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The recent Supreme Court decisions in Massiah and Escobedo expand the constitutional role of legal counsel beyond the traditional functions and duties surrounding trial type proceedings. The Court's rulings appear to make the adversary atmosphere of the courtroom a necessary ingredient of criminal investigations when the "focus is on the accused" with the "purpose to elicit a confession." The authors believe that the merits of certain underlying constitutional issues have been obscured by the use of the right to counsel as a device to protect such other rights. Furthermore, the authors conclude that the individual's right to freedom from compulsory self-incrimination can be safeguarded by less drastic alternative means which, unlike an expanded right to counsel, do not contain potential for undesirable extension beyond those types of investigations which pose dangers of coercion.

Arnold N. Enker* and Sheldon H. Elsent†

With all modesty, the Bar may well ask itself whether the Supreme Court's two most recent tributes to the need for legal counsel truly reflect a need for expansion of the lawyer's role, or whether lawyers have not been dubiously involved in the service of other ends, primarily because of their unquestioned capacity, and perhaps duty, to impede police interrogation directed toward their clients.1

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1. See the oft-quoted statement of Mr. Justice Jackson, concurring in Watts v. Indiana, 338 U.S. 49, 59 (1949):

Amid much that is irrelevant or trivial, one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty
Two decisions handed down this past term, *Massiah v. United States* and *Escobedo v. Illinois*, extend the constitutional role of counsel from the traditional function of preparing for and participating in a trial or trial type proceeding to the representation and counseling of persons under police investigation where they are under indictment, as in *Massiah*, or where, before indictment, the "focus" of the police has turned to such persons with the "purpose to elicit a confession," as in *Escobedo*. Thus, apparently, the Court has transformed this stage of the criminal investigation into an adversary proceeding as a matter of constitutional right and has converted the decision to confess into a tactical decision on the part of the defense.

This article contends that the proper judicial control of police investigations does not require that the investigatory process be transformed into an adversary proceeding by constitutional right and that such a concept, particularly when joined to such other recent decisions as *Gideon v. Wainwright*, and *Douglas v. California*, creates unnecessary and undesirable impediments to police investigation. Furthermore, discussion of the issue as one of right to counsel obscures the underlying problems, tends to impede discussion of alternative solutions, and indeed may assume the existence of underlying constitutional rights which have not previously been considered to exist and which should not be recognized without careful consideration of their merits.

Reliance on counsel, moreover, through the sixth and fourteenth amendments, has other ramifications of questionable desirability. The Court seems to have given principal attention to only one type of criminal, pre-trial investigation. The new doctrines, however, as presently formulated by the Court, may apply to criminal investigations other than those conducted in the police station, such as grand jury investigations and investigations conducted by administrative agencies which may look toward criminal prosecution. In these areas, application of these new doctrines becomes more complex and undesirable.

whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.


4. For the view that recent coerced confession cases seem to be imposing the image of the adversary trial on the interrogation process, see Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. Chi. L. Rev. 313, 320-27 (1964).


We submit that the Supreme Court's legitimate concern with coercive or unfair police interrogation would be better served by treatment with less potent medication than that provided by the new right-to-counsel cases. Extension of other doctrines, particularly the McNabb-Mallory doctrine of the federal courts, and greater formalization of police interrogation procedures, as by the requirement that a record be made of such proceedings, may well serve as fully the Court's appropriate purposes without risking the adverse side effects of the new counsel rules.

This article will explore Massiah and Escobedo, certain of the underlying issues as well as the new solutions provided through counsel, the scope and implications of this right to counsel, and some of the alternative solutions available.

I. THE RIGHT TO COUNSEL BEFORE MASSIAH AND ESCOBEDO

For approximately 25 years, until the time of Massiah, Escobedo, and their forerunners in various lower court and state court decisions and Supreme Court dissents or concurrences, the courts had taken their guidelines on the right to counsel from the classic statement in Powell v. Alabama:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

It should be noted that this statement concerns itself with the role of counsel at proceedings. The concept of a proceeding is left undefined, but the import of the Court's statement is such

7. E.g., Lee v. United States, 332 F.2d 770 (6th Cir. 1963).
that "trial" is understood, as well as preparation for trial. Thus
the lawyer is called upon for his well-recognized functions of
examining witnesses, making arguments of law, including objec-
tions to evidence, and of organizing and preparing the case for
the defense.

It is undoubtedly true that the functions of counsel have ex-
panded over the centuries.\(^\text{11}\) Initially, the role of counsel appears
to have been confined to what we now call matters of law, relat-
ing to pleadings, motions, and exceptions. The role of counsel in
the development and adjudication of the facts is a concept of
more recent times.\(^\text{12}\) But this expansion of the role of counsel
merely represented a recognition that the fair resolution of issues
of fact, no less than the resolution of issues of law, requires legal
skills in investigating, organizing, and presenting evidence.

Since the Powell case the Supreme Court has been primarily
concerned with whether counsel must be provided for indigent
defendants in those situations where counsel might fulfill the
functions alluded to above. In Johnson v. Zerbst,\(^\text{13}\) the constitu-
tional right to counsel under the sixth amendment was construed
to mean that counsel must be supplied in the federal courts if
the defendant cannot afford to retain a lawyer of his own choos-
ing. In the recent decision of Gideon v. Wainwright,\(^\text{14}\) this same
principle was extended to felony cases in the state courts. In
these cases the desirability of counsel's participation was obvious.
The question was whether a fair trial could not otherwise be
obtained so that the right involved was of constitutional
dimension.

Hamilton v. Alabama,\(^\text{15}\) where the Court reversed a state
court conviction for failure to provide counsel at a preliminary
arraignment, was an application of similar principles. The absence
of legal representation and advice at the arraignment precluded
the defendant from asserting certain defenses at the trial and
therefore created the possibility that Hamilton might have been
convicted despite the fact that he had not committed the offense
or had some other legal defense.

More difficult to understand is the Court's short per curiam

\(^{11}\) For a recent analysis of the historical development of the right to
counsel and its bearing on the problems discussed herein, see Comment, An
Historical Argument for the Right to Counsel During Police Interrogation, 73
Yale L.J. 1000 (1964).
\(^{12}\) See id. at 1018-30.
\(^{13}\) 304 U.S. 458 (1938).
\(^{15}\) 393 U.S. 52 (1969).
opinion in *White v. Maryland*, which seems to foreshadow *Escobedo*. This case also concerned the denial of counsel at a preliminary arraignment. Here, however, the question concerned the evidentiary use at trial of White's uncounseled plea of guilty entered at that arraignment, a problem not greatly different from the use at trial of an uncounseled confession given to the police rather than to a judge. The use of this plea did not create a possibility that White might be wrongly or illegally convicted. The absence of counsel created, rather, a situation where a defendant was convicted who might otherwise have been acquitted for lack of sufficient evidence. Still the Court reversed the conviction on the ground that White was denied his sixth amendment right to counsel.

It has been suggested that the admission in *White* having been a plea taken in open court before a judge was seemingly "akin to trial." Perhaps the impact of the formal guilty plea was thought by some judges to be greater on a jury than that of a confession. It may have been thought that a guilty plea is a stronger admission of the legal conclusion of guilt. Perhaps, finally, this was simply the easiest way to write the opinion in a field the Court did not feel ready to treat extendedly. In any event, *White* seems to represent a departure from the traditional constitutional role of counsel in that, for the first time, a defendant was accorded a constitutional right to a lawyer who would have helped him only to avoid making available to the court legal, relevant evidence. At least, the briefness of the Court's per curiam opinion lends itself to such a reading and glosses over the issues raised by a functional approach to the problem of counsel.

In 1958 the right to counsel was invoked in a different context, that is, with respect to confessions allegedly coerced by the police: *Crooker v. California* and *Cicenia v. Lagay*. We need not review the many coerced confession cases which had preceded these. Suffice it to say that despite the prior decisions, many...

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17. That is to say, convicted in violation of some right other than the right to counsel. An argument at this point that the defendant has a right to counsel in such a proceeding merely begs the question.
18. Apart from violation of the asserted right to counsel, such a conviction cannot be deemed a wrong or illegal conviction.
police, whether through ignorance or guile, had continued their efforts to extract confessions against the will of suspects. Certain of the evasions were achieved by shifting from the more overt forms of coercion, such as violence, to more subtle psychological methods. Success was rendered possible because of the lack of physical evidence to support a charge of police pressures and because the defendant's uncorroborated word was usually rejected in favor of the testimony of police witnesses. To deal with such problems, certain prophylactic rules have been evolved, that is, rules which not only prohibit coercion but which also cut through evasions and problems of proof by specifying certain demonstrable conditions which shall be deemed inherently coercive.

Foremost among such rules has been the McNabb-Mallory doctrine in the federal courts, which excludes confessions obtained during a period of "unnecessary delay" in bringing the defendant before a judicial officer for preliminary arraignment. Similarly, the right to counsel might serve as such a prophylactic rule, since interrogation in the absence of counsel might be deemed inherently coercive and the problems of proof would similarly be simple. Evaluation of such a use of counsel will be undertaken below. For historical purposes, however, it is enough to note that such a rule was previously urged, though not precisely in these terms, in the two 1958 cases which have been mentioned, Cicenia v. Lagay and Crooker v. California.

A bare majority of the Court rejected such a rule at that time, pointing to its inflexibility and its broad sweep. Mr. Justice Harlan, in the Cicenia opinion, also discussed the issue in a manner which indicated the parallel function which such a rule would play to the McNabb-Mallory rule applicable in federal prosecutions.

...[P]etitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel. Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. See McNabb v. United States . . . ; Mallory v. United States . . .

23. See, e.g., Spano v. New York, 360 U.S. 815 (1959), where a police officer who knew the defendant personally was prevailed upon to abuse this personal tie by telling him that the officer, with a pregnant wife, might lose his job unless the defendant would confess.
25. 357 U.S. at 509.
The following year, in Spano v. New York,26 the same four justices who favored the use of a prophylactic-right-to-counsel rule in the Cicenia situation also indicated their willingness to adopt such a rule for police questioning after an indictment had been returned. The majority, however, did not reach this question, but reversed Spano's conviction on the more traditional ground that the confession had been coerced.

II. MASSIAH v. UNITED STATES

Some five years elapsed between Spano and the Court's decisions in Massiah (May 18, 1964)27 and Escobedo (June 22, 1964). During that period Justices Frankfurter and Whittaker retired, Justices Goldberg and White joined the Court, and a number of principles which had been expressed in dissenting opinions began to find their way into the Court's majority opinions.

Winston Massiah was a seaman who, according to the Government's evidence, was one of a ring of seamen and longshoremen who were smuggling cocaine from Chile into the United States. In May of 1958 his ship was searched; cocaine was found and linked to Massiah, both through the testimony of informers and through circumstantial evidence. The cocaine package was wrapped in adhesive tape and that tape was linked to a roll found in Massiah's possession through microscopic comparison and the analysis of a textile expert. Thus probable cause existed and Massiah was arrested; in addition, there was sufficient evidence to warrant an indictment, which was promptly returned.

The Government did not know who the other smugglers were and lacked proof against those suspected. Two months later, however, after additional evidence had been accumulated, a case was developed against another seaman, one Jesse Colson. A superseding indictment was returned, which named Massiah and Colson as co-defendants. The investigation of course continued.

Shortly after the filing of the superseding indictment, Colson agreed to cooperate with the investigation conducted by the federal agents. As is not infrequently the case, his indictment had induced him to this, and thus had acted as a catalyst for the investigation. Massiah, in the meantime, had retained counsel.

Up to this point there had been no interrogation of Massiah, except for brief interviews at the time of his arrest. In November of 1959, Colson induced Massiah to enter into a discussion of

27. The Massiah case was tried in the Southern District of New York in 1961 and the appeal was argued initially before the Second Circuit in 1962; the authors represented the Government on that appeal.
the case in Colson’s car. Colson permitted a federal investigative agent to install a Schmidt radio transmitter under the front seat of his car. The agent, who had a receiver in his own car, was thus enabled to park near Colson and listen to the conversation between Massiah and Colson in which Massiah made a number of damaging admissions that were later introduced into evidence at the trial.

Subsequently, in March of 1961, a broader superseding indictment was returned, naming thirteen defendants, including Massiah and Colson. It was on this indictment that the case was tried.

Colson was to have been a witness and could have testified to Massiah’s admissions and numerous other transactions. When the trial began, however, Colson told Judge J. Skelly Wright that his life had been threatened and that he was afraid to talk. A mistrial was declared — the indictment was severed as to nine defendants, who could not be tried without Colson’s testimony — and the case went to trial as to the four others without Colson. Massiah’s damaging admissions were then testified to solely by the federal agent who had overheard them. All four defendants were found guilty.

The Second Circuit affirmed Massiah’s conviction, by a 2-1 vote, but the Supreme Court reversed. For the majority, Mr. Justice Stewart stated:

Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies. Johnson v. Zerbst, 304 U.S. 458. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Here there was no interrogation, in the sense of the police interrogations to which we have referred, and no element of coercion. Thus, the situation did not call for a prophylactic rule of the sort discussed in connection with police-station interrogations. Nevertheless, the Court held that the absence of counsel rendered Massiah’s statements inadmissible.

One might have argued, before Escobedo, that indictment is the point at which the right to counsel begins; so that any contact between the Government and the defendant after this point would have to be in the presence of counsel. If this had been the

28. Judge Wright, at that time a judge of the District Court of Louisiana, was sitting in the Southern District of New York by designation pursuant to 28 U.S.C. § 292(c) (1958).
30. 377 U.S. at 205-06.
Counsel for the Suspect

Court's intention — and from Mr. Justice Stewart's dissent in Escobedo it appears that this is his view — such an analysis would have been open to criticism for its very formalism. Since the majority in Escobedo drew the line in a very different manner, however, this point will be confined to footnote discussion.\textsuperscript{31}

Since the role of counsel was not to be the making of legal arguments nor the presentation or preparation of evidence, the critical questions raised by Massiah are what functions the Court envisioned for counsel, and what rights were thereby to be secured. Presumably, the role of counsel was to advise Massiah that what he said might be used against him and to advise him that he should not discuss the case with anyone, even his confederates. What right of Massiah's was thereby secured is not clear. Consider the situation which would have presented itself

\textsuperscript{31} Consider also Mr. Justice Stewarts concurring opinion in Spano v. New York, 360 U.S. 315, 326-27 (1959). The argument is that once the defendant has been indicted there is no longer any substantial need for the police to question him, since, despite the fact that indictment does not necessarily mean that the prosecution has proof beyond a reasonable doubt, it is ordinarily indication of the prosecution's belief that it has enough evidence to convict. Under such circumstances, the public interest in solving crimes no longer weighs so heavily as to outweigh the defendant's interest in protection through counsel. When the case has not yet reached the indictment stage, however, affording counsel to the defendant might preclude solution of the crime and successful prosecution of the offender. See People v. Waterman, 9 N.Y.2d 561, 565-66, 175 N.E.2d 445, 447-48, 216 N.Y.S.2d 70, 74-75 (1961); 76 Harv. L. Rev. 1800, 1802 (1963).

In People v. Garner, 57 Cal. 2d 135, 150, 867 P.2d 680, 695, 18 Cal. Rptr. 40, 55 (1981), Judge Traynor, concurring, criticized a rule which would draw the line at indictment. As he pointed out, such a rule could easily be circumvented simply by delaying the indictment. Moreover, it is often the case that only after indictment do the authorities discover that the criminal enterprise was much broader in its scope than they had originally thought. Massiah is a good example of a case where the indictment itself served to produce a witness who disclosed the broader outlines of the conspiracy. Under these circumstances additional investigation is required.

Much of the discussion of Massiah, both in the Second Circuit and in the Solicitor General's brief for the Supreme Court, dealt with the problems of such a continuing investigation and the use of Colson, the informer, for that purpose. Colson could hardly have been used had the Government been compelled to notify Massiah's lawyer that Colson was acting on behalf of the Government. Mr. Justice Stewart concluded the opinion with the statement that such a continuing investigation was permissible, except that the "defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U.S. at 207. This conclusion probably meant that statements made by Massiah to Colson about a third person could be used as leads in the investigation of that person but not against Massiah for only Massiah's rights were violated. See Greenwell v. United States, 336 F.2d 962, 966 (D.C. Cir. 1964) (dictum).
if Colson had not yet decided to cooperate with the Government at the time of his conversation with Massiah, if the two men had held the same conversation, and if only then had Colson gone to the agents with his story, including Massiah's admissions. Presumably there would have been no legal barrier which would have prevented Colson from testifying at the trial about this conversation any more than there would have been a legal barrier against the use in evidence of any other post-indictment admission made to a nonpolice witness by the defendant. The Court's majority seems to have agreed with this point since it stressed so heavily the fact that the Government agent had acted deliberately to seek a confession.

Viewed as a question of Massiah's need for counsel, however, that is, considering the function of a lawyer, Massiah would have equally needed his lawyer during such a talk with Colson, his friend who had not yet turned informer. The lawyer could have given similar advice concerning the dangers Massiah would run by producing witnesses against himself. Yet one senses that there is a difference between this situation and the actual facts, a difference not fully explained by the fact that in the actual case Massiah was damaging his interests more seriously since he was producing as a witness a Government agent, someone whose credibility would be less subject to attack than Colson's. If there is a difference, it lies between the situation where a defendant talks freely with a confederate, one he must know could at any time turn against him, and the situation where he incriminates himself by talking unknowingly directly into the ear of a law enforcement official.

But suppose that at the time he induced Massiah to talk, Colson had in fact decided to cooperate with the Government but had not yet communicated his intentions to the authorities, desiring to come to them armed with some evidence. The absence of any Government participation in the conversation would again seem to make Massiah's statements admissible against him. Yet this situation, too, poses no greater or lesser need for counsel by Massiah than does the actual case. Counsel might have advised his client of the possibility of trickery by Colson as much as of governmental deceit.

The point is even more sharply drawn if we suppose that Massiah had actually consulted with his counsel before talking with Colson in the car. And suppose further that Massiah's

32. It is interesting to note that so far as the record in Massiah reveals, Massiah may very well have consulted with his counsel before talking to Colson. There was no testimony at the trial that Massiah did not consult
COUNSEL FOR THE SUSPECT

Counsel had actually advised him to discuss the case with Colson, perhaps because he wanted Massiah to find out as much as he could about Colson in support of a defense theory which would try to shift the onus of guilt onto Colson. Suppose, for that matter, Massiah's attorney had actually been present in Colson's car during the conversation. Under such circumstances, we think it could hardly be supposed that it is Massiah's right to counsel that is being infringed upon. Yet, whatever impropriety existed in the Government's contact with Massiah would exist no less here. The fact that both the actual case and this hypothetical case should be decided the same way suggests that the issue is something other than the defendant's need for the protection of counsel.

Thus, we submit that the real problem facing the Court in Massiah was not one of the right to counsel but rather the permissible extent of governmental deceit inherent in undercover work and the use of informers. The real issue presented in Massiah is whether law-enforcement officials may seek evidence from an accused's own mouth when the accused does not realize that he is talking to such officials and is providing them with evidence that will help to convict him. This is not a problem of the scope of the right to counsel, but one of the scope of the fifth amendment right against self incrimination. Consideration of the case with his counsel, and certainly none that he was prevented from doing so. The reason for this is simply that Massiah never argued before the District Court that he was deprived of his right to counsel, the Supreme Court's statement in its opinion that the testimony was received "despite the insistent objection of defense counsel," 377 U.S. at 203, to the apparent contrary notwithstanding. Massiah's counsel did indeed object to the receipt of this evidence but on different grounds: (1) that the electronic eavesdropping allegedly violated the fourth amendment's ban on unreasonable searches and seizures, (2) that Colson had entrapped Massiah, and (3) that the best-evidence rule required that Colson, not the Government agent, testify. Counsel for another defendant objected on the ground that the agent had not identified Massiah's voice sufficiently. See Brief for Appellee, pp. 21-22, 36-38, United States v. Massiah, 307 F.2d 62 (2d Cir. 1962). The Court of Appeals noted that the contentions concerning Massiah's right to counsel were not raised at the trial, 307 F.2d at 65, but proceeded to the merits of the issue without discussing the Government's argument that the issue should not be entertained because it was first raised at this late stage. Under the circumstances, then, the argument that Massiah's right to counsel was infringed may have been factually groundless.

33. The problem of electronic eavesdropping also was present in the case. This issue, which could have been treated as one aspect of the problem of self incrimination, was raised by counsel in terms of violation of Massiah's fourth amendment right to be free from illegal searches and seizures. The Court did not discuss this problem.
in terms of the right to counsel only obscures the real issue involved and conceals what is in reality a substantial extension of the fifth amendment's protection. It may be, indeed, that cases such as *Leyra v. Denno* and *Spano* already contain the germ of such an idea and should be extended to cover additional forms of trickery in official questioning of suspects. That question, however, is beyond the scope of this article. The point is that the issues involved in such an extension should be met head on and should not be obscured by disposing of the case in terms of the right to counsel, an issue fortuitously present, if at all present, in the actual case.

III. **ESCOBEDO v. ILLINOIS**

*Massiah* was a federal case while *Escobedo v. Illinois*, decided one month later, arose from the state courts. It would appear, however, that in view of the Court's recent decisions that the fourteenth amendment makes the fifth and sixth amendments binding on the States, the origin of the case had no effect on the result.

Danny Escobedo was convicted of murdering his brother-in-law. On the night of the murder he was arrested without a warrant, interrogated, and released on habeas corpus after two and one half hours. He had retained a lawyer who advised him what to do in the event of interrogation. About eleven days later, another man, DiGerlando, who was already in custody and was later indicted for the murder with Escobedo, told the police that Escobedo had fired the fatal shots. The police arrested Escobedo, took him to the station, and confronted him with DiGerlando's accusation. Escobedo refused to talk until he had seen his lawyer.

The lawyer appeared, asked to see his client, and was refused. For a moment he caught sight of Escobedo in the station and they waved to each other. Eventually he made a complaint and left. The police apparently admitted that they told Escobedo his lawyer did not want to see him. After this, Escobedo, when confronted by DiGerlando, accused the latter of firing the fatal shots. This admission by Escobedo, that he had knowledge of the crime, led to additional admissions that became evidence sufficient to convict him. The Court pointed out that an Assistant

State’s Attorney participated in the later phases of questioning and also that Escobedo was probably unaware that an admission of complicity in the murder plot was legally as damaging as an admission of firing the fatal shots.

After recounting the facts, Mr. Justice Goldberg began his analysis of the case by mentioning the question of coercion. He did not discuss or analyze that issue, however, except to note that the decision of the Illinois Supreme Court, holding that there had been no coercion, was not binding on the United States Supreme Court. He made no reference to the fact of persistent abuses by the police despite the previous coerced confession cases or to the need for a prophylactic rule or other safeguards. Instead, without treating what we submit was the real vice in Escobedo, the persistent and secluded questioning of the suspect, the Court plunged immediately into its recent decision in Massiah. Rejecting the stage of indictment as the time at which the right to counsel accrues, Justice Goldberg pointed to the two factors stressed in Massiah: that as a practical matter the defendant was at the time an accused, and that the police purpose in the interrogation was “to ‘get him’ to confess,” as the Customs Agent’s purpose in Massiah was deliberately to seek a confession. Indictment was dismissed as a formal test resting on fortuitous circumstances and a new test was enunciated:

We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

Now here there was no doubt that Escobedo knew he was talking to officials, so that there was not the problem of surreptitious official contact with an accused which we have suggested actually underlay the decision in Massiah. Here, if there was an implicit assumption of novel rights, they were not the same as those assumed in Massiah. Nevertheless, presumably here also the function of counsel would have been to advise silence, or to make a tactical decision on whether or not to confess. Yet the Court again did not clearly specify what rights of the accused counsel was supposed to protect.

The Court did discuss the fact that the police had not advised Escobedo of his right to remain silent. However, Escobedo, as noted, had previously consulted with his attorney who had ad-

38. 378 U.S. at 485.
39. Id. at 492.
vised him of his rights. Moreover, when Escobedo saw his lawyer motion to him in the police station that night, he, by his own testimony, took this to impart renewed advice to maintain silence. Therefore, it seems doubtful that the failure of the police to so advise him was central to the Court's decision.40

It is possible that the Court was doing nothing more than engaging in an abstract literal interpretation of the constitutional mandate that “in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.”41 One may approach the problem solely in terms of the abstract question at what point do “criminal prosecutions” commence. Under such an approach it would be difficult to deny the logic of an argument that criminal prosecution has begun at the point of arrest and interrogation and certainly at indictment. To an extent, the New York cases42 which preceded Massiah and Escobedo (and which were cited approvingly by the Court) seem to take just this approach. But this kind of sterile legal analysis has been rightly condemned by contemporary writers and its question-begging tendencies are today fully recognized.43 It is unlikely that the Court was taking such an approach.

At some points the Court seems to approach the problem in terms of waiver of fundamental rights and to apply the well-established notion that a valid waiver requires full knowledge of such rights.44 This, too, merely begs the question, since it assumes that there exists a right to be waived. If there were a right not to confess, for example, as distinguished from a right not to be compelled to confess, then a voluntary confession could be deemed a waiver of the right. But if the accused’s right is not to be compelled to confess, as the Constitution seems to say, and as the courts had previously construed it,45 then a person who volun-

40. See text accompanying notes 50–54 infra.
41. U.S. Const. amend. VI.
42. See cases cited note 8 supra.
45. Witnesses, no less than suspects and those already accused, may maintain absolute silence when questioned by the police. This is not a matter of right but of the witness's power of silence which arises simply from the fact that he is under no legal compulsion to give the police any information. See Weisberg, supra note 35, at 28. Until Escobedo, witnesses, suspects, and apparently even those already accused, could have been subpoenaed to testify before the grand jury. See, e.g., United States v. Cleary, 265 F.2d 459 (2d Cir.), cert. denied, 360 U.S. 968 (1959); United States v. Scully, 225 F.2d 113 (2d Cir. 1955), cert. denied, 350 U.S. 897 (1956). Since such witnesses were
tarily confesses has not waived any of his rights. As noted, the Court does not say what underlying right is the subject of its attention. The foregoing suggests, however, that the Court may be creating a novel right not to confess except knowingly and with the tactical assistance of counsel.

The test formulated by the Court in Escobedo requires counsel only when the police “purpose is to elicit a confession.” Such a standard directs itself to the problem of coerced confessions, and seemingly points up the Court’s concern with this problem and its invocation of counsel as a device to protect defendants from police coercion. It suggests that the Court in the future may limit the new right to counsel to potentially coercive situations. Thus, under the Escobedo test, when a person spontaneously volunteers a confession — as distinguished from one who confesses in response to police questioning — the confession would be admissible in evidence even though such person was not advised by counsel prior to confessing, since there was no police “purpose to elicit a confession.” The lengthy quotation from Dean Wigmore at page 489 of the opinion with its emphasis on “compulsory self-disclosure” lends further support to this view. If so, we contend later on that other more workable and less drastic measures are available to accomplish the desired result. It should be noted, however, that People v. Meyer was among the New York cases cited approvingly by the Court in Massiah. In that case after preliminary arraignment before a magistrate, the defendant raised with one of the police officers the question of what kind of a deal he could get if he admitted his complicity in the crime alleged. Receipt of this unsolicited statement into evidence at the trial was held reversible error since the defendant did not have under legal compulsion to testify, they could invoke the fifth amendment’s protection if the answers might incriminate them. But they could not refuse to appear or refuse to answer questions on grounds other than possible self incrimination. In other words, there was really no such thing as a right to silence. As to the possible impact of Escobedo on these cases involving questioning of suspects before the grand jury, see text accompanying notes 81–86 infra.


48. 378 U.S. at 486.
counsel at that point. But Meyer did not involve a situation in which there was any danger of police coercion. And, as previously indicated, Massiah itself did not arise in a context which called for such a prophylactic rule. 49

Moreover, the argument in Escobedo was not limited to the facts at hand, to the problem of coercion and the creation of prophylactic rules. Rather, it broadly criticized a system of criminal justice that "comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." 50 Repeated stress was placed by the Court on Escobedo's alleged ignorance. 51 But it is proper to ask at this point just what kind of advice the Court had in mind. One would not argue with an approach which considers highly relevant the question whether the defendant was advised that he is not compelled to answer any questions. Such knowledge fortifies the defendant's will to resist extended questioning without eliminating a truly voluntary confession. In short, absent police abuses, such advice guarantees the voluntariness of any resulting confession. 52 At points in the opinion the Court does in fact seem

49. Mr. Justice Stewart attempted to meet the point that Massiah was not interrogated under potentially coercive circumstances by quoting from Judge Hays' dissent in the Court of Appeals: "If such a rule is to have any efficacy it must apply to indirect and surreptitious interrogation as well as those conducted in the jailhouse." 977 U.S. at 206. It is a proper rejoinder to point out that the use of such "indirect" means to elicit confessions eliminates the danger of coercion. The quoted statement suggests, then, that the "efficacy" the Court has in mind may be something more than protection from coercion. The possible implication in People v. Downs, 8 N.Y.2d 860, 168 N.E.2d 710, 263 N.Y.S.2d 908, cert. denied, 364 U.S. 867 (1960), to the effect that volunteered confessions may be admissible though made in the absence of counsel seems to be foreclosed now in New York by Meyer. See also People v. Waterman, 9 N.Y.2d 561, 566, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 76 (1961). But cf. People v. McElroy, 252 N.Y.S.2d 597, 599-600 (Albany County Ct. 1964).

50. 378 U.S. at 499.
51. Id. at 485 & n.5, 486.
52. As Mr. Justice White said, dissenting in Escobedo:
   The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and did not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. See Ward v. Texas, 316 U.S. 547; Haley v. Ohio, 332 U.S. 596; Payne v. Arkansas, 356 U.S. 560. I would continue to do so . . . .
to limit its concern to the defendant who is unadvised as to this right.53

Home Office Circular, The Judges’ Rules and Administrative Directions to the Police, 1964 CRIM. L. REV. (Eng.) 165, 166-70. The requirement apparently was laid down in response to a police request for judicial guidelines as to when a confession was voluntary. Devlin, The Criminal Prosecution in England 39-40 (1958).

To impose an absolute requirement that the police administer a caution would go too far. Such a requirement would raise the difficult problem of determining at what point the caution must be administered. It also would lack the flexibility present in the English practice whereby the judges have discretion to admit confessions despite police failure to comply with the Rules.

The Court touched upon the English Judges’ Rules, both in the majority opinion, 378 U.S. at 487 n.6, and in Mr. Justice White’s dissent, id. at 495-96, but not with respect to the requirement that the police caution a suspect. It dealt rather with the restrictions on interrogation which are imposed after the suspect has been charged or informed that he may be prosecuted. The majority pointed to language in English articles which suggested that the English had found such restrictions on interrogation desirable, and the dissent pointed to language which suggested that the English had found such restrictions unworkable.

This exchange suggests that one purpose of the majority may have been to import an English custom which it admired, the Judges’ Rules, but which it lacked authority to impose through rule-making power and which it could only bring in through some constitutional doctrine. The requirement of counsel, with its concomitant limitations on police interrogation, may have been conceived of as such a device.

It is not our purpose to attempt an appraisal of the English experience. It may be observed, nevertheless, that there are aspects of English practice which may make the Judges’ Rules more workable there.

In the first place the English Judges’ Rules are more flexible in application. As already noted, the trial judge is given discretion to exclude admissions or confessions obtained in violation of the Rules but is not required to exclude them. The rules are detailed, with much more precise guidelines to the police than Escobedo affords, and with the kind of exceptions and qualifications which administrative rules can afford and flat constitutional prohibitions cannot.

In the second place, as Lord Devlin has observed, the English rules are applied by a much smaller bar whose members may act one day as a prosecutor and the next day as defense counsel. Therefore, more responsible application of the rules, on both sides, is likely. The police are less likely to abuse the rules, for their counsel will himself refuse evidence which he thinks the court will or should disapprove, and the defense lawyer is less likely to abuse his rights and privileges. See Devlin, op. cit. supra at 25-27. In this country adversary lines are more sharply drawn, particularly by career prosecutors and a significant portion of the criminal defense bar. Thus, enforcement of the Judges’ rules in England is self-imposed to a degree far more than is possible in this country. If the English are having troubles, even under such relatively favorable conditions, we should hesitate before we seek to import their practices.

But, one may observe, Escobedo was aware of this right, having been so advised by his attorney previously and having taken his lawyer's wave of the hand to counsel silence. The Court then seems to be concerned not only that the defendant understand his constitutional rights, but that he also be advised by a lawyer whether or not to exercise such rights at each stage of the questioning. In replying to the argument that Escobedo was already advised of his rights, Mr. Justice Goldberg argued that he had not been advised what to do "in the face of a false accusation that he had fired the fatal bullets." Of course, counsel in advising his client how to react in the face of possible future interrogation can never anticipate every possible question and every conceivable accusation that may be put to his client. The argument, then, reduces itself to the proposition that not only should a defendant be made aware of his rights, but that he is entitled to be advised at each step of the interrogation concerning whether or not to respond and how to respond, i.e., the tactics of the defense. This proposition no longer speaks of voluntariness but elevates the decision to confess to a tactical decision. Yet the Court gave no reason in its opinion for this departure from the traditional test of the validity of a confession. Its strictures against a system which depends upon ignorance are stated in the context of ignorance of rights, not of these tactical considerations.

Possibly the Court’s true concern lay not with Danny Escobedo and Winston Massiah, who had hired their own lawyers, but with the many defendants who cannot afford legal advice. The argument for an extended right to counsel may be based on the belief that wealthy and experienced defendants know enough not to talk unless so advised by counsel, and that the impact of police questioning falls most heavily, almost exclusively, on the poor, ignorant, unbefriended defendant — in short, a sort of equal protection argument. Authority for such an argument might be sought in *Griffin v. Illinois* and *Douglas v. California*. Although the potential scope of *Griffin* and *Douglas* is unclear and has evoked much comment, they would not appear to carry this far. As Mr. Justice Black pointed out in *Griffin*, given the high percentage of reversals in criminal appeals, the first appeal is in

54. Id. at 485 n.5.
fact an extension of the trial. The denial of a transcript or of counsel at the first appeal may, therefore, result in many miscarriages of justice resulting solely from the accused's indigency. Thus, although due process may not require a State to afford anyone an appeal, a State may not provide this significant extended protection from illegal convictions for some defendants and deny it to others solely because of their indigency. This reasoning does not support an argument that because some defendants, by virtue of their wealth or experience, are able to avoid legal and just convictions, all defendants, including the indigent and ignorant, must be given a like opportunity. Such would be a new concept and an extreme extension of Griffin and Douglas, truly without definable limits.

Or, perhaps, there is now a notion that there is something per se improper in a powerful State dealing with weak and lonely citizens, i.e., a notion of equality not between defendants but between the State and each defendant it confronts:

Counsel, then, has been more than a technical aid; he has served to overcome the original unfairness of the balance of state against individual. Historically, this role has been played mainly at trial—the focus of confrontation [between the state and the individual]. If, however, a critical confrontation occurs at the earlier investigative stage of the process, we might have to alter our conception of the role counsel must play to readjust the balance.

The assumption underlying this argument is that, regardless of whether there is official abuse or not, inequality between a State and an individual is always bad and should be eliminated. But inequality between the State and the accused during police questioning does not pose the evils potentially present when such inequality exists at trial. At trial, inequality between the State and the individual will often result in a miscarriage of justice. The innocent defendant who has no tools for investigation, no skills for the organization and presentation of his story or for the cross-examination of his accusers, and who lacks the knowledge of the relevant rules of procedural and substantive law, may quickly find himself unjustly convicted.

59. 351 U.S. at 18.
60. Comment, 73 Yale L.J. 1000, 1034 (1964); see United States v. Guerra, 334 F.2d 138, 146 (2d Cir. 1964).
61. Professor Kamisar has suggested that the defendant in Betts v. Brady, 316 U.S. 455 (1942), whom a majority of the court thought not to have been prejudiced by the lack of counsel, may himself have been wrongly convicted. Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of the Accused, 30 U. Chi. L. Rev. 1, 42-56 (1963).
in such an unequal contest. No less does the decision to plead guilty require the advice of counsel, for the lay defendant often needs legal advice as to whether his acts were in fact in violation of the law.

No such dangers are present during police interrogation, however. Indeed, the presence of counsel at this point may very well result in the suppression of truth rather than its disclosure. This is because counsel, aware of the significance which an accused's admissions may have in building the prosecution's case, would normally tell his client to remain silent as a tactical decision. As a result, not only will coerced confessions be eliminated, but so will voluntary ones which will generally contain the truth. The accused's power is increased, but at the expense of the search for truth.

We recognize that the achievement of truth is not the sole value to be sought in a system of criminal procedure. Probative, trustworthy evidence is often rejected to promote paramount interests. Illegally seized physical evidence is the most obvious example. Indeed, it is now recognized that the basis for the exclusion of coerced confessions lies not exclusively in their lack of trustworthiness but in the broader values and interests that are thought to be safeguarded by maintaining what we have come to call an accusatory rather than an inquisitorial system of investigation and prosecution.62 Such interests include, for example, the desire to protect the innocent citizen from the harassment of police interrogation, particularly in the situation of mass roundups for questioning of suspects and those not quite so suspect. Wong Sun v. United States, which excludes confessions elicited by exploitation of illegal arrests, should go far toward eliminating such abuses, particularly if its rule is extended to the States.63 The presence of counsel, on the other hand, serves this interest to no greater extent and exacts the price of eliminating otherwise proper questioning.

Some have suggested that "coercion" is in part a function of


improper police practices. To the extent that such practices have coercive tendencies they are of course relevant to the question of coercion, and extension of that concept to include such considerations is laudable, proper, and the legitimate role of the courts. To the extent that police practices have no coercive tendencies, however, any attempt to bring such practices under the rubric of coercion is again, in reality, to recognize a new right. The right to counsel, then, to the extent that it is more than an expensive prophylactic rule designed to protect against coercion, serves to protect no interest other than to make prosecution of the guilty more difficult.

Perhaps there is involved here an extended notion of the dignity of the individual. To coerce a confession is to infringe upon one's personality. Perhaps it is also a violation of one's dignity to seek to impose disabilities upon him out of his own mouth. If so, one must disallow all confessions, for it is a false notion of the meaning of personality to allow one to impose disabilities upon himself only if he knows what he is doing. To allow punishment based on a confession given as part of a "deal" with the prosecutor in which the defendant gains some advantage is to debase both the individual and the system. In any event the moral issues are subtle; to impose such morality on a system based upon the adversary principle may be to subvert one's ends.

Proponents of extension of the right to counsel have argued that there would remain situations in which attorneys would advise their clients to confess. If this be so, and we doubt it, we venture the opinion that this would occur only in those cases where the police had already built up such a solid case against the defendant that the confession would be mere icing on the cake. It has been suggested that counsel would advise his client

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64. See authorities cited note 62 supra.
65. See Douglas, An Almanac of Liberty 239-40 (1954); 8 Wigmore, Evidence § 2251, at 316-17 (McNaughton rev. 1961) and authorities collected in n.2; Kamisar, supra note 61, at 7.
66. This principle, religious in its origin, perhaps underlies the view of Rabbinic jurisprudence in the Talmud that a person's self-incriminating statements may never be accepted as evidence even if voluntarily made. B. Sanhedrin 6b. For a different interpretation of the Talmudic view based upon the fear of untruthful confessions, see Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, para. 6, 3 Yale Judaica Series 52-53. See also Lamm, The Fifth Amendment and its Equivalent in the Halakha, 5 Judaism 53 (Winter 1966). One of the commentators on Maimonides, however, offers an explanation similar to that indicated here. Radbaz on Maimonides, loc. cit.
to confess where “full disclosure is exchanged for a lesser charge.” Such an exchange poses serious problems of illegal inducement. It is not a sufficient answer to the charge of coercion that the decision to confess in exchange for a lesser charge was made with the advice of counsel, and this merely removes the moral and legal dilemma of plea bargaining from the district attorney’s office back to the police station and renders such bargaining even less subject to judicial control than it is today. In any event, our experience indicates that counsel would gain no advantage for his client by advising him to confess to the police which he could not gain later on in his negotiations with the prosecutor. If anything, he would be giving up his one bargaining point without any assurance that the police can deliver on their promise. And if the police failed to deliver, counsel would have no assurance that the confession would be excluded from evidence at the trial. Counsel can always get his client as good a deal, and usually better, from the district attorney without running these risks.

Finally, we are told that no one really knows what effect the presence of counsel will have on police interrogation. The above, it is said, ultimately rests upon speculation. But this speculation is based upon the experience of those who have come into contact with law enforcement as prosecutors or defense counsel and even as judges. In any event, if we are to experiment with new procedures to safeguard established rights, prudence dictates that we proceed with caution. Experience dictates that there may very well be less drastic alternatives available.

68. If the judge or prosecutor threatens the defendant with increased penalties unless he pleads guilty, such a plea is involuntary. Walker v. Johnson, 312 U.S. 275 (1941); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963). Circumstances, no less than threats, might coerce a defendant into pleading guilty. Defendants in federal narcotics prosecutions often plead guilty to a “tax count,” 26 U.S.C. CODE OF 1954 § 7237, with its lesser penalties rather than risk trial on a count based on 42 Stat. 596 (1922), as amended, 21 U.S.C. § 178 (1958), which carries a nonsuspendable minimum sentence of five years imprisonment for the first offense. We do not know how often defendants have surrendered a triable defense so as not to risk the greater penalties. See, e.g., People v. Codare, 14 N.Y.2d 870, 200 N.E.2d 670, 251 N.Y.S.2d 676 (1964) (defendant should not be forced to make his defense of insanity at the risk of the death penalty; guilty plea to second-degree murder may be accepted although the evidence would not warrant a charge to the jury on that degree). Such situations present grave danger of coercion. A partial solution to the problem is to require closer judicial supervision over the “bargain,” not removal of the bargaining process to the police station.
IV. THE RAMIFICATIONS OF MASSIAH AND ESCOBEDO

Though the Court was not obliged to pass on all the ramifications of Massiah and Escobedo, it is submitted that such considerations cannot be avoided if the desirability and workability of the new doctrines are to be appraised. A substantial step in this direction was made by Mr. Justice White, dissenting in both cases, but there are also many other problems which bear meaningfully on the viability of the Massiah and Escobedo holdings as constitutional principles.

It may be that future litigation will see the Court limit the right to counsel to potentially coercive situations, primarily police station interrogations. However, the present rationale offered by the Court and the test, which is articulated in terms of focus on the accused and purpose to elicit a confession, are far broader in their scope than coercive situations and police station interrogations.

Restriction of the right to counsel to potentially coercive situations is warranted only if counsel is thought of solely as a means to protect defendants from coercive questioning. As we have seen, however, the Court's rationale for its decision in Escobedo appears to rest in part upon the proposition that an accused is entitled to the tactical assistance of counsel at any stage in the proceedings which may turn out to be critical in the sense that it will substantially affect the result at trial. If such a right exists it should extend to noncoercive situations as well, since noncoercive situations may also present the accused with the need to make such major tactical decisions. Indeed, as indicated, Massiah itself and the Court's approving citation of People v. Meyer indicate that the rule may well be broad in its application. So too, the "focus" and "purpose" test does not contain any built-in factors which limit the test to police station interrogations, for there are many other situations where the focus is on the accused and the purpose is to elicit a confession or damaging admissions.

The principal thrust of this section, then, will be to indicate Escobedo's "potential for expansion,"—to explore the meaning of the "focus" and "purpose" test in this context and to indicate some of the problems raised by extension of the right to counsel to cover various situations.

70. See Lockhart, Kamisar & Choper, Constitutional Law 39-40 (Supp. 1964), where, after noting that the Escobedo opinion fluctuates from "sweeping language" to underscoring the particular facts of the case, the authors suggest that "its meaning depends on how far and how fast a majority of the Court is willing to use the opinion's potential for expansion."

A. Focus on the Accused and Purpose to Elicit a Confession

These new terms of art are not defined in *Escobedo* except by reference to each other and to the facts of that case. The Court does not say, for example, whether a subjective or objective test is to be used, or some combination of the two, and the meaning of “focus” and “purpose” is left open.

As to “focus,” the problem may be shown by a simple example. Let us suppose that there is a robbery and the victim describes his assailant. Six suspects fit the description; the witness cannot choose between them, and the police wish to question all six. In this case there is no focus in the sense that any one man is the principal suspect; indeed the police would lack probable cause to arrest any one of the suspects. The purpose of the questioning, however, would be to elicit a confession or statements inconsistent with innocence from one of the suspects. In this sense there is focus. In view of the problem with which the Court was dealing and its coupling of “focus” with “purpose to elicit a confession,” it would seem that this latter sense of focus was the one intended.

The test of “purpose” is probably, at least in part, an objective one. Where a confession is challenged under *Escobedo*, one resolution could be a *voir dire* examination in which the police who interrogated the defendant are called upon to testify as to what their purpose was in questioning the accused. The Court does not expressly exclude this possibility, nor does it discuss the question of whether probable cause is the test. Where probable cause exists, however, or even where the accused was part of a group of suspects, as in the example above, it is highly unlikely that a police witness’s disclaimer of purpose to elicit a confession would suffice to validate the confession taken in the absence of counsel. Indeed, a subjective test runs the risk of forcing the police to approach their testimony with some cynicism, itself an undesirable development for law enforcement.

*Escobedo* and recent applications of the “focus” and “purpose” test in the California Supreme Court seem to suggest an objective approach measured by the weight of the evidence available to the police at the point of interrogation. Presumably, in none

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of these cases did the police officers concerned testify as to their subjective purposes since the trials were all held before the Court announced this test. If a subjective test were intended, a more appropriate course in each case would have been a remand to the trial court to explore the issue in light of the police testimony and all other relevant evidence. Instead, the courts seem to have looked solely to the objective evidence.

Under the English Judges' Rules, before their recent amendment,\textsuperscript{73} the police were called upon to give a warning once they had made up their mind to charge the defendant. Some writers thought this test was an objective one based upon probable cause;\textsuperscript{74} others argued that the decision to charge could in fact be and often was postponed.\textsuperscript{75} An objective test is even more likely for the new American rule, for it is noteworthy that the question of "purpose to elicit a confession" may be more readily determined from the objective evidence—such as the nature of the questions and accusations put to the defendant and the length of the interrogation—than the question whether the police had decided to charge the defendant.

Whether the test be objective or subjective, the point of reference is the investigating officers' purpose. Purpose may often be as elusive a concept here as it is in other contexts. For example, there is the common phenomenon of mixed purposes. When the police officer has made up his mind that the suspect is guilty, his sole purpose in questioning him will usually be to obtain a confession. When the police have not made up their mind, however, their purpose in questioning may be less focused, if we may use that word. The purpose of such questioning may be to test the suspect under tension, to determine whether he is guilty, or to help the police decide whether to charge him. If he confesses, only then will the police decide that he is their man. If he does not confess, the police may very well decide that despite some suspicious looking evidence, he is not the guilty party. Under such circumstances the person interrogated is not an accused in the eyes of the police. Do Massiah and Escobedo apply to this latter case?

Perhaps even more common is the situation where the police

\textsuperscript{73} The new rules are printed in 1964 Crim. L. Rev. (Eng.) 168-70. The old Rules appear in Devlin, op. cit. supra note 52, at 137-41.


\textsuperscript{75} Inbau, Restrictions in the Law of Interrogation and Confession, 52 N.Y. U.L. Rev. 77, 83-84 (1957); Williams, Questioning by the Police: Some Practical Considerations, 1960 Crim. L. Rev. (Eng.) 325, 327.
question a suspect not to test him under tension but with no purpose in mind other than to elicit truthful answers, be they denials or admissions, and with no preconceived idea of what answers they want and expect. In *Gallegos v. Nebraska*, Justice Frankfurter and Justice Jackson suggested that the dangers involved in coercive questioning are not present when the police are not trying to make the facts fit a preconceived theory of the case. Yet in a very real sense one of the police purposes in questioning the suspect is to obtain a confession. If an uncounseled suspect confesses in response to such police questioning, do *Massiah* and *Escobedo* require exclusion of his confession? Suppose he denies his guilt, offering some explanation of his suspicious looking conduct, and his denials or explanations are later disproved by the police. Is this evidence tainted?

Considering the weak evidence available against Escobedo—the unsworn and uncorroborated statement of an admitted participant in the crime who had every motive to try to shift the blame to Escobedo—one wonders with which of these possible senses of “purpose to elicit a confession” the police who interrogated him acted. The Court did not touch on this issue.

Instructive in this regard is the very recent Third Circuit decision in *United States v. Konigsberg*, where FBI agents arrested several persons in a garage which contained a large quantity of stolen goods. At the FBI office prior to preliminary arraignment, the agents asked Konigsberg “why he was in this garage and just what had taken place . . . if he wished to cleanse himself or explain . . . [and] why the other individuals were there.” Konigsberg’s incriminating replies were received in evidence against him and he was convicted. On appeal, the conviction was affirmed, in part because there was evidence to support the trial judge’s determination that he had been advised of his right to counsel. (Konigsberg had denied being so advised.) Despite the existence of probable cause to arrest Konigsberg and the others, the court held further that the questioning process was “investigative” rather than “accusatory,” and distinguished

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77. 386 F.2d 844, 849–53 (3d Cir. 1964), petition for cert. filed, 33 U.S.L. Week 5166 (U.S. Nov. 3, 1964) (No. 636). Compare the similar circumstances in R. v. White, noted in [1964] Crim. L. Rev. (Eng.) 720, dealing with application of the English Judges’ Rules. In White the police found the appellants in a garage containing stolen goods. When asked what they were doing there, appellants made incriminating statements later used in evidence. The Court upheld the convictions notwithstanding the fact that a caution by the police was not given until after the incriminating statements had been made.
78. 386 F.2d at 852.
Escobedo on the ground that the questioning did not constitute an "interrogation" but was a "conversation" in which the agents did not attempt to elicit a confession from Konigsberg but merely offered him an opportunity to explain his presence at the garage. While the Third Circuit thus seems to exclude the last sense of "purpose," and to limit Escobedo to cases involving aggressive interrogation, with repeated accusations and the like, our earlier discussion of Escobedo and Massiah suggests that it is far from clear that this is what the Supreme Court had in mind. It is interesting to note in this regard that the Third Circuit in Konigsberg made no reference to Massiah and its possible implications. A panel of the District of Columbia Circuit, on the other hand, appears to have expressed the view in Greenwell v. United States, that Escobedo and Massiah require the suppression of a confession obtained from an uncounseled accused during any interview, aggressive or mild.

The difficulty with the more limited right to counsel suggested in Konigsberg is that, at least in state cases which do not have a McNabb rule, it invites dispute between the police and the defendant over just how "aggressive" the questioning really was. Significantly, Greenwell, which was decided on McNabb grounds, involved just such a dispute.

More precise definition of these concepts, perhaps forthcoming in future cases, might give the police at least reasonable guidance as to their duties. Such is not the case, however, with other law enforcement agencies whose activities might well come within the ambit of such a test. We refer primarily to grand juries and to administrative agencies which, like the police, have the duty of investigating crime and also attempt to obtain confessions or admissions from suspects.

A grand jury has both investigative and accusatory functions. The proceedings are secret and traditionally only the witnesses, prosecuting attorneys, and stenographers or other clerical assistants have been permitted to participate with the grand jurors, since these persons, minimally, are necessary to assist the grand jury. When the grand jury functions as an accusatory body there may now be a constitutional prohibition against examining suspects in the absence of counsel. For the federal courts, cases

70. Compare the similar distinction drawn in Rothblatt & Rothblatt, supra note 46, at 47–48, with respect to application of the McNabb rule.


81. See discussion in part V infra.
such as the Second Circuit decisions of *United States v. Cleary* and *United States v. Scully*, which permit the questioning of suspects before the grand jury without counsel and possibly without even a warning as to the privilege against self-incrimination, may have been overruled by implication in light of the new test, and a right to counsel in the grand jury may have been substituted.

It is much easier to state the foregoing proposition, however, than to apply it in many areas of grand jury practice. The widespread and intricate investigations by federal grand juries, particularly in such fields as antitrust and the securities laws, do not lend themselves to simple tests of "focus" or "purpose" or even "probable cause." The existence of probable cause may conceivably be determined after analysis of a lengthy record, but when the grand jurors or prosecutors have not yet analyzed their record, or have done so only tentatively or hastily, or have made an error—as happens in any large human enterprise—they may not realize it. Yet hindsight under the new test, particularly if the test is to be objective, could serve to vitiate much of their work by suppressing testimony taken after what later appears to be the crucial point.

Permitting attorneys to be present in the grand jury room during the taking of testimony might constitute a serious breach of grand jury secrecy which could hamper investigations and prosecutions. The courts will have to deal with the question of how the issue whether "focus" and "purpose" exist is to be litigated in advance of a witness's appearance before the grand jury. A collateral adversary proceeding raises the same problems of premature disclosure of grand jury proceedings, since dis-

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82. 265 F.2d 459 (2d Cir.), cert. denied, 360 U.S. 936 (1959).
83. 225 F.2d 113 (9d Cir. 1955), cert. denied, 350 U.S. 897 (1956).
84. Although the witness himself is not bound to secrecy, Fed. R. CRM. P. 6(e), the lawyer will probably recall more about the areas explored in the questioning and will be more able to infer therefrom the nature of the evidence available to the grand jury. This is both because he is trained in such skills and because he is an observer rather than a participant in the proceedings. The problem could become particularly acute in an investigation directed toward an organized criminal group where each witness might appear before the grand jury with the same lawyer.

Rule 6(e) does impose secrecy on "attorneys." In view of the present practice of excluding defense counsel from the grand jury room, this word probably refers only to the prosecuting attorneys. There may be some question whether it would be permissible constitutionally to impose secrecy upon defense counsel since he might have to discuss the case with prospective witnesses even before indictment. In any event, counsel could easily circumvent a requirement of secrecy by dealing with witnesses through his client.
counsel of the grand jury record would be required in order to determine whether the focus is on the witness-accused.65 The prospect of such disclosure might even increase the contentiousness of prospective witnesses.66 A collateral nonadversary proceeding, particularly in a large, complex grand jury investigation, would deprive the judge of the assistance of counsel in winnowing the record and narrowing the area of dispute.

Possibly, the test here could be subjective, since prosecutors and grand jurors who are directly responsible to the court might be relied upon more than the police. But in any event premature disclosure of the prosecution's evidence might become necessary to permit adequate cross-examination of such witnesses concerning their purpose. Furthermore, presenting a witness with an issue of his right to counsel, which he can litigate before he has to testify, can create great delays in grand jury procedure, further complicating the task of assembling a body of 23 citizens to hear testimony over a long period. And if the issue is appealable, it might become possible for witnesses to delay the grand jury for long periods of time, even beyond the end of its term.

Similarly, the Escobedo test would apparently apply to investigations by administrative agencies, with even greater problems of application. The irony of this is that administrative agencies, which do not use armed personnel and have an atmosphere wholly different from the police station, present few if any problems of coercion. Despite the numerous motions which are normally made in federal criminal prosecutions arising out of administrative investigations, the charge of coerced confession is rarely, if ever, heard. Indeed, in some fields, the problem has been the timid investigator's fear of the witnesses. Nevertheless, the terms of Massiah and Escobedo apply to these proceedings, and most of the Court’s majority for those decisions have already said in a previous decision that there should be a right to counsel during

85. Nor is there any logical reason why such disclosure should be limited to the record already made before the grand jury. Presumably, the evidence available in the prosecutor's files is no less relevant to determining "purpose" and "focus."

86. A witness who litigates these issues and has learned all he wants to know about the prosecution's evidence might still refuse to testify before the grand jury on fifth amendment grounds. We should hesitate before treating the raising of this issue by the witness as a waiver of his fifth amendment privilege. It might be, for example, that the disclosures show him to be in greater danger of self incrimination than he feared. It is doubtful whether there would be any practical way of controlling abuses short of the prosecution conceding the point and permitting counsel to be present in the grand jury room every time the issue is raised.
administrative investigations which might lead to criminal prosecution.\textsuperscript{87}

The problems involved in administering the right to counsel in this area become more apparent if we consider as an example the investigation by the SEC of the distribution of unregistered stock. In the first place, though persons may be suspect and the SEC may have probable cause, the investigation may start out as a purely civil one, aimed at policing the securities markets through civil sanctions. Though the investigators may be seeking incriminating admissions, the question of whether to seek criminal sanctions would normally be decided late in the investigation, after considerable debate in which the issue would be not only the sufficiency of the evidence but also the general advisability of making a criminal case in that area given the nature, scope and extent of the violations, the difficulties and cost of prosecution, the previous history of the prospective defendants, and so on. When do “focus” and “purpose” enter the proceedings? In the administrative area this test becomes almost hopeless to apply unless of course it is to be applied equally to the civil enforcement activities of the agencies.

Administrative investigations frequently lack the coordination of the typical police investigation. They are often conducted out of several offices. Hundreds of people are likely to be interviewed in such an investigation, quite often all persons whose names appear in the stock transfer records of the company whose unregistered stock has been sold. An objective test of “focus,” such as probable cause, is workable where the investigating personnel are few and all are aware of the full scope of the investigation at any one time. In the wide-flung administrative investigation, however, the “focus” and “purpose” test of the simple crime once again breaks down.

We have shown that even in the context of police investigations, “purpose” may be an inappropriate term. In the typical administrative investigation, “purpose to elicit a confession” may be even more removed from the forefront of the investigator's numerous and varied conscious purposes. In many cases the purpose of an interview is to obtain admissions or leads to others. Where appropriate, experienced investigators will aim behind the outer fringe of minor offenders to ascertain and reach the central figures. But major offenders do turn up among the initial witnesses. Must all initial witnesses have counsel? Perhaps those who turn out to be minor offenders will never have standing to

raise this question, but the problem arises for those who turn out to be defendants, and who thus do have standing to complain.

**B. Assuring the Availability of Counsel.**

Danny Escobedo had retained a lawyer who knew about the interrogation but was denied access to his client. Many or most suspects when called for questioning have not retained a lawyer, and a large number of these persons could not afford a lawyer even if they were given an opportunity to retain and consult counsel before interrogation.

The defendant who can afford counsel but has not requested the opportunity to consult with a lawyer would seem to require counsel and protection no less than one who already has retained an attorney or knows his rights sufficiently to request counsel. The California Supreme Court recently so ruled, stating:

> The defendant who does not realize his rights under the law and who therefore does not request counsel is the very defendant who most needs counsel. We should not penalize the defendant who, not understanding his legal rights, does not make the formal request and by such failure demonstrates his helplessness.\(^8^8\)

Reason and authority would seem to require no less for the indigent defendant who cannot afford his own lawyer. Whether the right be one to make informed tactical decisions or to protection from coercion, the Court could hardly have intended these benefits only for those affluent and educated citizens who normally have access to counsel.

It is difficult to see the relevance of a request for counsel to the constitutional right asserted.\(^8^9\) Denial of such a request or interference with access to counsel by the police might be thought to furnish additional evidence of the existence of a police "purpose to elicit a confession," but this is no longer to talk of counsel as a constitutional right. Under Escobedo the ascertainment of

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purpose is relevant to determine when the defendant needs counsel, not vice-versa. It is conceivable that the Court would treat the denial of a request for counsel as per se coercion, perhaps on the ground that when the police seek out a confession there is greater danger of coercion than when they have no such preconceived purpose in mind— an approach somewhat similar to McNabb-Mallory in federal prosecutions— and devise other rules for cases in which the defendant did not request counsel. But making the choice of rule turn on fortuitous circumstances of such marginal relevance would probably not promote proper administration of the Court's rules. It would seem better to use McNabb-Mallory itself, as we suggest in Part V below.

Thus, once the right to counsel attaches, however the test be phrased, a suspect without a lawyer probably would have to be advised of this right and given an opportunity to retain counsel. For the indigent, counsel would have to be appointed, or at least he would have to be advised that he has a right to appointed counsel. Any confession obtained from a person at the "accusatory" stage without complying with these procedures would be suppressed as obtained in violation of the accused's right to counsel.

The most obvious problem of compliance with such procedures is that of providing counsel for the numerous routine police interviews. We have yet to ascertain the full impact upon the States of the cost of assigning counsel to the indigent for all pleas and trials. But trials are relatively few and pleas take up little of assigned counsel's time. The cost of assigning counsel for untold numbers of police interviews may be prohibitive, with the result that the police might be forced to cease routine questioning of suspects. The functions which appointed counsel would be called upon to perform here, moreover, are quite removed from participation at trial and, because of the hours and duties involved, much more burdensome to the lawyers personally and to the States financially.

Less obvious are the problems posed by the nonindigent sus-

90. Appointed counsel, who knows nothing about his client or the background of the case, cannot advise his client to answer questions until he has had an opportunity to investigate the case. This further supports the suggestion made above that the "easy way out" will be to advise clients not to talk.
91. Federal costs are also to be considered. The schedule of fees provided by the Criminal Justice Act of 1964, 1964 U.S. Code Cong. & Ad. News 2784 [18 U.S.C. § 8008A(d)], though a start, may well prove to be unrealistically low.
92. In all likelihood, legal aid societies and public defender officers will assign their new inexperienced men to this low-level operation. An inex-
COUNSEL FOR THE SUSPECT

pect who has not yet retained counsel. A recalcitrant witness could procrastinate in retaining counsel for the purpose of delaying the proceedings and cooling off an urgent investigation. And the introduction of litigable issues, such as claims of indigency and the existence of “focus” and “purpose,” offer the reluctant witness still further opportunities for delay. It is true that a reluctant witness or one bent upon obstructing an investigation can refuse to talk with the investigator unless subpoenaed before the grand jury or an agency, but few dare to be so transparently evasive. The intrusion of a constitutional right to counsel at this point, however, gives such persons an opportunity to manipulate this right to camouflage their obstructionist purposes.

It is not clear, moreover, who is to appoint counsel in an administrative investigation and where, if necessary, the issue of indigency can be litigated. The grand jury functions as an arm of the court and these problems can be brought before the court for solution. In the case of police interrogation, extension of legal aid services and of the work of voluntary defender offices may suffice. Also, if the suspect is under arrest, the police can ask for the appointment of counsel and resolution of the claim of indigency at the preliminary arraignment. In the case of administrative investigations, however, there is no matter pending before the courts and the courts may not have jurisdiction to appoint counsel or litigate indigency. Thus, the responsibility for the appointment of counsel may fall upon the agencies, which lack the relationship to the Bar and the moral influence that a court has over its officers and which it calls upon when appointing counsel. In addition, agencies, particularly federal agencies, may be located far from the scene of the investigation thereby complicating the problems of litigation, with the possibility of administrative appeals, and the problems of appointment of counsel. The foregoing suggests that administration of the right to counsel, particularly in the administrative investigation, may turn out to be an extremely complex matter.

C. OTHER RAMIFICATIONS

1. Fruits

Perhaps the full sweep of Massiah and Escobedo will not be experienced lawyer is even more likely to reason that he should take the safer route of advising the client not to talk.

93. This problem arises not only with the recalcitrant witness. An investigator who is questioning a cooperative witness wants to be certain that the answers and leads developed therefrom will be admissible in evidence in the event that the witness turns out eventually to be a defendant.
known until the Court passes on a case involving the “fruits of the poisonous tree” doctrine. For what has been said about the uncertainty and undesirability of the new “focus” and “purpose” test would be greatly compounded if the Court were to hold that not only the admissions obtained but all leads developed from them were to be suppressed.

To take the example of our SEC investigation again, it may be that in the first week of an investigation a witness states that he resold unregistered stock to ten people whom he names. Those ten are then interviewed and a two-year investigation of the matter is launched. Later the witness is indicted, and a judge, applying Escobedo by the objective test, holds that the focus was on the witness and that the investigators’ purpose was to secure admissions. Must then the entire investigation be suppressed? Had the investigators been forewarned, they might have sought and obtained the same information from other sources.

Admittedly not all problems can be resolved in advance and investigators must often run some risk of second guessing by the courts. But they are entitled to a reasonable degree of guidance. And, as we have indicated, the “focus” and “purpose” test, vague as it may be in the context of police questioning, is even vaguer in the case of an administrative investigation.

It may be noted that under the English Judges’ Rules, which apply only to the police and therefore do not create the variety of problems here discussed, one additional safety valve is the absence of the “fruits of the poisonous tree” doctrine. Thus, even if the police officer has guessed wrong, all that is lost is the confession itself. A lengthy investigation based on admissions or false denials would be salvaged.

2. Informers and Undercover Agents

The general problem posed for undercover work was stated by Mr. Justice White, dissenting in Massiah:

The general issue lurking in the background of the Court’s opinion is the legitimacy of penetrating or obtaining confederates in criminal organizations. For the law enforcement agency, the answer for the time being can only be in the form of a prediction about the future application of today’s new constitutional doctrine. More narrowly, and posed by the precise situation involved here, the question is this: when the police have arrested and released on bail one member of a criminal ring and another member, a confederate, is cooperating with the police, can the confederate be allowed to continue his association with the ring

95. 377 U.S. at 315.
or must he somehow be withdrawn to avoid challenge to trial evidence on the ground that it was acquired after rather than before the arrest, after rather than before the indictment?

The problem is whether the undercover agent must be withdrawn from the ring after arrest or indictment of one or more of the ring's members. Justice White hints at the difficulties of withdrawing the undercover agent. It would cause the drying up of information concerning what is often a continuing criminal operation; there is also a real danger to the undercover agent, for withdrawal soon after an indictment gives a strong indication as to who has informed and complicates problems of security until trial.

Justice White did not treat the undercover problem in his *Escobedo* dissent, but *Escobedo* raises even greater problems in this area. In the case of a ring, the "focus" may well be on all its members at the very outset of the undercover work. If, on the other hand, "focus" first appears at a later point, the undercover agent may never be able to determine when that point has been reached so that he must withdraw. And presumably the agent's purpose always would be to elicit admissions, among other evidence. Undercover work obviously becomes impossible under such circumstances.

Perhaps a line will be drawn between cases where evidence is being sought as to past, concluded illegal activities, and those where such activities are continuing.96 Undercover work would be permitted within the ring if its illegal activities continue after indictment, as is frequently the case, for example, in organized narcotics rings. But the authorities do not know in advance whether the ring will continue its operations. As a practical matter, and in pursuance of their duties to the public, the investigating bodies may be obligated to keep their informers and undercover men in such rings after indictment in order to find out what is happening. If so, the investigator should report everything he has heard even if, so far as he alone knows, such information does not demonstrate continued illegal activity, since when combined with other information available to his superiors it may show such continued activities. This entails a risk that the information provided may not in the end show continuing illegal activities, and the entire case may be jeopardized.97 Again, elimination of


97. One of the authors was confronted with this very problem while an Assistant United States Attorney. Five persons had been arrested in connection with the illegal possession of certain goods. One of the five, an employee of two other members of the group, had been informing the government con-
the "fruits" doctrine might prove to be a sufficient safety valve.

3. Loss of Reliable Evidence Through Exclusion of Official Witnesses

The facts of the Massiah case themselves point up an additional undesirable aspect of the new rule. As has been indicated, Colson, a co-defendant, held a conversation with Massiah which was overheard by a federal agent through the device of a radio transmitter. Colson, who could also have testified, was later frightened into silence by threats. The federal official remained available to testify. We have already indicated that had Colson engaged Massiah in the conversation without the knowledge and connivance of the federal agent, testimony by Colson concerning the conversation would have been admissible. But Colson's testimony would have been substantially less reliable than that of a federal agent since a confederate has more motive to color his testimony, and because persons such as Colson are not trained, as are agents, to make accurate observations and to record their observations promptly after the event.

The import of these observations is that the intrusion of officials does more than raise fifth and sixth amendment problems; it also increases the reliability of the evidence which the jury will hear, and indeed, where witnesses have been threatened, it may provide the only source of reliable evidence. Perhaps it is better to use the defendant's own words, taken by a trained agent, which constitute reliable evidence, than to rest solely on the words of the Colsons or to let the issue turn on the Colsons' readiness to testify.

4. On-the-Street Detention and Questioning

Recent years have seen debate over the propriety of police stopping persons on the street for questioning with less than probable cause. This is not the place to enter into this controversy, but it is important to point out the implications of Massiah concerning the group's illegal activities, but was arrested with the group to prevent the others from learning that he had informed. Each was questioned briefly concerning his personal and financial circumstances relevant to the fixing of bail. As each was questioned, the others remained together in another room. The informant advised the interviewers that the defendants in their private room were discussing how to intercept an additional illegal shipment of merchandise which was still en route. As it turned out this information revealed a continuing criminal enterprise, but there was no way of knowing this in advance.

and Escobedo for this problem. For example, suppose that in the early morning hours a police officer sees a man dressed in work clothes carrying an expensive looking suitcase in a neighborhood where there are some tourist hotels. Probable cause may not exist to arrest him for theft. May the police stop him and question him about his possession of the suitcase? Applying the “focus” and “purpose” test, it becomes apparent that focus on the individual exists though in a sense different from that in the more typical police investigation. Typically, a crime has been committed and the police focus is on one or more suspects. Here, all of the police focus is on this one person but there is a question whether any crime has been committed; if one has, this person is the culprit. In a real sense then the focus is on this person. As for “purpose to elicit a confession,” the policeman’s purpose clearly is to elicit truthful information whether it be an exculpating explanation or incriminating admissions.

This stage of the investigation is no less critical for our hypothetical suspect than it was for Escobedo. Will admissions made by this person be excluded because of the lack of counsel? If so, then the current debate concerning this problem has been rendered moot. And if the police cannot question this person, the pressures may become greater to permit them to adopt the more drastic alternative of detaining him, “arresting” him if you will, until they can investigate the circumstances. Massiah and Escobedo, then, if applied to these circumstances, as the current test may require, may lead to even greater invasions of citizens’ rights. In any event, the issues underlying this problem deserve to be explored and resolved on their own merits and not disposed of under the right-to-counsel rubric.

5. Escobedo and Wong Sun

Wong Sun v. United States⁹⁹ holds that confessions and admissions made after an illegal arrest by federal officers, i.e., where the arresting agents lack probable cause, are inadmissible in federal prosecutions. Escobedo may preclude all questioning after a legal arrest, i.e., where probable cause exists, except in the presence of defense counsel. This would seem to mean that federal police—and state police if Wong Sun is extended to cover them—may safely question a person without counsel only when that person appears voluntarily for questioning. Recent decisions, however, appear to be narrowing the circumstances in

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which an appearance for questioning will be held to have been voluntary. Further developments in this area may then preclude all police questioning as a practical matter.

V. ALTERNATE SOLUTIONS

As valid as the above arguments may be, the problem of police interrogation continues to present abuses and still seeks solution. The problems are real and have yet to be resolved by the case-by-case review of claims of coercion essayed these past thirty years.

Secret police interrogation of suspects raises two very serious problems here relevant. First is the difficult problem of proof. All too frequently a defendant’s charges of brutality are met by police denials. Even when no brutality is charged, there is often conflicting testimony whether inducements and/or threats were employed. The defendant who has in fact been the victim of police illegality has the cards heavily stacked against him: often he has a prior criminal record which adversely affects his credibility; it is frequently clear that the confession is truthful and this factor may well impel the trier to believe the police; and trial judges, whose evaluations of credibility are ordinarily immune from review, are subject to heavy local pressures to believe the police and help convict the criminal. When none of these factors is present, it is still difficult for the judge not to accept the word of those entrusted with law enforcement, who will confront him in his courtroom many more times, against the word of the defendant. Finally, even when the police concede having made the statements attributed to them by the defendant, the inarticulate defendant may have substantial difficulty in creating the coercive tenor and atmosphere of the questioning.

Secondly, secret interrogation of even the mildest sort tends to be coercive. The police perhaps know to what limits they are prepared to go in order to obtain their confession. The defendant most certainly does not. As time passes, politely if you will, the defendant must begin to wonder how long his detention will last. And he soon perceives the answer, or at least what he believes to be the answer: until he confesses. So far as the defendant is aware—alone, often without anyone knowing or caring where he is, or without legal and financial means to secure his release, and in the dark concerning the intentions of the police—the fear of indefinite detention can be dispelled only by giving

COUNSEL FOR THE SUSPECT

the police what they want.

One solution to this serious problem is, of course, to forbid any and all police interrogation of suspects. Few today would urge such a course. The solution offered by Massiah and Escobedo is to require the presence of counsel during the interrogation. No doubt this would provide a credible witness to the proceedings. It would also eliminate the defendant's fear of indefinite detention since counsel could advise the defendant of the limits placed upon the police and of the availability of habeas corpus. But, as we have demonstrated, it may also eliminate proper questioning.

We believe that these abuses may be controlled by more workable and less drastic means: by extending to the States the McNabb-Mallory rule or some variation thereof and by requiring that all police interviews with witnesses at places controlled by the police, and wherever else feasible, be recorded stenographically or electrically.

The McNabb-Mallory rule as applied to federal prosecutions requires the exclusion at trial of a confession given by a defendant while detained in violation of the requirement of rule 5(a) of the Federal Rules of Criminal Procedure, that an arrested person be brought before a judicial officer "without unnecessary delay." In combination with its companion rule 5(b), rule 5(a) guarantees at a minimum that before too long a period elapses, the defendant will be advised by an impartial judicial officer of his legal rights. More significantly, the rule makes impossible the practice of secret detention. A public record of the detention has been made and the defendant has been removed from the uncontrolled custody of the investigative agencies and their officers to his freedom on bail or at the least to the custody of the United States Marshal and federal detention officers, none of whom have any particular interest in the outcome of

101. Rogge, Book Review, 76 Harv. Law Rev. 1516 (1963), comes very close to such a suggestion.
102. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). It is also possible to combine a McNabb approach with counsel in the following manner: a confession obtained during a period of permissible delay would be admissible even if the defendant had no counsel, while one obtained during a period of longer detention would be admissible only if counsel were present during the interrogation. The attempt to limit Escobedo essayed in Konigsberg, see text accompanying notes 77-80 supra, would be more workable under such a combined scheme. Mr. Justice Douglas, however, has indicated that before a confession obtained by the police from a person under detention would be admissible, he would require both prompt arraignment and the presence of counsel. Reck v. Pate, 367 U.S. 438, 448 (1961) (concurring opinion).
the case. Similarly, in the federal practice supervision of the case by this time is no longer under the control of the investigative agency and its officers, but has come under the control of the United States Attorney who is much more directly under the control and moral influence of the court. Finally, *McNabb*, in recognition of the relevance of time—prolonged, unrelenting interrogation with its wearing down of the defendant’s will to resist—places a relatively short time limit upon the length of the interrogation. Indeed, the Supreme Court once characterized *McNabb* as an “experiment [which] has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance.”

Applying *McNabb* to the States should go far toward accomplishing these same ends. It would have the advantage over the *Escobedo* rule of both relative ease of application and of not eliminating confessions obtained as a result of short uncoercive questioning. While protecting the defendant’s rights, it would not convert the decision to confess into a tactical decision. Although a short period of questioning effectively precludes physical brutality and psychological coercion, it may be urged that some, though concededly limited, room is still left for the tender of threats and/or promises to induce a confession. Furthermore, in cases of prolonged delay, the *McNabb* test may not

104. Even in United States v. Vita, 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962), which gives the police considerable leeway in questioning a suspect before arraignment, the court stressed the fact that extra time would be permitted only “when needed for investigation rather than merely repetitious interrogation... so long as certain safeguards are observed.” 294 F.2d at 533. (Emphasis added.) The crucial facts, so far as the court was concerned, were that the defendant readily discussed the case with the agents from the very beginning, that the delay in arraignment was not used to “break his will” but to check out his explanations, and that he confessed when it was demonstrated that his explanations had been proved false.

While it is far from clear what circumstances will justify delaying the preliminary arraignment, see Comment, 68 Yale L.J. 1003, 1013-20, it is our impression that there exists a consensus among most federal judges and prosecutors that delay solely for the purpose of eliciting a confession is illegal. As the *Yale Law Journal* Comment indicates, id. at 1019-20, Heldeman v. United States, 259 F.2d 943 (D.C. Cir. 1958), cert. denied, 369 U.S. 959 (1959), is one of the few cases to raise the point squarely. Perhaps the reason that such delays are rarely reported in appellate opinions is that most federal prosecutors
eliminate disputes between the defendant and the police over what caused the delay. For example, the defendant might claim that he was interrogated for several hours while the police could insist that the time was used not for questioning but for checking out the defendant's story. As a practical matter, such problems do not seem to have arisen too often in federal practice. In any event, they can be safeguarded against by requiring that a record be kept of all conversations between the police and the defendant, such record to include a statement of the time during which the interview began and ended. While a police officer who is willing to coerce a confession may be tempted with some cynicism to indulge at trial in what he believes to be a white lie, it is doubtful that many officers would dare tamper with physical evidence such as a stenographer's notes or a tape recording. Furthermore, it could be required that the record be deposited with the court under seal at the time the defendant is brought before the court for preliminary arraignment.

The advantage of such a procedure lies not only in the ease with which the administrative details could be worked out. Adoption of the requirement of a record would also represent a logical step in the subjection of police practices to judicial control. As an indispensable aid to the review of actions of lower courts and of administrative agencies, our law often requires the preservation and preparation of a record of the proceedings being reviewed. Extension of this requirement to police questioning would be a natural development in the judicial supervision of police questioning. This would, of course, still leave open the period between arrest and the time the defendant is brought to police headquarters, but that short space of time leaves even the most willful police officer little room in which to maneuver illegally.

Up to now, the Supreme Court has declined to apply McNabb-Mallory to the States directly. However, the "inherently co- and agents no longer engage in such practices, or at least, when they do, the lower courts regularly exclude the confessions.

106. See McCormick, Evidence 233 (1954); Broder, supra note 63, at 522.
107. Cf. Williams, supra note 75, at 942.
ercive” approach begun in Ashcraft v. Tennessee\textsuperscript{110} certainly represented a step in that direction, and it has been argued that recent decisions in effect if not in form have applied McNabb to the States.\textsuperscript{111} If the basis for the McNabb-Mallory rule truly lies in the Court’s power to supervise federal officers who violate federal rules of practice, can the Supreme Court constitutionally impose such a rule upon the States? Can the Court require the States to make a record of police station interviews? The answer appears to be yes.

It should be obvious that prolonged secret detentions violate the constitutional mandate that no person shall be deprived of his liberty without due process of law. To take a person into custody, by definition a deprivation of liberty, and to hold him incommunicado without opportunity to test the legality of his detention is to accord him no process at all, let alone the legal process due him.\textsuperscript{112} Further, if we are correct in our conclusion that the real issues at stake here are the effective enforcement of one’s due process and fifth amendment rights to be free from rendering compelled, self-incriminating testimony, then it seems clear that the Supreme Court has the constitutional power, indeed, the responsibility to formulate rules, and if necessary, prophylactic rules, to effectuate such rights.

The Supreme Court perhaps cannot impose directly upon the States the requirement that a record be kept of police interviews. But it has the remedy of exclusion of the confession, and before it imposes the drastic step of requiring counsel, it might afford the States an opportunity to experiment with these less drastic remedies. After all, this is precisely what the Court did for 12 years after Wolf v. Colorado.\textsuperscript{113} After announcing the right of persons to be free from illegal searches and seizures by state officials, it permitted the States to experiment with varied means of enforcement. Only after such experiments failed or were not forthcoming did the Court impose the most drastic remedy of

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\item 110. 322 U.S. 143 (1944).
\item 111. Ritz, Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court, 19 WASH. & LEE L. REV. 35 (1962). Broeder, supra note 63, at 564–94, argues that McNabb should be extended to the States.
\item 112. Due process would not seem to require immediate arraignment but should be flexible enough to permit delay for the purposes now permitted under the McNabb rule. Cf. Comment, Prearraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure, 68 YALE L.J. 1003, 1035–37 (1959). But see Broeder, supra note 63, at 564–94.
\item 113. 338 U.S. 25 (1949).
\end{itemize}
exclusion of illegally obtained evidence. Also, Congress could require the keeping of a record pursuant to its power to legislate for the effectuation of fourteenth amendment rights.

In some areas the details of McNabb remain to be worked out. This is not the place to treat these areas in detail, but we should indicate some highlights relevant to our present discussion. One question occasionally raised is how to distinguish between arrest and voluntary appearance at police headquarters in response to a “request” to come in for an interview. Last year’s decision in Seals v. United States seems to represent a significant tightening of the screws in this area. After Escobedo, and assuming the application of Wong Sun to state prosecutions, Seals may represent a drastic closing of the only door left open to the police. On the other hand, if a McNabb approach were substituted for Escobedo, the Seals case could represent a legitimate attempt to bring most police station questioning under one test.

More serious, perhaps, is the problem of post-arraignment interrogation. Here McNabb’s time limitations do not operate at all. Still the problem may not be as serious as it appears. Some defendants are released on bail immediately following arraignment. Current attention devoted to the problems of bail may in the near future see the release of many more. Those not released on bail have been advised of their rights and are no longer being held in secret. And, as already indicated, in federal practice and probably in most large metropolitan centers, the case has by this point come under the jurisdiction of the district attorney who is more sensitive to the influence of the courts than are the police. The observation has been made in another context that while the police are motivated principally to solve the crime and may give little thought to the problems of trial, the prosecutor is motivated to protect his case when it reaches the court. The point is equally applicable here. Furthermore, if all of these safeguards prove insufficient, it will then be time to impose the requirement of counsel at the point of preliminary arraignment.

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117. See Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice, Report 58–89 (1963), and authorities cited therein.
118. See Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on “the Most Pervasive Right” of an Accused, 90 U. Chi. L. Rev. 1, 8–9 (1963), and authorities cited therein.
119. The United States District Court’s Rules of Criminal Procedure, Second Preliminary Draft of Proposed Amendments, Rules 5(b), 44, would
This would completely remove any abuses during post-arraignment interrogation while a McNabb test would operate in the pre-arraignment situation.

Finally, explicit recognition of the relevance which prompt arraignment bears to the problem of coerced confessions might very well release McNabb in the federal courts from its dependence on Rule 5(a), which still allows opportunity for prolonged interrogation where the delay is otherwise justifiable and permit the needed flexibility in its application in both state and federal prosecutions. And the adoption of a record of the interview might induce the courts to give the police somewhat more time to question suspects than they allow at present under McNabb, at least where the record shows that the questioning was not aggressive or abusive.

Adoption of a McNabb test together with the requirement that a record be kept of police station interviews would have the added advantage that such a test would not be subject to the pressure of expansion to administrative investigations. We have already discussed the problems posed by Escobedo and Massiah for administrative investigations. The difficulty with the Supreme Court's test lies principally in that the right to counsel and the standards enunciated for its application do not limit themselves to the context in which they were first enunciated and from which they arose. Although the problem of coerced confessions has arisen exclusively in police investigations, the right to counsel and the "focus" and "purpose" test may eventually expand (as legal concepts often do) to cover circumstances far removed from those which gave them their original force, here the administrative investigation. We believe that the approach we have suggested is better in that it articulates the standards in terms which are geared to arrests and detention. Thus the standards limit themselves to police investigations, the area where the problem exists, and have no built-in tendency to overexpand.

Similarly, the problems posed by the use of undercover agents assure the appointment of counsel for indigents no later than the defendant's "initial appearance before the commissioner or the court."


181. See the discussion of this aspect of the McNabb rule in Comment, 68 Yale L.J. 1003, 1032 (1959).

182. It has been said, for example, that prolonged interrogation during a period when a judicial officer is unavailable does not violate McNabb. United States v. Ladson, 294 F.2d 535, 537 (9d Cir. 1961), cert. denied, 369 U.S. 824 (1962).
could be approached on their own merits unobscured by the issue of counsel. Since cases such as Massiah involve neither arrest nor interrogation, our proposed McNabb test would be irrelevant. The problems of the permissible limits of trickery, inherent in undercover work, could then be analyzed and resolved directly.

One final problem raised under this heading involves the grand jury which seems to lie somewhere between administrative and police investigations. The atmosphere of the grand jury is certainly somewhat coercive, partly because the witness may fear indictment, partly because of his unfamiliarity with the proceedings, and partly perhaps because of the general atmosphere of secrecy. Also the witness is questioned by a skilled and trained prosecutor who may very well be seeking to use the witness's appearance as an opportunity to get a confession. Although traditionally counsel has not been permitted in the grand jury room, it is the practice to allow the witness who has counsel to leave the grand jury room at any time for consultation with his lawyer. Still, a witness might be pressured and trapped in the grand jury room, or at least sufficiently confused, to forget the presence of his lawyer outside. The witness, nevertheless, has significant protection in the presence of 23 citizens who presumably would not permit the most serious abuses which are the focus of our concern. Moreover, in many courts today grand jury proceedings are recorded, and where they are not, the citizens who comprise that body are available as witnesses to advise the court what happened. On balance the problems do not appear sufficiently serious to require the presence of counsel, and the issue should be approached in terms of the voluntariness of the confession given as was done in United States v. Cleary.\footnote{265 F.2d 459 (2d Cir.), cert. denied, 360 U.S. 936 (1959).}

CONCLUSION

As suggested, the future may see the Supreme Court withdraw considerably from the broad language and implications of its decisions in Massiah and Escobedo. In the meantime, however, the lower courts — federal and state — and law enforcement officers lack the guidance necessary to enable them to administer the new tests. These undesirable effects, it seems to us, stem principally from the Court's failure to articulate its premises clearly and to give adequate consideration to the availability of other procedures. In the long run, the high moral concern of the Court may be better served by slower institution of reforms that are more likely to endure.