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United States v. Henry: The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations

Despite the Burger Court's history of judicial conservatism, the Supreme Court in United States v. Henry exceeds the liberality of the Warren Court in the area of criminal defendant rights. The decision in Henry clearly provides further limitations upon the government's ability to conduct interrogations. The author examines the Court's factual and legal analysis of the case, emphasizes how the test established in Henry surpasses the rule promulgated in Massiah, and discusses the decision's impact as well as the curious turnabout of Chief Justice Burger.

I. INTRODUCTION

It was Jonathan Swift who wrote that:

> in all points out of their own trade they [lawyers] were the most ignorant and stupid . . . among us, the most despicable in common conversation, avowed enemies to all knowledge and learning, and equally disposed to pervert the general reason of mankind in every other subject of discourse, as in that of their own profession.[1]

It is obvious that the United States Supreme Court places a much higher value on the importance of attorneys than did Jonathan Swift, as is evidenced by the recent ruling in the case of *United States v. Henry*.[2] In *Henry*, the Supreme Court expanded the criminal defendant's right to counsel in the area of government interrogation subsequent to the formal indictment.[3] In broadening the protections afforded the criminal defendant during postindictment interrogations, the Burger Court expanded the rights of the criminal defendant further than did the Warren Court[4] in the 1964 case of *Massiah v. United States*.[5]

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1. J. SWIFT, GULLIVER'S TRAVELS 270 (Signet ed. 1960).

2. 100 S. Ct. 2183 (1980).

3. *Id. See also* Mann, *High Court Curtails Use of Informants*, L.A. Times, June 23, 1980, at 1, col. 1 [hereinafter cited as Mann].

4. Chief Justice Warren was appointed by President Eisenhower, and served as head of the high court from 1953 to 1969. Chief Justice Burger was appointed by President Nixon, and has served as head of the high court since 1969. THE WORLD ALMANAC & BOOK OF FACTS 1980 312-13 (Newspaper Enterprise Ass'n ed. 1980).

5. 377 U.S. 201 (1964). However, Chief Justice Burger in *Henry* urged that *Massiah* and *Henry* were indistinguishable as to their facts, and that the holding in *Henry* was based on the rule created and applied in *Massiah*. 100 S. Ct. 2183, 2187 & n.10. But Justice Blackmun found *Henry* to be a definite breaking away from the rule of *Massiah*. Whereas *Massiah* was concerned with actions moti-

The Court in *Massiah* held that any incriminating remarks *deliberately elicited* from an indicted defendant by government agents, in the absence of the defendant's lawyer, deprived the defendant of his right to counsel under the sixth amendment;[6] and, therefore, the defendant's statements could not be admitted into evidence against him at his trial.[7] But *Henry* has gone beyond that test in holding that "by *intentionally creating a situation likely to induce* Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel."[8] Thus, where the *Massiah* test appeared only to cover situations where the government, or its

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vated by a specific intent to draw incriminating statements from the defendant, Justice Blackmun viewed *Henry* as going beyond that test by prohibiting mere negligent reception of incriminating remarks. *Id.* at 2191 (Blackmun, J., dissenting).

For Warren Court decisions in favor of the criminal defendant *see, e.g.*, Benton v. Md., 395 U.S. 784 (1969) (fifth amendment guarantee against double jeopardy held applicable to the states); Katz v. United States, 389 U.S. 347 (1967) (what a person attempts to protect as private, while even in a public area, is constitutionally protected by the fourth amendment); United States v. Wade, 388 U.S. 218 (1967) (right to counsel at postindictment lineups); Berger v. N.Y., 388 U.S. 41 (1967) (New York eavesdropping statute was found to be too broad, and thus unconstitutional); Washington v. Tex., 388 U.S. 14 (1967) (sixth amendment right of the accused to have compulsory process for obtaining witnesses held applicable to the states); Klopfer v. N.C., 386 U.S. 213 (1967) (sixth amendment right to speedy trial held applicable to states); Miranda v. Ariz., 384 U.S. 436 (1966) (anytime an individual is taken into custody, or is significantly dispossessed of his freedom, his privilege against self-incrimination is endangered and the police must read him four warnings: 1) his right to remain silent; 2) the fact that anything he says can be used against him; 3) that he has the right to the presence of an attorney; and 4) that if he cannot afford an attorney one will be appointed for him if he so wishes); Pointer v. Tex., 380 U.S. 400 (1965) (sixth amendment right to confront opposing witnesses held applicable to states); Escobedo v. Ill., 378 U.S. 478 (1964) (confession acquired at police station before indictment was held to be a violation of the accused's right to counsel, because the police investigation had progressed from the stage of inquiry to the accusatory stage); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination held applicable to states); Massiah v. United States, 377 U.S. 201 (1964) (federal agents cannot, through the use of informants, "deliberately elicit" incriminating statements from the accused without the accused's counsel present); White v. Md., 373 U.S. 59 (1963) (the accused has a right to counsel at preliminary hearings); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel held applicable to states); Hamilton v. Ala., 368 U.S. 52 (1961) (the accused has a right to counsel at arraignments).

6. "[I]n criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

7. Massiah v. United States, 377 U.S. at 206-07. The reason why such statements are not allowed at trial is the exclusionary rule. The rule was solidified in the case of Mapp v. Ohio, 367 U.S. 643 (1961), where the Court held that evidence illegally seized was to be excluded from criminal trials. The rationale behind this rule is that the uprightness of the American judicial system makes it necessary for courts not to become involved in illegal intrusions into the constitutional rights of citizens by allowing such unlawfully obtained evidence in at trial. Terry v. Ohio, 392 U.S. 1 (1968).

8. 100 S. Ct. at 2189 (emphasis added).

agent, intentionally set out to extract incriminating statements from the defendant, the *Henry* rule could apply to situations where "negligent" events bring about damaging remarks.[9]

Even more important, the Burger Court has expressed the view that it is the attorney himself who can better protect the individual's constitutional rights during interrogations by the government. Contrary to Jonathan Swift's cynical portrayal of attorneys, the United States Supreme Court in *Henry* sees attorneys as the "guiding hand"[10] in preserving the rights of criminal defendants.

This paper will examine the history of the right to counsel, present the facts of *Henry*, then examine the Supreme Court's basis for decision in the *Henry* case and compare it to the Court's decision in the *Massiah* case. In addition, this paper will discuss how the test established in *Henry* goes further than the test in *Massiah* in protecting the criminal defendant. Lastly, the impact of the *Henry* case, the debate over whether or not to extend criminal defendant's rights, the apparent about-face of Chief Justice Burger in the *Henry* decision, and the future of the government's use of informants will all be discussed.

II. History of the Right to Counsel

The right to counsel can be traced all the way back to the middle ages.[11] Close to the end of the thirteenth century, three styles of representation by counsel were available to defendants: the lawyer as pleader,[12] attornatus,[13] and advocatus.[14] Until approxi-

9. *Id.* at 2191 (Blackmun, J., dissenting).

10. The inexperience of the criminal defendant has been noted:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . [and] requires the *guiding hand of counsel* at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Ala., 287 U.S. 45, 69 (1932) (emphasis added). *See also* United States v. Ash, 413 U.S. 300, 307 (1973); Colemen v. Ala., 399 U.S. 1, 7 (1970); United States v. Wade, 388 U.S. 218, 223-25 (1967); Hamilton v. Ala., 368 U.S. 52, 54 (1961); Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

11. P. Lewis & K. Peoples, Constitutional Rights of the Accused 549 (1979). Although, the concept of right to counsel in the middle ages covered a much different area than the concept covers today.

12. A Pleader was someone "learned in the law who did not act as a representative of the defendant but merely stood at the defendant's side for his cause." *Id.*

13. An attornatus acted as the defendant's actual representative, appearing in his place. *Id.*

14. The advocatus customarily made a case, not for the defendant's defense,

mately the middle of the fifteenth century, English law had allowed the right to counsel considerable breadth and prominence.[15] But, two distinctions appeared in English law which had the effect of suppressing and reining in the right to counsel: the distinction between the presentation of questions of law and fact, and the refusal to grant a defendant the guidance of legal counsel when the defendant was accused of perpetrating a felony.[16] The facts-law distinction gave the task of presenting the facts entirely to the defendant, whereas it was the attorney's narrow assignment to apply the law to the particular facts of the case.[17] While the defendant was disallowed access to legal counsel in felony cases, he was, surprisingly, allowed the right to counsel in misdemeanor cases.[18] During the next four centuries, the right to counsel concept broadened "slowly but steadily."[19]

Just prior to the American Revolution, three colonies[20] were giving a broader view of the right to counsel than that accorded in England. By 1789, the year Madison proposed the sixth amendment,[21] all states but Georgia and Rhode Island had some variation of the right to counsel in their constitutions, and eleven states had abolished, either directly or impliedly, the facts-law distinction altogether.[22] In 1791, the sixth amendment was ratified,[23] and for nearly two hundred years its meaning has been debated.[24] Until 1932, however, there were but a few cases touching

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but for his own, because he primarily represented the defendant as a "surety or warrantor." *Id.*

15. *Id.* at 549-50. *See* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L. REV. 1000, 1032 (1964) [hereinafter cited as *Historical Argument*].

16. P. LEWIS, *supra* note 11, at 549-50.

17. *Id.* at 550. Consequently, the defendant was left on his own to do the pleading witout the advantage of the lawyer's expertise. *Id.*

18. *Id. See* W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-9 (1955). The individual charged with a felony was deemed more hazardous to the English Government. *See also* United States v. Ash, 413 U.S. 300, 306-07 (1973).

19. P. LEWIS, *supra* note 11, at 550. By the eighteenth century, attorneys were performing many more roles, excepting the opportunity to address the jury at the close of the evidence, because that was left to the government's counsel exclusively. *Id.*

20. *Id.* The three colonies were Pennsylvania, South Carolina, and Delaware.

21. *Historical Argument, supra* note 15, at 1031.

22. P. LEWIS, *supra* note 11, at 550. *See also* United States v. Ash, 413 U.S. 300, 306-07 (1973); United States v. Wade, 388 U.S. 218, 224 (1967). *See generally* Powell v. Ala., 287 U.S. 45 (1932) (general discussion of right to counsel history).

23. *Historical Argument, supra* note 15, at 1031. The amendment passed both Houses without debate.

24. The basic lack of historical data and material, in regard to Congress's intent in ratifying the sixth amendment, makes it an arduous task to determine just what the scope of the right to counsel was meant to encompass. Each state could adopt the amendment as a guarantee to the right to counsel already enjoyed under each state's particular constitution. Thus, it was left to the courts to determine if the amendment provided a broader interpretation of the right to counsel

upon the right to counsel.[25]

Beginning with *Powell v. Alabama*,[26] the United States Supreme Court has made a number of rulings pertaining to the sixth amendment and the right to assistance of counsel, with the cumulative effect of further expanding the rights of the criminal defendant.[27]

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than was available under a particular state's constitution. W. BEANY, *supra* note 18, at 24.

United States courts often expand the right to counsel to meet new situations that arise which present confrontations requiring further legal assistance for the criminal defendant. *See generally* United States v. Ash, 413 U.S. 300, 311 (1973) (discussion concerning new contexts presenting same hazards which gave rise to right to counsel in the first place).

25. *Historical Argument, supra* note 15, at 1031. It was not until the United States became highly industrialized and urbanized that there arose a problem of the indigent defendant and, in addition, the investigation process of the law enforcement community became more complex.

26. 287 U.S. 45 (1932). The Court held that a criminal defendant had a right to the assistance of counsel in a case involving a capital offense where the ignorance or lack of clear-thinking on the part of the accused made the accused unable to present an adequate defense. *Id.* at 71.

The Court in *Powell* relied upon the fourteenth amendment. It was not until *Massiah* that American courts began relying directly upon the sixth amendment in right to counsel cases. P. LEWIS, *supra* note 11, at 420. In *Massiah*, the Court looked explicitly at the sixth amendment, whereas all previous decisions involving right to counsel had relied upon the due process clause of the fourteenth amendment. Those cases relying upon the fourteenth amendment looked to whether or not the denial of counsel constituted fundamental unfairness in the criminal process for the accused. For decisions relying upon the fourteenth amendment see Hamilton v. Ala., 368 U.S. 52, 52 (1961); Spano v. N.Y., 360 U.S. 315, 324 (1959); Cicenia v. Lagay, 357 U.S. 504, 508 (1958); Crooker v. Cal., 357 U.S. 433, 434 (1958); Payne v. Ark., 356 U.S. 560, 561 (1958); Powell v. Ala., 287 U.S. 45, 71 (1932).

27. Since the landmark case of *Powell*, the United States Supreme Court has made many decisions affecting the criminal defendant's right to counsel. The Court established the right to court-appointed counsel at federal trials. Johnson v. Zerbst, 304 U.S. 458 (1938) (two marines were tried and convicted for feloniously uttering and passing counterfeit bills, and though they asked the district attorney for court-appointed counsel at trial, they were denied their request).

The Court granted the right to be free from coerced confessions. Spano v. N.Y., 360 U.S. 315 (1959). In *Spano*, the defendant was convicted for the murder of a former professional boxer, who had previously beaten the defendant at a saloon and stolen his money. The defendant turned himself in to the authorities, and, after eight hours of questioning, confessed. During those eight hours the police had used a friend of the defendant's, a police cadet, to arouse the defendant's compassion, by having the friend falsely claim that unless the defendant confessed, he, the friend, would be in serious trouble. Looking at the totality of the circumstances, the Court found a coerced confession. *Id.* at 316-20, 323.

The Court has given the defendant the right to counsel at arraignments. White v. Md., 373 U.S. 59 (1963); Hamilton v. Ala., 368 U.S. 52 (1961). In *White*, the defendant had initially made a plea of guilty, but later at his arraignment, this time with counsel present, the defendant pleaded not guilty. While his not guilty plea was

Permeating the decisions of the United States Supreme Court in connection with the defendant's right to counsel is the theory of "critical stages."[28] If the particular stage in the criminal proc-

allowed to stand, the fact that he had previously pleaded guilty was admitted into evidence at trial. The Court held that the original guilty plea should not have been admitted at trial, because the plea was obtained at a time where the right to counsel attached, due to the reason that counsel was required to be present so the defendant could plead intelligently. 373 U.S. at 59-60. In *Hamilton*, the defendant was charged with burglary and he was denied counsel for his arraignment. Under Alabama law, the arraingment was the only time a defendant could assert the defense of insanity; thus the Court reasoned that since the arraignment was such an important stage, where significant opportunities could be eternally lost, the defendant had a right to counsel at such proceedings. 368 U.S. at 52-55.

The right to court-appointed counsel at *all* felony trials was established by the Court. Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon*, the defendant was charged with the burglary of a poolhall, and, despite his indigency, he was denied his request for court-appointed counsel at trial. Thus, the defendant handled his own defense, and was subsequently convicted and sentenced to five years in prison. *Id.* at 336-37.

The right to counsel after indictment whenever the government *interrogates* the defendant was instituted in *Massiah*, and relied upon in *Henry*. 100 S. Ct., at 2186-88.

The Court has applied the right to counsel whenever the process becomes accusatory, rather than investigatory, and the government interrogates the defendant. Escobedo v. Ill., 378 U.S. 478 (1964). In *Escobedo*, the defendant's brother-in-law had been shot and killed, and eleven days later the defendant was arrested for that shooting and taken to the police station for questioning. The defendant made many pleas to see his lawyer, but was repeatedly denied access to counsel. In reversing the conviction, the Court found that the defendant's right to counsel under the sixth and fourteenth amendments had been denied. *Id.* at 479-83, 491.

The Court established the right to court-appointed counsel during custodial (versus postindictment) interrogation. Miranda v. Ariz., 384 U.S. 436 (1966) (anytime an individual is taken into custody, or is significantly dispossessed of his freedom, his privilege against self-incrimination is endangered and the police must warn him about his right to remain silent, the fact that anything he says can be used against him, his right to the presence of an attorney during questioning, and his right to have the court appoint an attorney if he cannot afford one).

The right to counsel has been extended to postindictment lineups by the Court. United States v. Wade, 388 U.S. 218 (1967). In *Wade*, the defendant was indicted for the robbery of a bank, and without notifying his counsel, the government placed the defendant in a line-up, where the defendant was identified as the robber. The Court reversed the subsequent conviction on the grounds that since the absence of counsel at that proceeding could cause the trial to be unfair, the defendant was entitled to the assistance of counsel at the lineup. *Id.* at 219-21, 224.

The Court has instituted the right to counsel at a preliminary hearing. Coleman v. Ala., 399 U.S. 1 (1970) (the preliminary hearing was held to be such a crucial stage for the defendant in the criminal process, that he had the same right to counsel at that stage as he had at the trial itself).

The right to counsel for all crimes punishable by a prison sentence has been established by the Court. Argersinger v. Hamlin, 407 U.S. 25 (1972) (the court held that it could not read anything in the sixth amendment justifying a distinction between misdemeanors and felonies).

In addition, the Court has applied the right to counsel when the government, even indirectly, interrogates the defendant after the defendant has been formally charged with an offense. Brewer v. Williams, 430 U.S. 387 (1977). For a synopsis of the *Brewer* facts *see* note 78 *infra*.

28. *See* text accompanying notes 69-71 *infra*.

ess is deemed to be critical, then the defendant has the right to counsel at that time.[29] However, if the stage is not determined to be critical, then no right to the assistance of counsel attaches.[30]

III. FACTUAL BACKGROUND OF *UNITED STATES V. HENRY*

A bank in Norfolk, Virginia was robbed by two men wearing masks and carrying guns, while a third man waited in a car outside. The car used for the robbers' escape was discovered shortly thereafter abandoned. A lease and rental receipt, for a rented house in Norfolk, was found in the car. This discovery led to the subsequent arrest of two men at the rented house.[31] Implicated by the rental receipt, Billy Gale Henry was arrested three months later and indicted for armed robbery.[32] Shortly thereafter, Henry was given appointed counsel.

A Mr. Nichols, who was imprisoned in the same cellblock as Henry, and who was sometimes paid on a contingent basis for giving information to the FBI, was requested to be on guard to any statements made by prisoners, particularly Henry, but not to initiate any conversations concerning the charges against them.[33] A

29. *See, e.g.*, Coleman v. Ala., 399 U.S. 1 (1970) (preliminary hearing is a critical stage because it could have a prejudicial effect on the trial); United States v. Wade, 388 U.S. 218 (1967) (line-up is a critical stage so as to insure that the trial will be fair); Escobedo v. Ill., 378 U.S. 478 (1964) (when the criminal process becomes accusatory, whether or not there is an indictment, it is a critical stage when the defendant is interrogated); Massiah v. United States, 377 U.S. 201 (1964) (post-tindictment interrogations of the defendant constitute critical stages); White v. Md., 373 U.S. 59 (1963) (preliminary hearing is a critical stage to insure intelligent pleading by the defendant); Hamilton v. Ala., 368 U.S. 52 (1961) (arraignment is a critical stage because what happens there could have effect on trial); Crooker v. Cal., 357 U.S. 433 (1958) (if a pretrial proceeding without counsel would substantially prejudice the defendant at trial, then the right to counsel attaches at that proceeding); Powell v. Ala., 287 U.S. 45 (1932) (some pretrial stages are as critical as the trial itself).

30. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973) (photo display is not a critical stage); Kirby v. Ill., 406 U.S. 682 (1972) (preindictment showup is not a critical stage because formal proceedings against the defendant have not been initiated); United States v. Wade, 388 U.S. 218 (1967) (taking of blood and fingerprints are not critical stages); Gilbert v. Cal., 388 U.S. 263 (1967) (handwriting exemplar is not a critical stage because there is only a minimal chance that it will make the trial unfair).

31. The government agents found the money from the robbery, the masks, and the guns used in the robbery at the rented house. 100 S. Ct. at 2184.

32. Henry was indicted under 18 U.S.C. § 2113(a)(d) (1976).

33. The government agent involved submitted an affidavit describing his relationship and conversation with Nichols, the paid informant:

I recall telling Nichols . . . to be alert to any statements made there by in-

month or so later, Nichols was released from jail and reported what Henry had told him about the bank robbery. Nichols was paid for giving such information.

At Henry's trial, evidence was admitted regarding Henry's connection to the rental receipt, along with testimony linking Henry to the rented house and the other two men in the robbery. Evidence was also admitted indicating it was Henry's palm prints found on the lease agreement. Finally, the informant, Nichols, testified in reference to the incriminating statements made by Henry to him in their conversations.

Henry was convicted of bank robbery and sentenced to a term of twenty-five years in prison. On appeal, he raised no sixth amendment claim[34] and his conviction was affirmed. Upon subsequent appeal, Henry asserted that Nichols' testimony had constituted a violation of his right to assistance of counsel. The district court, however, ruled against Henry. The appellate court reversed the lower court and found that there had been a violation of Henry's sixth amendment right.[35]

IV. THE *MASSIAH* TEST AND THE *HENRY* FACTS

In *Massiah*, the defendant, a merchant seaman, was arrested when the United States Government agents found three and a half pounds of cocaine aboard ship. The defendant was arraigned[36] and indicted, along with a co-defendant, and released on bail following his having retained a lawyer. The co-defendant, deciding to cooperate with the federal agents, allowed those agents to place a listening device under his automobile's front seat for the purpose of recording conversations with the defendant; the co-defendant was directed to elicit information. The defendant divulged the incriminating remarks sought after, and was subse-

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> dividuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements.

100 S. Ct. at 2185-86.

34. It was not until some time after his initial appeal that Henry discovered the fact that Nichols was a paid government informer, thus Henry's appeal on sixth amendment grounds was somewhat belated. *Id.* at 2185.

35. In reversing and remanding the lower court, the appellate court relied upon Massiah v. United States, 377 U.S. 201 (1964). The appellate court held that if Nichols had created a confidential and trustworthy relationship with Henry, through ordinary conversation or association or both, so as to lead Henry to make damaging statements, then Henry's sixth amendment right to counsel was infringed upon. 590 F.2d 544 (1978).

36. The defendant pleaded not guilty. 377 U.S. at 202.

quently convicted.[37] In reversing the defendant's conviction,[38] the United States Supreme Court held that the government had *deliberately elicited* incriminating comments from the defendant in the absence of counsel and after indictment, and therefore, had violated his sixth amendment right to the assistance of counsel.[39] Hence, *Massiah* established the rule that the government cannot interrogate a defendant, whether directly or indirectly,[40] without the defendant's counsel present after a defendant has been indicted.[41]

In finding *Massiah* to be controlling,[42] the *Henry* Court noted the presence of three elements which led to the Court's conclusion that a deliberate elicitation had occurred: first, Nichols was acting as an informant on a contingent fee basis; second, Nichols was "ostensibly" no more than a fellow prisoner in Henry's eyes; and, third, Henry was under indictment and imprisoned when he made his incriminating statements.[43] After examination, however, each element of the Court's conclusion, and hence, the conclusion itself, may be seen to be less than satisfactory.

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37. *See generally* statement of facts, *Id.* at 202-03.

38. *Id.* at 207.

39. *Id.* at 206. The *Massiah* decision marked a departure from the United States Supreme Court's reliance on the voluntariness test in determining the admissibility of confessions. *Id.* at 210, 213 (White, J., dissenting) (absence of counsel is but one of many factors to consider). *See also* Escobedo v. Ill., 378 U.S. 478, 492, 496 (1964). For decisions relying on the voluntariness test *see* Spano v. N.Y., 360 U.S. 315, 324 (1959); Payne v. Ark., 356 U.S. 560, 562, 567 (1958).

The Court in *Spano* looked at all the facts and circumstances surrounding the confession in determining if it was voluntary. 360 U.S. at 321. The cases following the voluntariness test did not address the question of whether or not the defendant was allowed the presence of counsel during interrogation, nor did *Massiah* and *Escobedo* focus on whether or not the confession was voluntary. Quite possibly, the voluntariness test was abandoned because it was deemed inadequate protection for the defendant in that it gave the trial court too much discretion in determining whether the confession was voluntary or not, which would lead to a complete lack of uniformity in decisions. *See generally* Miranda v. Ariz., 384 U.S. 436 (1966).

40. 377 U.S. at 206. *See* Brewer v. Williams, 430 U.S. 387, 400 (1977) (the fact that the incriminating remarks were directly elicited in *Massiah*, but indirectly elicited in *Brewer*, was deemed constitutionally irrelevant). *See also* R.I. v. Innis, 100 S. Ct. 1682 (1980). *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L. REV. 1 (1978).

41. Such postindictment elicitation of incriminating remarks requires a reversal of conviction based on such evidence. 377 U.S. at 204. See People v. Waterman, 9 N.Y.2nd 561, 175 N.E.2d 445, 449, 216 N.Y.S.2d 70 (1961). *See generally* J. KLOTTER & J. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE 387 (3d ed. 1977).

42. 100 S. Ct. at 2186.

43. *Id.*

A. The Contingent Fee Arrangement

Because Nichols was acting on a contingent fee basis, the Court reasoned, he was only to be paid upon his providing information which, despite the agent's instructions not to initiate any conversations but only to listen, would impel Nichols to take positive steps to obtain incriminating information.[44] However, in its analysis the Court disregarded some key factors which, when considered together, would lead to an assumption contrary to that of the majority. Those key factors included the agents specific instructions to Nichols,[45] the assumption that Nichols would not be paid unless he followed the instructions given,[46] the fact that Nichols had worked for the FBI for four years, and the fact that Nichols was to be attentive to the conversations of many prisoners, not just Henry's.[47] Considering the above factors, the Court placed itself on unstable ground when it determined that the federal agent, in having a contingent fee arrangement with Nichols, thereby "intentionally created a situation likely to induce Henry to make incriminating statements." While there was evidence to support the Court's inference, there was equal evidence to support a competing inference,[48] *i.e.*, that Nichols did, in fact, follow the specific instructions given him and thus only *listened* to Henry incriminate himself. Had the Court so ruled, no interrogation could have been shown to have occurred, and hence, there could have been no denial of the right to counsel at the time Henry made his incriminating remarks to Nichols.

In relying upon the contingent fee arrangement, the Court in *Henry* rested its decision on more dubious rationale than that found in *Massiah*. In *Massiah*, the informant, a co-defendant, had a strong motive to enter into an arrangement with the police to specifically elicit incriminating remarks from Massiah.[49] The informant in *Massiah*, therefore, had a direct and primary focus of

44. *Id.* at 2187. The majority opinion, written by Chief Justice Burger, assumed there was such a contingent fee scheme on the basis of Nichols being paid in the past at the time he produced information, rather than constantly remaining on the FBI payroll. *Id.* at 2187 n.7. Justice Blackmun, in his dissent, however, refused to find that such a scheme ever existed, as the lower court had made no such finding. *Id.* at 2193.

45. *See* note 33 *supra*.

46. Does an individual truly expect payment for completing an assignment in a manner contrary to the instructions? This author would answer in the negative.

47. 100 S. Ct. 2183, 2194 & n.9, (Blackmun, J., dissenting) (a discussion of the factors mentioned in the text). The fact that Nichols had worked so long for the FBI gives rise to the presumption that the FBI had been pleased with his work and that he had followed instructions.

48. *Id.* Also, the intentional creation of such a situation was seen by the majority as tantamount to interrogation. 100 S. Ct. at 2189. *But see* notes 55, 59 *infra*.

49. 377 U.S. at 202-03.

attention on Massiah in particular. Nichols, the informant in *Henry*, was told to be alert for remarks made by many prisoners, not just Henry.[50] Thus, in spite of the fact that Nichols would receive payment for providing information, there is no proof to support the Court's belief that Nichols's general desire to receive money payments would lead him to specifically violate the instructions given him and single out Henry, from among the many prisoners, from whom to elicit information.

B. Nichols Was Ostensibly a Fellow Prisoner

The involuntary waiver of counsel issue is probably the strongest ground on which the Court reached its result since the use of undisclosed informants precludes the possibility of the existence of a valid *waiver* of the right to counsel. The United States Supreme Court has established four major criteria in determining if such a waiver has occurred.

First, every reasonable presumption is taken against the existence of a waiver.[51] Second, a waiver of the right to counsel during interrogation must be done knowingly and intelligently, with full understanding of the nature of that act.[52] Third, a waiver cannot be presumed from a silent record.[53] Fourth, it is the government's burden to prove a waiver.[54] When applying these standards to the *Henry* case it becomes obvious that, if in fact an interrogation did occur,[55] there could not have been any such waiver. At least with known government agents a defendant is able to deal with the government at "arm's length," but with an undercover agent, as with Nichols, it can be assumed that the defendant would not have revealed any information if he had known he was conversing

50. *See* note 33 *supra*.

51. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See* Brewer v. Williams, 430 U.S. 387, 404 (1977); Brookhart v. Janis, 384 U.S. 1, 4 (1966); Carnley v. Cochran, 369 U.S. 506, 514 (1962); Glasser v. United States, 315 U.S. 60, 70 (1942).

52. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

53. *Id.*

54. Brewer v. Williams, 430 U.S. 387, 402-03 (1977).

55. Justice Rehnquist, in his dissenting opinion, questions the majority's determination that an interrogation even took place. 100 S. Ct. at 2203. If no interrogation, or elicitation of information, occurred, then the question of whether or not a valid waiver took place is moot because not every attempt by the government to acquire evidence, or every conversation the government has with a criminal defendant, is interrogation. United States v. Hearst, 563 F.2d 1331, 1347-48 (9th Cir. 1977) (mere listening does not constitute interrogation).

with the government.[56] In sum, a waiver of right to counsel is simply inapplicable when conversations with an unknown undercover government agent occur.[57]

Justice Blackmun, on the other hand, would contend that the question of waiver should never have been raised[58] by the Court for the reason that the few facts presented just as easily point to an assumption that no interrogation occurred at all.[59] This case could be seen simply as the situation where a defendant has erroneously placed his confidence in another prisoner not to reveal his wrongdoing.[60] The facts are such that Henry could have initiated the conversations with Nichols himself, on a voluntary basis, without Nichols having done any prodding whatsoever.[61]

C. *Imprisonment Itself Makes a Defendant More Susceptible to the Strategies of Informants*

Chief Justice Burger, writing for the majority in *Henry*, wrote that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents."[62] The Court recognized the strong psychological pressures which compel prisoners to reach out to those around them for aid.[63] Henry's need to reach out, especially to one sharing a common predicament, enabled Nichols to earn Henry's respect and confidence, and consequently, elicit incriminating

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56. 100 S. Ct. at 2188.

57. *Id.*

58. *See* note 55 *supra*.

59. There simply are not enough facts present to make a determination either way. 100 S. Ct. at 2193-95. *See* text accompanying notes 45-48 *supra*.

60. Hoffa v. United States, 385 U.S. 293, 302 (1966). This decision was based on the rationale that one's voluntary statements found no protection in the sixth amendment. *Id.* at 304. However, *Hoffa* was held not to apply to situations where the defendant had already been indicted; in those cases, an informer could not elicit incriminating remarks from the defendant in the absence of counsel. In *Hoffa*, the defendant had not been indicted at the time he made incriminating remarks to the undercover agent. *Id.* at 309. Nevertheless, both Justices Blackmun and Rehnquist, in their dissents in *Henry*, found the *Hoffa* concept of "misplaced belief" applicable to the *Henry* case. 100 S. Ct. at 2192, 2199. If it is assumed that Nichols did in fact follow the specific instructions given him, then the *Hoffa* rule may indeed be applicable, for the reason that Henry then would have made the remarks to Nichols as a result of his voluntary decision to do so, knowing very well that Nichols could possibly relay such remarks to the police.

61. Possibly, the *Henry* Court found that the couplet, "[a]n open foe may prove a curse, but a pretended friend is worse," is worthy of sixth amendment right to counsel protection despite the fact that the "pretended friend" did not elicit incriminating remarks. Spano v. New York, 360 U.S. 315, 323 (1959) (quoting John Gay).

62. 100 S. Ct. at 2188.

63. *Id.* *See* Miranda v. Ariz., 384 U.S. 436, 448-54 (1966).

information.[64] The fact that incarceration makes one more willing to talk, however, cannot make a voluntary statement any less voluntary.

In summary, the *Henry* Court, in finding an interrogation present, drew too much from the available facts, and in so doing, established a rule far too broad.[65] As Justice Powell suggested in his concurrence, the case would have been far less troublesome had an evidentiary hearing been held regarding the *Massiah* claim.[66] If such an evidentiary hearing had been conducted, the Court would have had a stronger foundation in determining whether or not Nichols acted to elicit information after receiving his special instructions, and such a hearing would have brought forth evidence and testimony establishing his precise instructions.

V. The Court's Use of the "Critical Stage" Rationale

Since the landmark decision of *Powell v. Alabama*, the United States Supreme Court has examined postindictment confrontations between defendants and government agents "to determine whether they are 'critical stages' of the prosecution at which the

64. The fact that Henry asked Nichols to participate in an escape from jail evidences the respect and trust Henry had placed in Nichols. 100 S. Ct. 2183, 2189 & n.12.

There is a contrary view, however, which finds the pressures of incarceration too minute to make a difference. Justice Blackmun, in his *Henry* dissent, noted that "official surveillance has traditionally been the order of the day," 100 S. Ct. at 2194 (quoting Lanza v. N.Y., 370 U.S. 139, 143 (1962)). He noted further that prisoners are aware of the fact that many of their jailmates, in seeking their own interests, offer to assist the authorities. 100 S. Ct. at 2194.

In his dissent, Justice Rehnquist said that "[a]n appeal to an accused's conscience or willingness to talk . . . does not . . . have a sufficiently overbearing impact on the accused's will to warrant special constitutional protection." *Id.* at 2203. *See also* R.I. v. Innis, 100 S. Ct. 1692 (1980).

65. The author is not of the opinion that the rule of *Henry* is *per se* too sweeping, but rather that it is not compatible with the particular facts of the *Henry* case. *See* 100 S. Ct. at 2193 (Blackmun, J., dissenting), 2201-03 (Rehnquist, J., dissenting). The rule in *Henry* would be more compatible with a different scenario of facts. If the federal agents had not given Nichols specific instructions prohibiting him from eliciting information from Henry, but rather had just told Nichols that they would generally like to have such incriminating statements from Henry, then the test created in *Henry* would be applicable. In that situation, the federal agents *would have* created a situation likely to induce Henry to incriminate himself, but, to the contrary, they merely created a situation whereby Nichols might be able to listen to voluntary confessions made by Henry.

66. *Id.* at 2190.

Sixth Amendment right to the assistance of counsel attaches."[67] The Court in *Henry* found that Nichols had deliberately elicited incriminating information from Henry resulting in a usurpation of Henry's constitutional right to counsel. Its opinion might have been a stronger one had it spoken to the "critical stages" issue.[68]

Over the years, three criteria have been used in determining whether a confrontation constitutes a "critical stage." First, the courts determine whether or not the particular confrontation created the possibility of unfairness in the subsequent trial if counsel were not allowed to be present.[69] Second, the courts inquire as to whether or not counsel would have any opportunity to cure, at trial, any defects arising out of a postindictment confrontation, if counsel were not present at the particular confrontation.[70] Third, the courts ask whether or not counsel is needed at a particular stage to assist the defendant in coping with legal problems or in meeting the adversary.[71]

Applying the above criteria to *Henry* would result in no other conclusion than that the alleged interrogation of Henry was a "critical stage." The fact that Nichols was viewed as working undercover as a government agent while outwardly appearing only as a prisoner points to what may be considered an unjust advantage over Henry, with the possible result that the ensuing trial was unfair for Henry. Further, as to whether or not incurable defects arose from any postindictment confrontation in the *Henry* case, that would be a question of witness credibility at trial. The safest rule in terms of the defendant's rights would require the presence of counsel at any and all interrogations, whether they be direct or surreptitious. Lastly, it cannot be doubted that every postindictment interrogation involves problems for the defendant in handling legal questions and in confronting the adversary.

VI. THE *HENRY* TEST: AN EXTENSION OF *MASSIAH*

Although the majority in *Henry* made the claim that the case is

67. *Id.* at 2186. *See, e.g.*, United States v. Ash, 413 U.S. 300, 311, 313, 315-16 (1973); United States v. Wade, 388 U.S. 218, 224, 226-28, 231-32 (1967); Powell v. Ala., 287 U.S. 45, 57 (1932).

68. However, this is assuming that the existence of a postindictment confrontation between the government and Henry was proven, which this author believes has not conclusively been shown. *See* note 55 *supra*.

69. *See* United States v. Ash, 413 U.S. 300, 311 (1973); United States v. Wade, 388 U.S. 218, 227 (1967); Escobedo v. Ill., 378 U.S. 478, 486 (1964) (referring to Hamilton v. Ala., 368 U.S. 52, 54 (1961)).

70. *See* United States v. Ash, 413 U.S. 300, 315-16 (1973); Coleman v. Ala., 399 U.S. 1, 9-11 (1970) (quoting from United States v. Wade, 388 U.S. 218, 227 (1967)).

71. *See* United States v. Ash, 413 U.S. 300, 313 (1973); United States v. Wade, 388 U.S. 218, 226 (1967).

indistinguishable from *Massiah*,[72] the holding in the *Henry* case goes further, and thus encompasses the factual distinction that truly did exist.

In *Massiah*,[73] the federal agents urged the informant to engage in conversation with the defendant,[74] with the hope of drawing incriminating remarks from him. The federal agents had deliberately and designedly set out to obtain incriminating remarks from the defendant in the absence of defendant's counsel.[75] The word "deliberately," used in the *Massiah* test, indicates intent.[76] Thirteen years after *Massiah*, the Supreme Court, in the decision *Brewer v. Williams*,[77] found that the "Christian Burial"[78] speech, though indirect as it was, represented a scheme to "deliberately

72. *See* note 5 *supra*. *See generally* Mann, *supra* note 3, at 1, 15.

73. The *Massiah* case relied on a series of New York cases. *See generally* People v. Davis, 13 N.Y.2d 690, 191 N.E.2d 674, 241 N.Y.S.2d 172 (1963); People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); People v. Swanson, 18 A.D.2d 832, 237 N.Y.S.2d 400 (1963); People v. Price, 18 A.D.2d 739, 235 N.Y.S.2d 390 (1962); People v. Wallace, 17 A.D.2d 981, 234 N.Y.S.2d 579 (1962); People v. Karmel, 17 A.D.2d 659, 230 N.Y.S.2d 413 (1962); People v. Robinson, 16 A.D.2d 184, 224 N.Y.S.2d 705 (1962).

74. Massiah v. United States, 377 U.S. at 202-03 (1964). *See* 100 S. Ct. 2183, 2187 n.10.

75. 377 U.S. at 206.

76. *Id. See* 100 S. Ct. at 2191 (Blackmun, J., dissenting).

77. 430 U.S. 387 (1977).

78. In *Brewer*, the defendant was arrested in Davenport, Iowa for the abduction of a ten-year-old girl, who was missing after her brother's wrestling match at a YMCA in Des Moines, Iowa. Accompanied by two police officers, the defendant was driven from Davenport to Des Moines. During that trip, one of the police officers made the "Christian Burial" speech:

> I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you, yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of the little girl should be entitled to a christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all . . . I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.

430 U.S. at 392-93. Shortly thereafter, the defendant led the officers to the little girl's body. *Id.* at 393.

and designedly . . . elicit information from [the defendant]."[79] The holdings in these two cases, focus on the intent of the government to *deliberately elicit*, whether through direct questioning or oblique persuasion, incriminating statements from the defendant after he has been indicted and in the absence of counsel. These holdings are, primarily, based on the rationale that the defendant is denied counsel at the precise time he needs counsel the most.[80]

In contrast, the government agent, in *Henry*, gave the informant specific instructions not to question the defendant nor engage the defendant in any conversation pertaining to his part in the crime.[81] Such restricted instructions point to the assumption that the government did not deliberately and designedly plan to elicit incriminating information from the defendant, but merely hoped that the informant would have the opportunity to listen to some voluntary admissions made by the defendant.[82] In *Henry*, the Court created a newly-worded test: "By *intentionally creating a situation likely to induce* [the defendant] to make incriminating statements without the assistance of counsel, the government violated [the defendant's] Sixth Amendment right to counsel."[83] Consequently, "while claiming to retain the 'deliberately elicited' test, the court really forges a new test that saps the word 'deliberately' of all significance. The court's extension of *Massiah* would cover even a 'negligent' triggering of events resulting in reception of disclosures."[84]

To put the subject in another light, the difference between the test created in *Henry* and the test established in *Massiah* can be ascertained through an examination of the stages involved in each rule. There are two stages in the "deliberate elicitation" standard of *Massiah*, whereas the "intentionally creating a situation likely to induce" formula of *Henry* may be divided into three stages. The first stage in *Massiah* is represented by the word "deliberate," inferring a design or purpose, or, more specifically, an intent to evoke incriminating statements from a defendant, in the absence of counsel. The next stage, "elicitation," involves the act of interrogation, whether directly or indirectly, of the defendant so as to effectuate the intent of the first stage. Thus, the *Massiah* test simply consists of the intent element coupled with the actual exercise of elicitation.

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79. *Id.* at 399.
80. *Id.* at 398. 377 U.S. at 205.
81. *See* note 33 *supra*.
82. *See* 100 S. Ct. at 2196-201 (Blackmun, J., dissenting), 2201-02 (Rehnquist, J., dissenting). *Contra, id.* at 2187.
83. *Id.* at 2189 (emphasis added).
84. *Id.* at 2191 (Blackmun, J., dissenting).

The first stage in *Henry* is closely related to the first stage of *Massiah*. In *Henry*, that stage is represented by the word "intentionally," which connotes having a plan in mind. The principal difference between the two tests rests on what the intent of the first stage focuses on in the second stage. In *Massiah*, that intent focuses on the act of elicitation itself, but in *Henry*, that intent does not center on the act of extracting information; rather, it concentrates on the creation of a situation which would likely lead to the inducement of incriminating remarks. Consequently, under the *Massiah* rule the government cannot, through its officials, agents, or informants, intentionally question the defendant in the absence of counsel. However, under the *Henry* rule, the government, in its use of informants, cannot even create circumstances whereby the defendant may *possibly* be induced by the informant to make incriminating statements. In other words, if the government does not take every precaution to insure that the informant does not elicit such incriminating remarks, then the government will be found to have elicited such remarks, whether it truly did so or not.[85] The third stage of the *Henry* test is the actual inducement of incriminating statements from the defendant in the absence of counsel, which, as mentioned, is assumed if the government improperly sent the informant into close proximity with the defendant, after the indictment of the defendant. Thus, in contrast to *Massiah, Henry* places an extra burden or duty on the government.

Further evidence of *Henry*'s expanded test is found in the high court's repudiation of the argument found in the Justice Department's legal brief:

> Only when the government has directed the informant to question the accused, or has placed the informant in a situation where incriminating statements are likely to be overheard without adequately instructing him,[86] should the government be held to have "deliberately elicited"

85. Which, in effect, says that the government cannot use informants to obtain incriminating statements from a defendant, in the absence of defendant's counsel, after the defendant has been indicted. Mann, *supra* note 3, at 1, 15, col. 1. This is considered to be the case, because in *Henry* the fact that the federal agents gave Nichols specific instructions not to elicit incriminating comments was deemed insufficient by the Court. 100 S. Ct. at 2187. However, if Nichols had not been on a contingent fee arrangement with the government, but rather had acted for no fee, then the Court might possibly have assumed that Nichols would not have been motivated to defy his orders and deliberately question Henry.

86. "Without adequately instructing him" is presumed to mean the failure to instruct the informant to refrain from questioning the defendant and merely act as a passive listener. Without such instructions, there would be no way to impress

statements that are made in response to the informant's questions.[87]

From what can be read of the new test promulgated in *Henry*, it unmistakably goes beyond the test of *Massiah* and *Brewer*, but as to how far beyond, only the future will tell.[88]

VII. IMPACT

A. The Debate over the Policy of Balancing Will Continue

As enunciated in the case of *Spano v. New York*,[89] there is an underlying conflict in every dispute involving the rights of criminal defendants.[90] It is an encounter between two essential interests of society: at one extreme is the interest of competent and quick law enforcement and at the other is the interest in prohibiting encroachment in the area of individual rights by unconstitutional means of law enforcement.[91]

On the side of law enforcement, it has been argued that requiring counsel's presence destroys the importance of interrogations and cripples effective law enforcement by setting criminals free.[92] Society is made to suffer by broadening criminal defendant's rights, and the search for truth is seriously hindered.[93] On the other side of the balance, it has been argued that law enforcement officials have a duty to obey the law while enforcing it, because life and liberty can be destroyed as much by wrongful police methods as by criminals themselves.[94] A system of criminal law which depends on confessions, rather than other forms of evidence, is apt to suffer more abuses and be less trustworthy.[95]

It is very unlikely that the decision handed down in *Henry* will stifle this underlying conflict of criminal law; in fact, the decision

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upon the informant that he is to avoid questioning the defendant at all costs. *See generally* note 33 *supra*.

87. Mann, *supra* note 3, at 15, col. 1.

88. A few weeks before *Henry*, the Supreme Court established a definition of an interrogation, in respect to a *Miranda* custody question, in the case of R.I. v. Innis, 100 S. Ct. 1682, 1691 (1980): "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 1690 (emphasis in original). Despite the fact that *Innis* held that this definition was "not necessarily interchangeable" with *Brewer* and *Massis, Id.* at 1689 n.4, the similarity of the test established in *Henry* appears to be more than accidental.

89. 360 U.S. 315, 315 (1959).

90. *Id.*

91. For further discussion in this area, *see Historical Argument, supra* note 15, at 1048-49.

92. *Id.*

93. *See, e.g.*, 100 S. Ct. at 2192 (Blackmun, J., dissenting); Massiah v. United States, 377 U.S. 201, 207-08 (1964) (White, J., dissenting).

94. Spano v. N.Y., 36 U.S. 315, 320-21 (1959).

95. Escobedo v. Ill., 378 U.S. 478, 489 (1964).

may stir up additional controversy regarding this balance.[96]

B. The About-Face of Chief Justice Burger

In his dissenting opinion in the *Brewer*[97] case, Chief Justice Burger found the decision of the majority to be unbearable for modern society.[98] In that opinion he said, "In a variety of contexts we inquire whether application of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society."[99] In addition, the Chief Justice has often objected to the tremendous price society pays when dependable evidence is excluded in criminal trials.[100] Yet, in the *Henry* case, the Chief Justice not only voted to extend the rights of the criminal defendant, it was he who wrote the majority opinion. This change of direction for Chief Justice Burger must be viewed as a drastic one when one considers the number of cases in which the Chief Justice voted not to extend the criminal defendant's rights.[101]

Many observers had forecast that the Burger Court would use *Henry* to overrule the *Massiah* decision of the Warren Court.[102] Despite the Justice Department's urging, under the Carter Administration, that *Massiah* be overruled, and despite the conservative history of the Burger Court, the Court went ahead and

96. The decision handed down in *Massiah*, "shocked" law enforcement officials and prosecutors. J. KLOTTER & J. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE 378, 390 (3d ed. 1977).

97. 480 U.S. 387, 415 (1977).

98. *Id.* at 415.

99. *Id.* at 421-22.

100. *See, e.g.*, Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

101. *See* Brewer v. Williams, 430 U.S. 387 (1977) (Burger, C.J., dissenting) (right to counsel at postindictment interrogations); Middendorf v. Henry, 425 U.S. 1281 (1976) (joined in majority opinion) (no right to counsel at summary courtmartial proceedings); Herring v. N.Y., 422 U.S. 835 (1975) (joined in dissenting opinion) (cannot deny defense counsel to make closing argument in nonjury trial); Faretta v. Cal., 422 U.S. 806 (1975) (Burger, C.J., dissenting) (right to self-representation at felony trials); Wolff v. McDonnell, 418 U.S. 539 (1974) (joined in majority opinion) (no right to counsel at prison disciplinary hearing); Ross v. Moffitt, 417 U.S. 600 (1974) (joined in majority opinion) (no right to court-appointed counsel after first appeal); United States v. Ash, 413 U.S. 300 (1973) (joined in majority opinion) (no right to counsel at postindictment photo displays); Kirby v. Ill., 406 U.S. 682 (1972) (Burger, C.J., concurring) (no right to counsel at preindictment lineup); Coleman v. Ala., 399 U.S. 1 (1970) (Burger, C.J., dissenting) (right to counsel at preliminary hearing).

102. Mann, *supra* note 3, at 15, col. 1.

extended the criminal defendant's right to counsel.[103] In fact, the *Henry* decision may have gone further than the Warren Court would ever have gone. Consider the case of *Miller v. California*, a case decided by the Warren Court, wherein the defendant's attorney established a 24-hour-a-day watch of the defendant's cell to prevent the government from interrogating the defendant.[104] Law enforcement officials sent an undercover agent into the defendant's cell under the guise of a fellow inmate, and the informant received information from the defendant which was admitted into evidence at trial. The defendant was convicted, and the United States Supreme Court, under Chief Justice Earl Warren, affirmed that conviction.[105]

The shift in Chief Justice Burger's viewpoint is significant. But whether or not that shift represents an indication of the Court's direction in the future, regarding the defendant's right to counsel, remains open to speculation.

C. The Future of the Government's Use of Informants

To many criminal law scholars and observers, the decision in *Henry* is seen as an astounding jump for the Court.[106] Professor Kamisar,[107] of the University of Michigan Law School stated that the decision was a surprising one in terms of how far it went.[108]

Most observers thought that, while the decision does not ban the use of informants, it will probably force law enforcement officials to indict at later times and avoid the use of contingent fee arrangements with informants.[109]

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103. *Id.* Only Justice Rehnquist gave support to overruling *Massiah*, 100 S. Ct. at 2197.

104. 392 U.S. 616 (1968). In *Miller*, the defendant's husband was burned to death in the automobile he and the defendant had been operating, and approximately twelve hours later the defendant was arrested and thereafter questioned. The defendant claimed that the fire was an accident, whereas the government alleged that the fire had been purposely set by the defendant, and that she had murdered her husband in order to collect insurance money and marry another man. *Id.* at 616-17.

105. *Id.* What may have held the Warren Court back was the fact that the defendant had not yet been formally charged with the crime. The dissent in *Miller*, however, emphasized that, realistically, criminal proceedings had begun against the defendant, and that the proceedings had stopped being a general inquiry because the unique facts of the case dictated that if a crime had been committed, only the defendant could have done it. *Id.* at 624.

106. Mann, *supra* note 3, at 1, 15, col. 1.

107. *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?* 67 GEO. L. REV. 1 (1978).

108. Mann, *supra* note 3, at 15, col. 1.

109. *Id.* at 15, col. 1. As long as no indictment has been filed, *Henry* is inapplicable. 100 S. Ct. at 2184. Thus, to further the availability of the use of informants, law enforcement officials may postpone indictments so as to avoid conflicts with *Henry*.

VIII. CONCLUSION

It is evident that the *Henry* case represents more than a mere application of the test conceived in *Massiah*. Through its interpretation of the facts and consideration of the policies underlying the constitutional rights of criminal defendants, the United States Supreme Court, in the *Henry* case, in effect, gave its approval to a statement once made by Hubert H. Humphrey: "We can not expect to breed respect for law and order among people who do not share the fruits of . . . freedom."[110] Quite possibly, the decision in *Henry*, granting individuals additional rights under the constitution when confronting the government, will have the ultimate effect of inducing a greater respect for the laws of the United States.

It is the opinion of this author that the United States Supreme Court will be required to consider the *Henry* test in deciding future cases regarding postindictment use of informants. The Court will not be confined to the ruling in *Massiah* in deciding future cases, for the reason that *Henry* has created a far more expansive rule than that which was established in *Massiah*.

KEVIN T. KERR

110. D. VARNER, G. WRIGHT & S. GREENE'S INSTANT QUOTATION DICTIONARY 166 (1969).