 U.S.L. Week 3120 (U.S. Oct. 13, 1964). Note that this is a Washington D.C., case, so the *McNabb-Mallory* rule was available, but not applicable under U.S. v. Mitchell, 322 U.S. 65 (1944).

82. 378 U.S. at 491.

indictment confession, obtained out of the presence of counsel, be excluded? The latter is a rather different question. If the persuasive role of counsel does not require constitutional protection, such statements can be admissible. Neither counsel's presence nor prior consultation would be required.[83] Once the suspect has been warned of his rights to remain silent and to counsel, does not the failure to request an attorney at least indicate that the suspect feels no compulsion, so that his fifth amendment privilege is not threatened?[84] Since the purpose of the new right to counsel rules is primarily to protect that privilege,[85] is there any reason to exclude confessions, simply because no attorney was present? Thus the policeman should be able to obtain admissible confessions by questioning a suspect with no attorney present, if after a full warning there is no request for an attorney.

The above analysis does not, however, resolve the problems raised when the suspect requests counsel. For example, if Doe requests counsel, should the police hold him incommunicado and thereby prevent him from contacting his attorney? Or rip his phone from the wall? If they do so, should any subsequent confession be excluded? The dissenters in *Escobedo* claimed that the presence or absence of a request for counsel would not have changed that decision.[86] But it is apparent that such presence or absence indicates whether the suspect feels that he is under compulsion, and therefore whether his fifth amendment privilege is threatened. Thus, this fact may be much more important to the Court than the dissenters recognized.

Regardless of the precise holding in *Escobedo,* the Court has shown increasing concern with this type of situation and will probably require the exclusion of confessions, at least in some circumstances, if such a request is denied, even though the suspect has been fully warned.[87] In *Escobedo* the Court did not lay down any absolute rule that all denials of requests for an attorney violate the right to counsel.

83. See previous discussion in text at notes 68-77 *supra.*

84. Of course, if the police went one step further and asked the defendant whether he wanted to consult counsel, and he did not, traditional waiver principles would apply, and the police could then question him. *Cf.* Carnley v. Cochran, 369 U.S. 506 (1962). But should this step be necessary? Are the doctrines concerning waiver of the benefit of counsel at trial applicable to the pre-indictment situation? If the defendant, after a full warning, makes no request for consultation, why would it be necessary or useful to determine whether he has waived any rights? Is it not sufficient to say that the supportive role of counsel has received adequate protection as long as he has indicated no felt need for supoprt?

85. See text accompanying and following note 68 *supra.*

86. 378 U.S. at 495.

87. This point has been discussed previously in the text following note 23 *supra.* For examples of the Court's concern with such denials, see Escobedo v. Illinois, *supra* note 7, at 485; and dissenting opinions in Spano v. New York, *supra* note 13, Crooker v. California, *supra* note 62; Cicenia v. LaGay, *supra* note 62.

It had an opportunity to do so by overruling *Crooker v. California.*[88] But instead of overruling *Crooker,* the Court distinguished it from *Escobedo.* The distinction was made on two grounds, but there is a third ground which, although unrecognized, should not be ignored. One distinction stated by the Court was that Crooker had been warned of his right to remain silent, but Escobedo had not.[89] A second distinction was that Crooker was "a well-educated man," but that Escobedo was not.[90] But it should also be noted that Escobedo's attorney was at the station-house during the questioning, while Crooker's was not, and the attorney did not immediately proceed there when called by his client.[91]

The scope of the right to counsel after request will be determined by which of these distinctions is meaningful to the Court. If the lack of warning to Escobedo is the crucial distinction, the police may always deny requests for an attorney as long as they warn the suspect of his rights.[92] This would indicate that the pre-indictment right to counsel rules protect only the informational role of counsel. The supportive role would not be protected because, even though the suspect has sought the moral and psychological support available only from his advocate, it could be denied him. Is the Court's expressed concern with denials of requests for counsel really just a cover-up for a concern as to whether the suspect has been warned?[93] Should the supportive role of counsel remain unprotected, even though protection of that role will not necessarily eliminate effective interrogation?[94] Some due process sanction against denials of requests for consultation should be expected. A warning by the police will not always allow them with impunity to isolate the suspect from the outside world. Thus the warning to Crooker should not be regarded as the crucial distinction between the cases.

The other stated distinction between the *Escobedo* and *Crooker* cases is that one defendant was educated and the other was not. This distinction may be regarded in three ways: (1) It is the crucial distinction, thereby making the right to counsel rules merely adjuncts of the involuntary confession rules. (2) It is a significant factor to the Court, requiring courts to apply the rule only when the police have substantially interfered with the defendant's right to counsel. And, (3) It

88. *Supra* note 62.
89. 378 U.S. at 491-92.
90. *Id.* at 492.
91. *Id.* at 478; 357 U.S. at 436, 437.
92. This point has been discussed at greater length in text at notes 21-24 *supra.*
93. See note 87 *supra.*
94. See text at p.46 *supra.* Even if the Court's rule is more limited, any confession obtained after such a denial by the police will certainly be closely scrutnized for signs of involuntariness. 378 U.S. at 499 (disscnting opinion). See text at notes 113-14 *infra.*

is not significant at all; *Crooker* is in effect overruled, and every denial of a request to contact counsel violates the sixth amendment, automatically requiring exclusion of all subsequent confessions.[95]

If the education of the defendant is a crucial distinction, the criteria for applying the right to counsel rule, after a request for counsel, would bear a strong resemblance to the criteria for determining the voluntariness of a confession. In the latter determination, courts consider the effect of the interrogation tactics used by the police and the defendant's probable ability to withstand such tactics. The question in each case is whether the accused's will to remain silent was overborne.[96] In the former determination, courts would consider the information given by the police, the suspect's ability to appreciate this information, and his ability to withstand the pressures of police questioning in the absence of his attorney. The question in such cases would then be whether his will to consult counsel before cooperating was overborne. In each type of determination, the courts would be seeking to ascertain a presumptive state of mind.[97] Under such an analysis, once a person had been warned, his protection against unfair interrogation would come primarily from the involuntary confession rules. The right to counsel rules would be regarded as an adjunct to strengthen the defendant's position in certain particular circumstances, but not to change the general structure of the rules regarding interrogation. Such an analysis would protect the informational role of counsel, and would also protect the supportive role in those cases where such support is most needed.

There is theoretical support for basing an analysis on these grounds. If the purpose of the new right to counsel rules is to protect the privilege against self-incrimination, are not both these rules and the involuntary confession rules designed to protect persons from speaking under compulsion? Is then the essential question, in all cases, whether the defendant spoke voluntarily, which involves an examination of his probable state of mind at the time he spoke? A request to consult counsel before speaking at least indicates a hesitancy to cooperate without further advice. The voluntariness of a confession obtained without further advice is not precluded, but is suspect.[98] To determine its voluntariness a court should consider both the conduct of the police and the defendant's background, so as to determine the

95. The defense in *Crooker* sought such a ruling, 357 U.S. at 440, but the conviction was affirmed and the requested ruling rejected by a majority of the Court. The defense request was quoted in *Escobedo*, and there expressly rejected again. 378 U.S. at 491.

96. For further discussion of my views on this subject, see Spanogle, *supra* note 3.

97. *Id.* at 430-31.

98. See text at note 113 *infra*.

effect of this conduct on him and his probable powers of resistance. Thus the right to counsel rules would be but a specialized variant of the involuntary confession rules.

There may, however, be reason to doubt that the right to counsel rules are limited in this mauner. First, the new rules seem to be "objective" in that they do not generally consider "the totality of the circumstances."[99] In particular, the statements of the holding in *Escobedo* do not take notice of the interrogation tactics used by the police, but only the single fact that the request for consultation was denied.[100] Thus the Court has pronounced a different type of rule, which looks to a different type of evidence for its determination. Do these differences prevent the new rules from being incorporated into the involuntary confession methods of analysis?

Second, the new rules are derived from the sixth amendment, but the involuntary confession rules are derived solely from the fifth amendment. Would a new rule which is merely an adjunct to the involuntary confession rules be derived from a different amendment? Does the deliberate use of the sixth amendment indicate that the Court is not merely enlarging a suspect's fifth amendment protection, but is providing him a different kind of protection?

If a different kind of protection is being offered, what is its nature? The fact which concerns the *Escobedo* Court is not merely the request for counsel, but the fact that that request was denied by the police.[101] Does this mean that the denial of such a request is itself a violation of the right to counsel—thus initiating the principle that a suspect has a right, upon request, to seek contact with his attorney? Should the police, absent special reasons, interfere with this attempt? If not, can not the Court at least restrict any active opposition or interference by the police with a suspect's attempt to consult counsel? If so, such a rule is not merely an adjunct to the involuntary confession rules, but has a purpose and an effect which are independent of 'coercion."

Such a rule need not, however, require the automatic exclusion of all confessions which follow denials of requests for counsel. First, there will be special cases where long delays in allowing contact with

99. *Cf.* Reck v. Pate, 367 U.S. 433, 443 (1961); Fikes v. Alabama, 352 U.S. 191, 197 (1957). The distinction between "subjective" and "objective" tests is discussed in note 3 *supra.*

100. 378 U.S. at 490-91, 492.

101. "[T]he suspect has requested *and been denied* an opportunity to consult . . . ." 378 U.S. at 491. (Emphasis added.) "When petitioner requested, *and was denied,* an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.'" 378 U.S. at 485. (Emphasis added.) For further discussion of this language, see text at note 35 *supra.* See also the discussion in *Escobedo* of People v. Donovan, *supra* note 32. 378 U.S. at 486-87.

an attorney will be necessary.[102] But even in cases where special circumstances are absent, if the *Escobedo* Court had intended to pronounce such a mechanical rule, it would have overruled *Crooker*. Instead, it chose to distinguish that case, reaffirming the principle that the denial of a request for counsel must "fundamentally prejudice" the defendant's rights to require exclusion of subsequent confessions.[103] This indicates that the exclusionary rule depends in part upon the total circumstances surrounding the questioning, not upon the presence or absence of a single fact.[104] Thus the fact that Escobedo was unwarned and uneducated may be considered a significant factor in the exclusion of his confession, so that the new rules do not operate mechanically, but only when the police have substantially interfered with the suspect's attempt to contact counsel.

What then should a policeman do if the suspect he plans to question requests a consultation with his attorney? Should he not at least allow the suspect who has an attorney to try to contact that attorney? Does not the sixth amendment at least prohibit interference, so that permitting a phone call is a minimum requirement? If so, does not a denial of a request to call counsel violate that amendment, jeopardizing the admissibility of any subsequent confession, even if it does not require exclusion in all cases?

But what of the suspect who does not have an attorney, and in particular of one who is indigent and cannot hire counsel? Certainly he should not be discriminated against due to that fact alone.[105] Does he not also have a right to seek consultation with an attorney, even though the state must provide that attorney's services? But permitting him to make a phone call to an attorney would usually be an illusory remedy. The fact situation is too different to rely upon that requirement, even though the police are required not to interfere with contact with counsel. Nor have policemen any duty or authority to appoint attorneys to defend indigents. Thus there could be no requirement on policemen in this situation to "have defense counsel at their side."[106] Yet, in each community, there are authorities whose duty it is to provide counsel for indigents—either the courts or a public

102. For examples of such situations, see Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 631-32 (1949). Prevention of the disappearance of accomplices is a primary example of a necessary reason for such a protracted delay. See also Comment, 68 YALE L.J. 1003, 1013-20 (1959).

103. 378 U.S. at 491. There would seem to be no inconsistency in using a "fundamental fairness" rule to control the applicability of the right to counsel in the pre-indictment situation, in spite of Gideon v. Wainwright, *supra* note 17, because of the different purposes of the right to counsel rules in the two situations. For discussion of a similar point, see note 84, *supra*.

104. See note 95 *supra*.

105. Gideon v. Wainwright, 372 U.S. 335 (1963).

106. *Cf.* 378 U.S. at 496 (dissenting opinion).

or private defender. The implementation of the indigent defendant's request for counsel will depend on whether these authorities are notified of that request. Thus it would seem that the police should at least permit the indigent suspect to contact these authoriies if he requests counsel. It then becomes their duty to further implement his request.

Further, should not the police contact the authorities themselves? Is placing such a duty upon them at all onerous, and in many cases do they not present the indigent to the appropriate authority when proceedings in court are initiated? Are the authorities more likely to react and furnish an attorney when the communication is from the police than from a private person? Is the analysis of this problem different from the analysis outlined above[107] requiring the police to warn a suspect of his right to counsel as well as his right to remain silent, especially in view of the fact that the police are still rendering substitute performance? If the police do contact the appropriate authorities, they have then initiated the implementation of defendant's request to the furthest extent of their authority to do so, and can then claim that further implementation must be accomplished by others.

Of course, in most such situations defense counsel will not be able to see or speak to the suspect immediately. How often is the typical attorney out of his office, or in conference with another client, or simply "unavailable" when called on the phone? Travel time will be required before there can be any face-to-face consultation. Thus a question will arise as to the admissibility of statements made after counsel or other authorities have been notified, but before the consultation has occurred. In answering this question, the third ground for distinguishing *Crooker* from *Escobedo* may become important. Escobedo's counsel was present in the station-house and available for immediate consultation, while Crooker's was not.[108] There were, therefore, important differences in the practical situations confronting the parties.

Should all confessions made after a request for counsel, but before actual consultation with him, be excluded due to that fact alone? For example, in the introductory hypothetical case, if Doe requests counsel and is allowed to call him on the telephone, then "tells all" before the attorney arrives, should the confession be automatically excluded? Suppose the attorney followed Judge Moore's statement[109] and advised Doe to confess before counsel arrived? Could the rendering of this advice ever be proved?[110] Any rule mechanically excluding

107. See text accompanying and following note 82 *supra.*
108. See note 91 *supra.*
109. See note 1 *supra.*
110. The primary difficulties would, of course, be practical ones. But also the

confessions made before counsel arrived would create periods during which no confession could be obtained. The drawbacks of this type of rule have been discussed previously[111] in regard to any rule which requires the physical presence of, or consultation with, counsel as an absolute prerequisite to obtaining admissible confessions.

Is there any basic difference between a rule which requires counsel's presence at all interrogations and one which requires his presence at all interrogations following a request for counsel? The defects, due to the use of the mechanistic approach in both, are the same. However, there is a basic difference—each rule seeks to protect a different role of counsel. The former rule concerns only the persuasive role; but the latter rule concerns the supportive role in addition, because the suspect has indicated that he feels a need for consultation and support. Thus, this problem raises questions it was not necessary to discuss in Part II. How should the balance be struck in a conflict between promotion of counsel's supportive role and the societal interests concerning effective but non-abusive interrogation? Is protection of the individual always preferable?[112] How should the balance be struck in a conflict between promotion of the supportive role and the possible abuses of the judicial system due to the opportunities to obtain immunity through confession?

It would seem that a non-mechanical approach to the problem would first ascertain whether the individual is otherwise protected during this period and would then determine how effective that protection is. Is he otherwise without protection after a request for counsel but before counsel arrives? The involuntary confession rules offer protection against use of coercive methods by the police. Regardless of the Court's present attitude toward their worth, they have not been demonstrated to be ineffective.[113] Do they not have added effectiveness in these circumstances? Has not defense counsel stronger evidence than usual to show that the confession was made under a prohibited state of mind when such a request has been made but is not yet fulfilled, even though it was not denied? Will not the prosecution find it more difficult to show voluntary cooperation when the defendant has first requested counsel? Does not the request indicate that, at that time, he was not willing to cooperate without

privilege against self-incrimination would prevent such evidence from coming from the suspect himself, and that privilege or the attorney-client privilege would prevent it from coming from the attorney.

111. See text at notes 71-77 *supra*.

112. Compare the much more limited statement of Mr. Justice Goldberg in *Escobedo*: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused *to be advised* by his lawyer of his privilege against self-incrimination." 378 U.S. at 488. (Emphasis added.)

113. See text at notes 57-60 *supra*.

further advice? Such an indication does not preclude a later voluntary change of mind, and subsequent voluntary confession. Nor would police attempts to obtain the suspect's cooperation preclude a voluntary change of mind. A fundamental assumption of the involuntary confession rule is that every person has some power to resist police questioning if he does not wish to cooperate.[114] The request for counsel makes subsequent confessions suspect, but by no means necessarily involuntary. Yet with such strong arguments available to the defendant, it would be difficult to say that the involuntary confession rules will not furnish effective protection.

Thus the defendant's fifth amendment rights are protected. Are his sixth amendment rights also protected? The answer to that question depends upon the nature of those rights. Does the right to counsel require the physical presence of counsel, or are the suspect's sixth amendment rights protected as long as there is no interference with his attempts to contact counsel? *Massiah* and *Escobedo* seem to provide different answers to this question. *Massiah* requires counsel's physical presence as a sixth amendment right after indictment. But the *Escobedo* Court was concerned with the *denial* of the defendant's request, not with counsel's presence, and not even with the request itself.[115] Thus the essential violation of Escobedo's right to counsel was the prevention of consultation, not the fact that the police continued their questioning in counsel's absence. Once the police have permitted the attorney to be contacted, they have no control over his actions. He may come immediately or delay, for good reason or no reason. A delay may even be desired for ulterior motives. Must the investigation stop to await his actions, especially if other, less hampering, devices protect the suspect? If not, admissible confessions may be obtained after a request for counsel but before actual consultation.

Thus it is at least arguable that those roles of counsel which require constitutional protection do receive sufficient protection after a request for counsel without requiring his presence. The informational role is protected by the warning requirement. The supportive role is protected both by allowing the suspect to seek consultation

114. The Court has refused to hold that the police may not question the defendant, Culombe v. Connecticut, 367 U.S. 568, 571, 588-90 (1961); and they may even detain him, fail to warn him of his rights, or deny him access to counsel without necessarily overbearing his will so as to render subsequent confessions involuntary. Thomas v. Arizona, 356 U.S. 390 (1958); Crooker v. California, *supra* note 62; Cicenia v. LaGay, *supra* note 62; Stein v. New York, 346 U.S. 156 (1953); Lisenba v. California, 314 U.S. 219 (1941). Since such tactics place pressure on the defendant to cooperate, the Court must assume that he has some powers to resist such tactics.

115. See note 101 *supra*.

and by prohibiting interference once counsel arrives. The former assures that the suspect's state of mind will not be adversely affected by a denial of his request, protecting his privilege to remain silent. This protection is supplemented by the involuntary confession rules. The latter assures that he will receive advice and support as soon as counsel is capable of providing them, thus protecting his access to counsel. Since the supportive role is protected by these requirements, is the further requirement of actual consultation as a prerequisite to admissibility warranted? In view of the defects of such a rule, especially the possible abuses from immunity through confession, its constitutional necessity is questionable. Instead the right to counsel would seem to require that the police have not hampered consultation between the suspect and his counsel.

Under the above analysis, the request for counsel will have two effects. First, the sixth amendment rules will require the police to allow the suspect to seek contact with his attorney. If he is indigent, the defender or appropriate court should be notified of the request. It is then their duty, not that of the police, to provide him with counsel. In either case, subsequent confessions would not be excluded automatically due to a denial of consultation, but could still be admitted if no substantial prejudice was caused. Second, the mere fact that consultation has been requested will make it more difficult to show that subsequent confessions are voluntary. Thus the problems of meeting the fifth amendment involuntary confession rules will be more acute, although by no means prohibitive. If John Doe should request an attorney, the police are not therefore precluded from using any admissions he may make until his attorney arrives. Nor are they precluded from questioning him until that time, as long as they have first allowed him to seek contact with an attorney. Any resulting confessions will not be procured in violation of the right to counsel, and their admissibility will therefore be judged according to the standard involuntary confession rules.

IV. Conclusion

The 1964 right to counsel cases do not themselves abolish the usefulness of interrogation as a tool for law enforcement. But, if the rules in these cases are extended to require either a consultation with counsel before interrogation in all cases, or the physical presence of counsel during interrogation, such abolition is possible. It would seem that the future of the utility of interrogation will depend upon the determination of two questions by the Court. First, is there a necessity to protect the persuasive role of counsel during interrogation,

or do only the informational and supportive roles require constitutional protection? Second, are the new rules to be applied mechanically so that any lapse from them requires exclusion of subsequent confessions, or should the courts exercise discretion and admit the confessions if the lapses are not harmful to individual rights?

In the pre-indictment situation, neither of these questions are answered by *Escobedo*. There are indications in that opinion that neither protection of the persuasive role nor a mechanical approach is necessary. In the post-indictment situation, however, *Massiah* would indicate both that the persuasive role must be promoted and that a mechanical approach is required. There is also a problem as to whether the Court recognizes the differences between the two approaches, which creates a danger that the *Massiah* approach will be applied to pre-indictment questioning.

It would seem that such a result would not properly protect the societal interests involved, however, and would give the accused advantages which are not required by any constitutionally derived purpose. Such purposeless advantages would create an imbalance in the communal and individual interests involved.

The present pre-indictment rules require the police to warn a suspect of his right to remain silent, and will probably be extended to include a warning of his right to counsel. They may also prohibit the police from interfering with attempts to contact or consult with counsel. Any violation of such rules which substantially prejudices these rights will require exclusion of any subsequent confession. Thus these present rules seem designed to protect the informational and supportive roles of counsel, and also to balance the societal and individual interests involved by not requiring mechanical application.

An absolute right to consultation with counsel or the physical presence of counsel during interrogation would not protect these roles, however. The only purpose of such rules would be to afford counsel an opportunity to persuade his client not to cooperate, regardless of the client's original willingness. It will be virtually impossible for the police to persuade defense counsel to cooperate in making his own job more difficult, so that any such rule would effectively preclude the use of interrogation, and could lead to possible immunity through a well-timed confession.

The right to counsel does not seem to require promotion of the persuasive role during interrogation. Its promotion will not enhance either the protection of the individual's privilege against self-incrimination or his protection against police interference with attempts to consult counsel. Therefore the approach used in *Escobedo* seems

preferable to that used in *Massiah*. Should not the *Massiah* approach then be abandoned? Certainly that action would be the only method of protecting the judicial system from the abuses of immunity through confession.